

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County

Honorable Robert E. Hood, Circuit Court Judge

DAVID M. DIXON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000295

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 2019-GS-26-01076

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

March 10, 2020

DAVID MARK DIXON,)

Defendant.)

B E F O R E:

Honorable Steven H. John
Horry County Courthouse
Conway, South Carolina

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

Martin D. Spratlin, Esquire
Attorney for State of South Carolina

Kia T. Wilson, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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BY THE COURT

3

1 MARCH 10, 2020 - 12:02

2 DAVID MARK DIXON, HAVING BEEN DULY SWORN,
3 TESTIFIED AS FOLLOWS:

4 THE COURT: Yes, Solicitor?

5 MR. SPRATLIN: Thank you, Your Honor.

6 This matter is the State of South Carolina, County of
7 Horry versus David Mark Dixon charged with true-billed
8 indictment 2019-GS-26-01076. Originally charged with that
9 indictment with attempted murder. He is before the Court on a
10 guilty plea to a lesser included offense of assault and
11 battery of a high and aggravated nature. That charge carries
12 up to 20 years. It is violent and serious. There is a
13 negotiation from the state of a cap of 12 years in this
14 matter.

15 If I could approach, I have a copy of the sentencing
16 sheet as well as a copy of a competency evaluation that was
17 conducted in this matter.

18 THE COURT: All right, sir. Very good.

19 All right. Madam Court Reporter, could you mark the
20 competency as an exhibit, please, ma'am?

21 STATE'S EXHIBIT NUMBER 1

22 ADMITTED INTO EVIDENCE

23 THE COURT: All right. The Defendant, David Mark Dixon,
24 underwent a competency to stand trial evaluation conducted by
25 the South Carolina Department of Mental Health at the Medical

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1 University of South Carolina Forensic Psychiatry program.
2 Regarding this particular matter, that evaluation took place
3 on May 17th, 2019. The report is dated May 26th, 2019, as
4 issued by the staff at the Medical University of South
5 Carolina Forensic Psychiatry Program. In that evaluation, it
6 is stated that it is the opinion that Mr. Dixon has the
7 factual and rational understanding of the proceedings against
8 him. He has the capacity to rationally assist counsel in his
9 own defense, and it is their opinion that he is competent to
10 stand trial.

11 Ms. Wilson, does the defense challenge or in any way
12 dispute the findings as set forth in that evaluation?

13 MS. WILSON: Your Honor, I do not challenge, nor does my
14 defendant challenge that he is competent. Now, to be clear,
15 he does have some diagnoses, and I'm not suggesting to the
16 Court that those things make him incompetent for trial
17 purposes, but he does have some mental health issues that I
18 plan to put on the record during the plea, but I'm willing to
19 let the Court know about them right now, if the Court needs to
20 hear them.

21 THE COURT: But -- okay, and I understand that. But, as
22 to the issue of his understanding of the proceedings against
23 him, and having the capacity to assist you in his defense, is
24 there any challenge to those findings?

25 MS. WILSON: None at all, Your Honor.

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BY THE COURT

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1 THE COURT: All right. Very good.

2 And you understand that, Mr. Dixon?

3 MR. DIXON: Yes, yes, Your Honor.

4 THE COURT: All right. Very good.

5 I'm gonna ask you a series of questions, Mr. Dixon, and
6 -- which will necessitate you responding to them. If at any
7 point in time you do not understand my questions, you have a
8 question about what I've asked, or in any way need a further
9 explanation, I need for you to let me know. You can raise
10 your hand, you can tell your attorney, but in some way, if
11 you've got a question, you need to let me know, otherwise, I'm
12 going to assume that you understand what I'm asking you. All
13 right?

14 MR. DIXON: Yes, sir.

15 THE COURT: All right. Very good.

16 Now, you're coming before the Court pleading guilty to
17 the crime of assault and battery high and aggravated nature.
18 You understand that?

19 MR. DIXON: Yes, sir.

20 THE COURT: Now, this is listed as a violent and serious
21 offense by the State of South Carolina. Do you understand
22 that?

23 MR. DIXON: Yes, sir.

24 THE COURT: Did you talk about that with Ms. Wilson?

25 MR. DIXON: Yes, sir.

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BY THE COURT

1 THE COURT: You understand that violent affects the -- is
2 a matter that the Department of Corrections using -- uses
3 regarding the sentence as to how long you stay in the
4 Department of Corrections; you understand that?

5 MR. DIXON: Yes, sir.

6 THE COURT: And serious is a strike. If the Court
7 accepts this guilty plea, you have a strike under the state's
8 three-strike law. And that would mean that if you would come
9 back and have a -- have offenses in your background that would
10 total up to three strikes, the sentence would be life in
11 prison without the possibility of parole. That's not the case
12 here now, but it could be in the future if you accumulate
13 those three strikes. You understand that?

14 MR. DIXON: Yes, sir.

15 THE COURT: All right. The matter comes before the Court
16 by way of negotiations. First, the assault and battery high
17 and aggravated nature could be a sentence up to 20 years; you
18 understand that?

19 MR. DIXON: Yes, sir.

20 THE COURT: But the negotiations have been negotiated
21 among yourself, your attorney, the state, and the state's
22 representatives, for a sentence not to exceed or cap of 12
23 years; you understand that?

24 MR. DIXON: Yes, sir.

25 THE COURT: If for some reason I did not find the plea to

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BY THE COURT

1 be appropriate, I would allow you to withdraw your plea; you
2 understand that?

3 MR. DIXON: Yes, sir.

4 THE COURT: Understanding all this, do you want to go
5 forward now with your guilty plea?

6 MR. DIXON: So, you say that -- you say that it's zero to
7 12, 12 is the cap, right, Your Honor?

8 THE COURT: All right, sir. The negotiations are -- have
9 reduced the sentence from zero to 20 to zero to 12, a cap of
10 12 years. The sentence cannot exceed 12 years. It could be
11 12 years based upon what the Court hears, but it can't exceed
12 or be greater than 12 years.

13 MR. DIXON: Yes, sir.

14 THE COURT: All right, sir. So, again, understanding all
15 that, do you want to go forward now with your guilty plea?

16 MR. DIXON: Yes, sir.

17 THE COURT: Are you currently under the influence of any
18 drugs or intoxicants of any kind or currently have them in
19 your system?

20 MR. DIXON: No, sir.

21 THE COURT: Are you suffering from any kind of physical,
22 mental, emotional problem that keeps you from knowing what
23 you're doing here today?

24 MR. DIXON: No, sir.

25 THE COURT: When you plead guilty, you give up

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BY THE COURT

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1 constitutional rights. The right to remain silent, you talk
2 to me, you give that right up; do you understand that?

3 MR. DIXON: Yes, sir.

4 THE COURT: Other rights are presumption of innocence,
5 the right against self-incrimination at a trial. The state
6 has to prove you guilty beyond a reasonable doubt. You plead
7 guilty, you give up those rights. Do you understand that?

8 MR. DIXON: Yes, sir.

9 THE COURT: You're entitled to a jury trial. Twelve men
10 and women look at the facts presented by the state to see if
11 there are indeed enough facts and evidence to prove you guilty
12 beyond a reasonable doubt. If you plead guilty, you're giving
13 up your jury trial; do you understand that?

14 MR. DIXON: Yes, sir.

15 THE COURT: Now, in that jury trial, with your attorney,
16 you could question the witnesses and the evidence presented by
17 the state. If you wanted to, you could present a defense,
18 testify, call witnesses, present evidence. If you plead
19 guilty, you give up those rights; you understand that?

20 MR. DIXON: Yes, sir.

21 THE COURT: You're coming before the Court and pleading
22 guilty to assault and battery high and aggravated nature. Are
23 you pleading guilty to that crime freely and voluntarily?

24 MR. DIXON: Yes, sir.

25 THE COURT: Of your own freewill and accord?

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BY THE COURT

1 MR. DIXON: Yes, sir.

2 THE COURT: Pleading guilty because you are guilty of
3 that crime.

4 MR. DIXON: Yes, sir.

5 THE COURT: Did anybody promise you anything, or threaten
6 you, or force you in any way to get you to plead guilty?

7 MR. DIXON: No, sir.

8 THE COURT: And you understand that you were originally
9 indicted for the crime of attempted murder, and you're
10 pleading to a lesser offense; you understand that?

11 MR. DIXON: Yes, Your Honor.

12 THE COURT: Very good.

13 All right. You're here today with your attorney, Ms.
14 Wilson, correct?

15 MR. DIXON: Yes, sir.

16 THE COURT: Did you tell her everything you wanted to
17 tell her about this case?

18 MR. DIXON: Yeah, pretty much.

19 THE COURT: All right, sir.

20 Have you had enough time to talk to her?

21 MR. DIXON: Yeah, I mean -- yeah, I'd say so.

22 THE COURT: All right, sir. Do you need any more time to
23 talk to her?

24 MR. DIXON: Not really, I mean, I got one thing I'd like
25 to run by her.

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BY THE COURT

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1 THE COURT: All right. Well, go do that right now, then.
2 Go ahead. Ask her right now.

3 (REPORTER'S NOTE: Defendant confers with counsel.)

4 MR. DIXON: All right, Your Honor. Thank you.

5 THE COURT: Yes, sir. Now, Mr. Dixon, don't tell me what
6 y'all talked about, but did -- you were able to ask the
7 question and receive a response, correct?

8 MR. DIXON: Yes, Your Honor.

9 THE COURT: All right. Very good.

10 So, now, do you need any more time to talk to your
11 attorney?

12 MR. DIXON: No, sir.

13 THE COURT: All right. Are you satisfied with the help
14 and representation you've received?

15 MR. DIXON: Yes, sir.

16 THE COURT: Any complaints?

17 MR. DIXON: No, sir.

18 THE COURT: All right, Ms. Wilson. You represent the
19 interest of your client, Mr. Dixon, in this matter?

20 MS. WILSON: Yes, I do.

21 THE COURT: He comes before the Court tendering his plea
22 of guilty to the offense named. Do you concur?

23 MS. WILSON: I do.

24 THE COURT: And you believe he's coming before the Court
25 of his own freewill and accord?

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BY THE COURT

1 MS. WILSON: He has.

2 THE COURT: And have you explained to him his
3 constitutional rights, any defenses he might have, as well as
4 the information and the evidence in possession of the state?

5 MS. WILSON: Yes, sir, I have.

6 THE COURT: Thank you very much.

7 All right, Solicitor?

8 MR. SPRATLIN: In this matter back on or about November
9 13th, 2018, in Horry County, South Carolina, the defendant,
10 David Mark Dixon, did commit an assault and battery of a high
11 and aggravated nature by shooting at the vehicle being driven
12 by the victim in this matter, who is present here in the
13 courtroom, Carl -- also known as C.J. -- Neubauer, which is
14 listed in the indictment. This matter, Your Honor, stemmed
15 from a relationship that the defendant had had with who is now
16 Mr. Neubauer's current wife. She had left Mr. Dixon recently
17 and gone and began a relationship with Mr. Neubauer. Mr.
18 Dixon didn't like that very much. He began to threaten and
19 harass the couple, even going so far as to show up at their
20 house. They thought they had kind of settled everything,
21 discussed matters as adults. However, on this morning, as Mr.
22 Neubauer is heading to work, he sees Mr. Dixon parked outside
23 of an establishment off of Highway 701 in Conway. And then,
24 Mr. Dixon drives up beside him and unloads at least seven
25 shots into the side of his vehicle, striking the vehicle at

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BY THE COURT

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1 least seven times. I have a photograph that I would like to
2 hand up to the Court. I've showed it to Ms. Wilson and it has
3 been provided in discovery.

4 THE COURT: All right, sir. Very good.

5 MR. SPRATLIN: As the Court can see from that photograph,
6 the shots that were fired came exceptionally close to striking
7 Mr. Neubauer. The fact that he was not hit at all, other than
8 with some glass that flew from the window as the bullet came
9 through it, is quite frankly a miracle. The fact that he's
10 sitting here with no injuries, no severe traumas, but that is
11 -- I want that picture to kind of show how serious this
12 incident was, how close it came to Mr. Dixon, who I'm certain
13 was acting out of anger, acting out of hatred, acting out of
14 jealousy, whatever the matter may be, to taking the life or
15 seriously injuring Mr. Neubauer.

16 I've spoke with Mr. Neubauer about whether or not he
17 wished to speak. He does not. But, he did want me to relay
18 to the Court that he is in favor of a lengthy prison sentence
19 and that he wants nothing more to do with this defendant.

20 THE COURT: All right. Very good.

21 Madam Court Reporter, could you mark this as an exhibit,
22 please, ma'am?

23 STATE'S EXHIBIT NUMBER 2

24 ADMITTED INTO EVIDENCE

25 THE COURT: All right, Mr. Dixon.

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BY THE COURT

1 MR. DIXON: Yes, sir.

2 THE COURT: You heard the facts of the case stated by the
3 solicitor. And understanding that you are pleading to the
4 lesser offense of assault and battery high and aggravated
5 nature, are those facts true and correct?

6 MR. DIXON: Yes, sir.

7 THE COURT: And you understand you engaged in that kind
8 of activity, you were committing a crime; you understand that?

9 MR. DIXON: Yes, sir.

10 THE COURT: Have you understood my questions today?

11 MR. DIXON: Yes, sir.

12 THE COURT: All the answers that you've given to me been
13 the truth?

14 MR. DIXON: Yes, sir.

15 THE COURT: Anybody tell you how to answer my questions?

16 MR. DIXON: No, sir.

17 THE COURT: And you understand you have the right to
18 appeal your guilty plea within 10 days?

19 MR. DIXON: Yes, sir.

20 THE COURT: I find there's been a substantial factual
21 basis for the plea, I find the defendant's decision to plead
22 guilty has been done freely, voluntarily, knowingly, and
23 intelligently made. He's had the advice of competent counsel
24 with whom he's satisfied. Therefore, Mr. Dixon's decision to
25 plead guilty to assault and battery high and aggravated nature

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BY THE COURT

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1 is accepted.

2 Anything further from the state?

3 MR. SPRATLIN: No, Your Honor.

4 THE COURT: All right. Ms. Wilson?

5 MS. WILSON: Thank you, Your Honor.

6 Your Honor, Mr. Dixon is 38 years old. And I want the
7 Court to understand that in no way during anything that I say
8 in the next few minutes am I trying to downplay the
9 seriousness of what has occurred. My client is standing
10 before the Court with the obvious risk of going to prison for
11 a substantial amount of time. I think we're well aware that
12 the crime itself is a serious one. And I appreciate that my
13 client is not looking at a zero to 30, but a zero to 20-year
14 offense. With that being said, I am also going to distinguish
15 this instance from something in the same offense family that
16 would be maybe worthy of the higher end of this range of zero
17 to 20.

18 I have looked at the pictures. Mr. Dixon -- I've shown
19 them to Mr. Dixon. We've talked about these things. I'm not
20 disputing the seven shots, the six to seven shots. I think
21 it's obvious that there were multiple shots, and I think at
22 this point my client would agree that any one shot was one
23 shot too many. And I think if he could go back and undo his
24 actions, he would.

25 With that being said, Your Honor, I believe that

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BY THE COURT

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1 approximately two to three of shots were at the back of the
2 van and the remaining shots were along the side. And, yes,
3 they were at the door and I think that the bullet holes speak
4 for themselves. I am also able and ready to acknowledge that
5 the one shot through the glass clearly could have caused
6 massive injury and was a major, you know, threat to the life
7 and safety of Mr. C.J. However, I do want to point out to the
8 Court that he was not hit, and it was not because my client
9 didn't try. He acknowledges that -- what he was doing; that's
10 not the point. My point here is that the level of the actual
11 injury that was suffered is not the same as if someone was
12 actually hit in a case like this. I think that that kind of
13 offense would be more deserving of a lengthier period of time.
14 However, that's not we have here. My client understands that
15 just for the sheer act of trying to harm someone, he is going
16 to likely end up in prison. He is prepared to do that. What
17 we are asking this Court to consider today is his state of
18 mind at the time that this was going on. And I'm providing
19 this information to the Court just as a bit of mitigation
20 because it's been of great concern to my client. He tells me
21 that a few months prior to his actions in this case, his
22 father had passed away of a heart attack. He had been with
23 Mr. C.J.'s current, his wife now, he had been -- my client had
24 been with her for approximately 17 years at the time that she
25 then left the home. He had spent that time with her and her

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BY THE COURT

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1 child as a family raising -- and all of sudden those things
2 were gone. He tells me, Your Honor, that he worked at FSA,
3 the Full Steam Ahead company, doing demolition and mold
4 removal. That was his, his, his means of support. And that
5 after those things happened in his life that he kind of hit a
6 spiral of sorts where he was somewhat depressed. I think he
7 was taking methadone in an effort to get himself straightened
8 out and cleaned up. And of course, the combination of things
9 certainly enhanced the behaviors that resulted in this
10 instance.

11 And, again, he's not telling the Court that he was not
12 responsible for his actions; he's clearly saying to the Court
13 he was. I just want the Court to understand that this was not
14 just a normal course of behavior for him. Clearly, he's acted
15 out in the past. He has a few small things on his record but
16 nothing to the extent of this. And I think that says a lot
17 about what would maybe be a more normal response for him.

18 With all that being said, Your Honor, since he's been at
19 J. Reuben Long, it's my understanding that he has been
20 diagnosed with PTSD, bipolar disorder, and anxiety. And he
21 tells me that he's been taking Seroquel, Cogentin -- I think
22 is how you say that -- and BuSpar to help him. And I
23 discussed with him about whether those things assist him or
24 make him worse off to make sure that he was able to understand
25 and go forward today, and he tells me that they definitely

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BY THE COURT

1 help keep him calm and relaxed.

2 And if I've misspoken about the record, I don't have my
3 file here today because I was planning on this being an
4 arraignment, but I think I'm pretty correct about it as far as
5 ---

6 THE COURT: Yes, ma'am. He's been charged in the past,
7 but I don't believe he has any convictions.

8 MS. WILSON: Right.

9 THE COURT: That's my understanding.

10 MR. SPRATLIN: He just has two magistrate level
11 convictions, Your Honor.

12 MS. WILSON: Right. And that's -- okay, thank you for
13 confirming that.

14 THE COURT: All right. Very good.

15 MS. WILSON: I don't want to misrepresent to the Court.

16 THE COURT: That's fine.

17 MS. WILSON: With all that being said, Your Honor, we are
18 asking -- my client's firmest, most fervent desire is that the
19 Court would consider a five-year sentence for him. And I
20 think I have permission to ask the Court to consider no more
21 than six or seven if the Court feels that the five is
22 insufficient.

23 My client has served, at this point, 481 days, Your
24 Honor, at J. Reuben Long. My understanding is that that is
25 from November 14th of 2018.

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18

BY THE COURT

1 We are just asking for the Court -- clearly, he
2 understands his responsibility. He may ask the Court for
3 something else in addition when he addresses the Court. But,
4 what I am trying to put out here, Your Honor, is that I'm
5 asking the Court to just distinguish between the levels of
6 severity in -- within the range of an ABHAN and what could
7 have happened versus what actually did happen in my client's
8 actions. We're not saying prison time is the wrong thing.
9 We're saying the lower end, I think, is more appropriate in
10 this instance.

11 THE COURT: Thank you, ma'am.

12 MS. WILSON: Thank you.

13 THE COURT: Mr. Dixon, anything you want to add to what
14 your attorney has already said, sir?

15 MR. DIXON: Well, as far as what the solicitor said on
16 the harassment charges, I took them to trial and I was found
17 not guilty on them. I want to say that.

18 THE COURT: All right, sir.

19 MR. DIXON: I want that to go on the record.

20 THE COURT: Okay. Yes, sir.

21 MR. DIXON: The other thing is I'm truly sorry for what I
22 done, man, I weren't -- I weren't in my right mind at the
23 time. I was trying to transition from the methadone clinic to
24 Shoreline to get on the Suboxone. And so, within that seven
25 days that this was going on -- I take about 700 milligrams a

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BY THE COURT

1 week of the methadone. I stopped -- taking nothing. Mr.
2 Neubauer, the victim, when I talked to him at his house, he
3 said that he -- that I needed some help and he was willing to
4 help me, but things changed as the days went on. I was trying
5 to beg and plead to see my daughter, which she's not
6 biologically mine, but I raised her. That was all I was
7 wanting, Your Honor, and I was just upset about my father and
8 everything that was going on. And I'm truly sorry to Mr.
9 Neubauer. I knowed Mr. Neubauer for over 22 years. We was
10 raised together. And I was just hurting, man. It was like a
11 crime of passion, you could say, I guess you could say. Plus,
12 my father dying, plus all the withdrawals I was going through
13 in the transition, Your Honor. I'm really truly sorry, man.
14 I wish you could give me -- give me another chance at the
15 world before you sent me to prison, man. I mean, I apologize.

16 THE COURT: All right, sir. Thank you very much.

17 MS. WILSON: Your Honor, if I could just add one more
18 thing really quickly.

19 THE COURT: Yes, ma'am.

20 MS. WILSON: I did advise my client about -- and I
21 believe the Court did say it, but I want to be clear that I
22 advised him about this being a violent offense as well as
23 serious strike and what that means.

24 THE COURT: Yes, ma'am. And I believe we talked about
25 that and Mr. Dixon acknowledged that he had talked to you

SENTENCE OF THE COURT

1 about that.

2 MS. WILSON: Okay. Thank you.

3 THE COURT: Thank you, ma'am.

4 SENTENCE OF THE COURT:

5 THE COURT: 2019-GS-26-1076, State of South Carolina,
6 County of Horry versus David Mark Dixon regarding assault and
7 battery high and aggravated nature, the Court has heard the
8 facts of this case. I think it's clear to everyone that, but
9 for the Grace of God, Mr. Dixon's firing into the van that was
10 occupied by Mr. Neubauer that something obviously much more
11 tragic didn't occur. As indicated by the state and the
12 defense, you can just look at the picture and see that. I
13 appreciate the -- and I've gone through the evaluation that
14 the Department of Mental Health through the Medical University
15 of South Carolina has indicated in their findings, not only
16 the opinion about him being competent to stand trial, but
17 their opinions elsewhere about his status and state of mind.
18 And I've taken into consideration what counsel has said, Ms.
19 Wilson, as well as Mr. Dixon.

20 MS. WILSON: Yes, sir.

21 THE COURT: That fact of the matter is, the state has
22 also given concessions in this matter reducing it from
23 attempted murder, which carried up to 30 years, to assault and
24 battery high and aggravated nature which carried up to 20
25 years, and then talked about a cap of 12.

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21

SENTENCE OF THE COURT

1 All that being said, 2019-GS-26-1076, State of South
2 Carolina, County of Horry versus David Mark Dixon, regarding
3 assault and battery high and aggravated nature, the sentence
4 of the Court is Defendant is committed to the State Department
5 of Corrections for a determinat term of 10 years. Defendant
6 is given credit for the 481 days he has already served.

7 Thank you very much.

8 MR. SPRATLIN: Thank you, Your Honor.

9 MS. WILSON: Thank you, Your Honor.

10 **ADJOURNED - 12:26 P.M.**

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CERTIFICATE OF COURT REPORTER

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I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina v. David Mark Dixon, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on March 10, 2020.

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

Kay H. Richardson

Official Court Reporter

August 6, 2020.

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CERTIFICATE OF COURT REPORTER

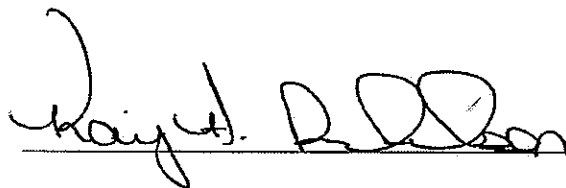
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina v. David Mark Dixon, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on March 10, 2020.

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



Kay H. Richardson

Official Court Reporter

August 6, 2020.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Horry

IN THE COURT OF COMMON PLEAS

W

3336

Full name and prison number (if any) of Applicant

DAVID MARK DIXON

SCDC# 383201 VS

State of South Carolina

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 KIRKLAND CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence HORRY COUNTY 15TH CIRCUIT
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: _____
 (a) 2019 AS 2601076 A&B HAN
 (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) 10 YEARS SCDC VIOLENT 3-10-2021
 (b) _____

RECEIVED
Horry County
Clerk of Court
2021 JUN -2 AM 11:39

- (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?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) I DID NOT HAVE PROPER COUNSEL FOR
- (b) AN APPEAL, THE SENTENCE WAS IMPOSED
- (c) DUE TO A PLEA
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE ASSISTANCE OF COUNSEL
 (b) MALICIOUS PROSECUTION
 (c) DUE PROCESS VIOLATIONS
 (d) NOT ALLOWED TO FILE MOTIONS

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

- (a) COUNSEL FAILED TO CONDUCT INVESTIGATION & ASSESS IN "FILING"
 (b) CHARGED WITH HIGHER CHARGE THEN NECESSARY BY LAW
 (c) NOT ALLOWED BY JUDGE TO REPRESENT MYSELF "PRO SE" OR RETIRE COUNSEL
 (d) CLERK REFUSED TO FILE MOTIONS ON PCARNEY'S BEHALF WHEN REQUESTED

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. _____
 - ii. _____
 - iii. _____

iv. _____

(d) the date of each such disposition

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) INEFFECTIVE ASSISTANCE OF COUNSEL UNAVAILABLE TO MAKE APPEAL

(b) DUE PROCESS VIOLATION/MALICIOUS PROSECUTION

(c) NOT ALLOWED TO FILE MOTIONS/CLERK WOULD NOT RESPOND TO MOTIONS

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? N/A
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

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. KTA WILSON (SCBWA44)

ii. 203 LAUREL ST

iii. CONWAY SC 29526

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

i. PLEA AND SENTENCING

ii. _____

iii. _____

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

5 years

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

NO.

STATE OF SOUTH CAROLINA

County of Horry

VERIFICATION

20

3336

I, David M. Dixon, 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.

David Mark Dixon

SWORN to and subscribed before me this 28th
day of May, 2020.

Beth A. Mangold (L.S.)
Notary Public

BETH A. MANGOLD

Notary Public, State of South Carolina

My Commission Expires: My Commission Expires 8/10/2028

CLERK
CLERK OF COURT
HORRY COUNTY, SC

7:38 JUN -2 AM 11:39

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

David M. Dixon
I, David M. Dixon, 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.

David M. Dixon
Applicant

SWORN or affirmed to and subscribed before me this
28th day of May, 2020.

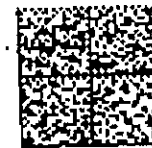
Beth A. Mangold
Notary Public

BETH A. MANGOLD
Notary Public, State of South Carolina
My Commission Expires 8/10/2028

My Commission Expires: _____

2020 JUN -2 AM 11:39
CLERK
COURT
HORRY COUNTY, SC

David Dixon #383201
Mailroom CI-47
Kirkland Correctional Institution
4344 Broad River Road
Columbia, S.C. 29210



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Conway, SC 29528

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

David Dixon, #383203,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-26-3336

RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT

FILED
HORRY COUNTY
SEP 30 P 1:20
RENEE N. EMMIS
CLERK OF COURT
HORRY COUNTY

NOW COMES Respondent, moving for a more definite statement and making its return to the post-conviction relief (hereafter "PCR") application filed on June 2, 2020, by David Dixon (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its March 2019 term, the Horry County Grand Jury indicted Applicant for Attempted Murder (2019-GS-26-01076). Applicant was represented by Kia T. Wilson, Esquire. Assistant Solicitor Martin D. Spratlin of the Fifteenth Circuit Solicitor's Office prosecuted the case. On March 10, 2020, Applicant appeared before the Honorable Steven H. John, circuit court judge, and pled guilty to the lesser-included offense of Assault and Battery of a High and Aggravated Nature with a negotiated cap of twelve years imprisonment. Judge John sentenced Applicant to ten years' imprisonment. Applicant did not pursue a direct appeal.

II. Statement of Facts

On November 13, 2018, Applicant committed an assault and battery of a high and aggravated nature by shooting at the vehicle driven by the victim, Carl Neubauer. (Tr. 11). The

victim's wife by the time of plea proceedings had been in a relationship with Applicant before she left him for the victim. (Tr. 11). Applicant, who did not care for the victim, began threatening and harassing the couple, at times showing up at their house. (Tr. 11). On the morning of the incident, the victim was heading off to work when he saw Applicant appear alongside him and fire at least seven shots into the side of the vehicle, striking the vehicle at least seven times. (Tr. 11-12). The shots were incredibly close to striking the victim. (Tr. 12). These shots were documented by photographs. (Tr. 12).

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. "Ineffective assistance of counsel."
 - a. "Counsel failed to conduct investigation and assist in defense."
2. "Malicious prosecution."
 - a. "Charged with heavier charge than necessary by law."
3. "Due process violations."
 - a. "Not allowed by judge to represent myself *pro se* or relieve Counsel."
4. "Not allowed to file motions."
 - a. "clerk refused to file motion on plaintiff's behalf."

Attached to and incorporated herein are Applicant's Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, and the current PCR application. Respondent reserves the right to amend this Return upon receipt of additional relevant information.

IV. Argument

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts

ineffective assistance of counsel as a ground for relief, the applicant must show “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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”). Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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.

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant’s right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Absent valid reasons why the applicant is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v.*

United States, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the applicant must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a defendant “lacks knowledge of material evidence in the prosecution’s possession.” *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999).

A defendant’s knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and “may be accomplished by colloquy between the court and defendant, between the court and defendant’s counsel, or both.” *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). “[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

Failure to Investigate

Applicant raises several allegations concerning failure to investigate. Regarding failure to investigate allegations, Applicant is required to present evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Additionally, whether Applicant was prejudiced by Counsel’s failure to investigate is contingent on whether the evidence presented would have led Counsel to change her recommendation

regarding the plea. *Stalk v. State*, 383 S.C. 559, 562, 681 S.E.2d 592, 594 (2009).

Applicant alleges Counsel was ineffective for failure to investigate, but fails to state what he failed to investigate, why Counsel was deficient for failing to investigate, or how further investigation would have changed Counsel's recommendation to plead. Thus, a more definite statement is needed for Respondent to ascertain whether this allegation has merit.

Failure to Present a Defense

Applicant claims Counsel was ineffective for failure to assert a defense. This was likely waived when Applicant entered his plea. Still, Respondent requests a more definite statement because Applicant failed to state what the defense would have consisted of, how Counsel was deficient for failing to investigate and raise said issue, or how Applicant's decision to plead would have changed had Counsel asserted the defense.

However, the ineffective assistance of counsel allegation probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

Malicious Prosecution

Applicant alleges the State engaged in misconduct because she was "harshly prosecuted and sentenced." Courts have recognized that prosecutors have many powers within the criminal justice system. Included in this, is "discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n. 6, 735 S.E.2d 471, 479 n. 6 (2012). Additionally,

prosecutors can use “punishment of the offender” as a proper motivation behind their behaviors and punitive motivations do not render otherwise lawful activity unlawful. *State v. Blakely*, 402 S.C. 650, 658, 742 S.E.2d 29, 33 (2013) (citing *State v. Fletcher*, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct.App.1996)).

However, a conviction will be reversed if the applicant can show prosecutorial vindictiveness, in that “the prosecutor acted with genuine animus toward the defendant” and “the defendant would not have been prosecuted but for that animus.” *State v. Odon*, 412 S.C. 253, 263, 772 S.E.2d 149, 154 (2015) (quoting *United States v. Wilson*, 262 F.3d 305, 314 (2001)) (quotations omitted). Otherwise, a “prosecutor’s charging decision is presumptively lawful.” *Id.* at 263-64 (quoting *United States v. Goodwin*, 457 U.S. 368, 384 n. 19 (2015)). The case in which an applicant can overcome the presumptive validity of the prosecutor’s actions is rare. *Id.* at 264 (quoting *Goodwin*, 457 U.S. at 384 n. 19).

Applicant claims he was harshly prosecuted. He does not, however, show or state that he was prosecuted out of prosecutorial vindictiveness, that he would not have been prosecuted but for the vindictiveness, or that the charging decision was unlawful. Thus, a more definite statement is needed for Respondent to ascertain whether or not this allegation has merit.

Pro Se Representation

Applicant alleges he was denied his right to proceed *pro se*. “It is well-established that an accused may waive the right to counsel and proceed *pro se*.” *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). This right must be honored even if it is to the defendant’s detriment and must be asserted prior to trial. *Id.* If asserted after trial has begun, the grant or denial to proceed *pro se* is within the judge’s discretion, who is then required to weight the prejudice to the legitimate interests of the defendant against the potential disruption of proceedings in process.

State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (citing *United States v. Wesley*, 798 F.2d 1155, 1155-56 (8th Cir. 1986); *United States v. Stevens*, 83 F.3d 60, 66-67 (2d Cir. 1996)). The right to counsel must be waived knowingly and intelligently, with an understanding of the consequences. *Id.* The trial judge has the responsibility to guarantee the waiver of Counsel is done knowing and intelligently. *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014). Further, a defendant competent enough to stand trial is competent enough to waive the right to counsel. *Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Additionally, a trial judge is not required to permit hybrid representation, a situation where applicant proceeds partially *pro se* and partially by counsel. *Id.* at 43, 503 S.E.2d at 751.

Applicant claims he was denied his right to proceed *pro se*. He does not, however, present any substantiating evidence indicating he requested to proceed *pro se* leading up to plea proceedings, that this issue was raised before the judge, or that the decision to waive Counsel was done or would have been done knowingly and intelligently. Thus, a more definite statement is needed for Respondent to ascertain whether or not this allegation has merit.

Rejection of Motions and Dual Representation

Applicant alleges he is entitled to relief because the clerk disregarded his *pro se* motions. However, as previously stated, Applicant was represented by Counsel leading up to plea proceedings and there is no right to dual representation in South Carolina. *Id.* Applicant has no right to have *pro se* motions considered while being represented by counsel and, thus, is not entitled to relief on this ground. Still, Respondent requests an evidentiary hearing on the claims raised in Applicant's PCR application.

V. Motion for a More Definite Statement

Respondent moves for a more definite statement regarding Applicant's allegations.

Applicant alleges that plea counsel was constitutionally ineffective for failure to conduct investigations and assist in defense, that the clerk of court acted unconstitutionally by disregarding *pro se* motions, that he was denied the right to proceed *pro se*, and was maliciously prosecuted. However, he does not explain exactly why this entitles him to relief. Applicant fails to set forth with specificity any facts and circumstances upon the claim is based. The Uniform Post-Conviction Procedure Act requires that applicants must “specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In a PCR application, it is incumbent upon applicants to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRPC, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Respondent moves pursuant to Rule 12(e), SCRPC, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an additional amended application well in advance of any evidentiary hearing concerning this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the allegation.

VI. Other Allegations Denied

Each and every other allegation in Applicant’s PCR application not explicitly admitted,

qualified, or explain in this Return is hereby denied by the Respondent.

VII. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant's court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a). SCRCP and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) ("In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases."); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) ("When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record."); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 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 the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential 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 withheld until the last minute resulting in undue prejudice to Respondent.

VIII. Conclusion

WHEREFORE, Respondent requests that the Court require Applicant to provide a more definite statement and then hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: s/ Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

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

September 29, 2020

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF HORRY) Case No. 2020-CP-26-03336

3 -----x
4 DAVID M. DIXON,)
5 Applicant,)
6 vs.) TRANSCRIPT OF RECORD
7 STATE OF SOUTH CAROLINA,)
8 Defendant.)
9 -----x

October 28, 2021

POST-CONVICTION RELIEF HEARING

B E F O R E:

The Honorable Robert Hood, Presiding Judge

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

Carla Grabert-Lowenstein, Esq.
Attorney for the Applicant

William Ray, Esq.
Attorney for the State

Court Reporter: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

WITNESS/DESCRIPTION	PAGE
KIA WILSON	
Direct by Ms. Grabert-Lowenstein	5
Cross by Mr. Ray	21
Redirect by Ms. Grabert-Lowenstein	32
MARTIN SPRATLIN	
Direct by Ms. Grabert-Lowenstein	34
Cross by Mr. Ray	38

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

(Whereupon, the following proceedings started at 11:20 a.m.):

THE COURT: Okay. And, let's see, are you David Dixon?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You're welcome to take off your mask if you'd like to. You don't have to, but you're welcome to, if you want to.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: Great. And, let's see, Mr. Dixon, we're here today for your PCR hearing. So this is David Dixon versus the State of South Carolina. The docket number is 2020-CP-26-3336. Mr. Dixon is present and represented by Carla Grabert-Lowenstein. The State is present and represented by William Ray.

And do you have a packet for me?

MR. RAY: Sure do, Your Honor.

THE COURT: Okay. All right. Thank you.

And the State may go ahead and get us started.

MR. RAY: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. RAY: Mr. Dixon is currently incarcerated. He was indicted by the Horry County Grand Jury back in March of 2019 for attempted murder. He was represented by Ms. Kia Wilson, who is here today. And Assistant Solicitor Martin Spratlin

1 prosecuted the case, who he is also here today, Your Honor.

2 On March 10th, 2020, Mr. Dixon appeared before the
3 Honorable Steven H. John and entered a guilty plea to the
4 lesser included offense of assault and battery of a high and
5 aggravated nature with a negotiated cap of 12 years.

6 Judge John sentenced Mr. Dixon to ten years'
7 imprisonment. Mr. Dixon did not pursue any appellate review.
8 He filed this application on June 2nd, 2020, and he raised
9 several different allegations of ineffective assistance of
10 counsel, malicious prosecution, due process violations. And
11 we received some amendments from his counsel, Carla
12 Lowenstein; namely, that his plea counsel, Ms. Kia Wilson, was
13 ineffective for failing to challenge a criminal responsibility
14 report and a competency report, failing to advise Mr. Dixon of
15 all aspects of his case that might have indicated he may not
16 have been criminally responsible, and then, furthermore,
17 ineffective assistance of counsel for failing to adequately
18 communicate with Mr. Dixon.

19 With that, I'll go ahead and turn it over to
20 Ms. Lowenstein.

21 THE COURT: Okay. All right. Ms. Lowenstein, you're
22 also welcome to remove your mask if you want to. You don't
23 have to, but you can if you want to.

24 And you may call your first witness.

25 MS. GRABERT-LOWENSTEIN: Your Honor, I would ask that we

1 be allowed to wait until -- well, I'll call Ms. Wilson at
2 the -- yeah.

3 THE COURT: Okay. Come on up, Ms. Wilson.

4 KIA WILSON,

5 the witness, after having been duly sworn, was examined
6 and testified to as follows:

7 THE CLERK: Please have a seat and state your name for
8 the Court and spell it. I'm not going to touch this.

9 THE WITNESS: Okay. Kia Wilson. Do you want me to spell
10 that?

11 DIRECT EXAMINATION

12 BY MS. GRABERT-LOWENSTEIN:

13 Q Good afternoon, Ms. Wilson.

14 THE COURT: Go ahead.

15 BY MS. GRABERT-LOWENSTEIN:

16 Q When were you assigned -- you were assigned to
17 Mr. Dixon's case, correct, through the public defender's
18 office?

19 A That's correct.

20 Q And when were you assigned that?

21 A Give me one quick second. I'm going to pull it up.
22 Okay?

23 Q I'm sorry?

24 A Give me one second. I'm going to pull that up.

25 Q Sure.

1 **A** I was assigned on November 29th, 2018.

2 **Q** Now, when was the first time you had an opportunity to
3 speak to Mr. Dixon?

4 **A** One second. I'm doing everything on the iPad, so let me
5 just pull up the file. It just takes a second.

6 **Q** Sure.

7 **A** Unless, of course, it decides it's not going to work, but
8 it takes a sec. We had a meet-and-greet in December of that
9 same year, so 12/19/2018. My note reflects 10:43 a.m.: Meet
10 and greet at J. Reuben Long.

11 Meet-and-greets are what I put in my notes as
12 conversations with clients usually at the jail where they do
13 not have discovery yet. So we're just having a
14 getting-to-know-each-other session.

15 **Q** And when you met with him, did you notice any issues that
16 caused your concern in representing him?

17 **A** No. I don't recall anything problematic as far as his
18 ability to speak to me. Now, he was asking questions about
19 bond reduction. I told him it was unlikely he would be
20 eligible for one in the next 90 days, and he mentioned an
21 issue with drugs.

22 **Q** Okay. And did he -- when did you make the decision to
23 ask for the two evaluations?

24 **A** Bear with me one second, please. My notes don't
25 specifically say when I made the decision. What I do note is,

1 on March 19th, 2019, I had another conference with him where
2 he told me he was not in the right frame of mind when he was
3 doing this.

4 Q Okay. And --

5 A He seemed reluctant -- my notes reflect that he seemed
6 reluctant to have a mental health eval. I was not clear about
7 why, but he indicated that he had concerns about his frame of
8 mind at the time. So that would probably have been why I
9 would have gone forward with that.

10 Q Do you remember anything in addition to he indicated to
11 you he wasn't in his frame of mind that elucidated on that
12 statement?

13 A I do not -- in these particular notes, I don't have
14 anything specific about -- I don't think I understand what
15 you're asking me. Are you asking me if I thought he had a
16 problem as well?

17 Q Well, no. What I was asking you was whether he said
18 anything -- first of all, whether he said anything else that
19 gave you more information about what he meant about not being
20 in the right frame of mind.

21 A There was nothing else in my notes to reflect an
22 explanation. What I do have here is that he had admitted to
23 the crime in that conference with me and told me that he
24 wasn't in his right frame of mind when doing it. Okay? My
25 notes reflect: Admitted to crime, seemed reluctant about the

1 mental health eval, but -- and, apparently, I brought it up
2 after he said he wasn't in his right frame of mind when he did
3 it. So I don't know anything beyond that. I can't recall
4 with any specificity anything beyond that. I didn't think
5 there was an additional problem, if that's what you're asking.

6 Q But based on just that, you went ahead and asked for the
7 criminal responsibility and the competency evaluation?

8 A Mm-hmm, absolutely.

9 Q So you saw that, at that time, as a red flag that you
10 needed to deal with, I'm assuming?

11 A Yes.

12 Q Okay. Did he later tell you that there were things that
13 had happened in his family? Did he discuss with you
14 post-traumatic stress because a parent had died?

15 A I'm sorry; I'm looking at my notes. I don't reflect
16 anything with that level of specificity. Now, if it -- if he
17 had, it would have been written on the mental health eval form
18 that we would have completed. Sometimes we add it in so that
19 the evaluators at Mental Health -- at the Department of Mental
20 Health understand part of the basis for which we are
21 submitting the request for the eval. But, usually, there's
22 lines on the form for that. But, otherwise, I don't have any
23 particular recall of that.

24 Q Do you recall if, at the time he entered his plea, that
25 you put on the record he had indicated post-traumatic stress

1 and some other issues?

2 **A** I don't recall it. And, I'm sorry, I have not looked at
3 this transcript again very recently. So if you want to give
4 it to me and tell me that I said it -- I'm not denying it.
5 I'm just telling you I can't recall it specifically at this
6 moment. I don't recall that.

7 **Q** Sure. And I think I can --

8 MR. RAY: I have got a copy of the transcript.

9 MS. GRABERT-LOWENSTEIN: Yeah, I have got...

10 (Mr. Ray hands transcript to witness.)

11 MS. GRABERT-LOWENSTEIN: I think I was going a little bit
12 too fast.

13 BY MS. GRABERT-LOWENSTEIN:

14 **Q** Okay. Referring you to page 4, starting at 13 and going
15 down to about 20, you do indicate that you feel he does have
16 some mental health issues that you plan to put on the record?

17 **A** Mm-hmm. Yes. I'm sorry.

18 **Q** Okay. And you did that?

19 **A** Yes. I do see that, on page 16, I list some of the
20 issues that I was aware that he had and what he told me he had
21 been taking.

22 **Q** Okay. And, now, did he seem at all confused the day of
23 the plea?

24 **A** I don't have a note reflecting that, and I don't recall
25 that with any specificity, and I'm sorry I don't. I will tell

1 you that -- well, as far as that day, I don't recall that he
2 was confused. We discussed what was happening. He knew why
3 he was coming because it had been a point of contention.

4 Q Okay. And -- but, on page 16, starting at 18, you did
5 put on PTSD, bipolar, and anxiety?

6 A Yes, that's the lines I was referring to previously.

7 Q Okay. And, at the time of the plea, you told the Court
8 you didn't feel a necessity to challenge the mental health
9 evaluation?

10 A Mm-hmm. That's correct.

11 Q Okay. Now, how many times total, if you can tell me, did
12 you meet with him?

13 A Meetings in person at the jail?

14 Q Yes. I'm sorry; I should have been a little clearer.

15 A Well, we would have had other conversations, but at the
16 jail, I see one -- let's see. So we had one on 12/19/2018.
17 We had one on 1/22/2019, one on 3/19/2019. Let's see. Then
18 there was another one on a 5/29/2019. Let's see. Then we
19 spoke by phone, but that's not an actual visit in person.
20 That was in July.

21 Let's see. 10/7/2019 is the next one. And then there's
22 another one, let's see, on 10/15/2019. And then we're moving
23 into 2020. There was a staff visit with him for a video and
24 the disc in his file. That was February of 2020. And,
25 apparently, I saw him around the same time because I have a

1 note in the file about a meeting that, apparently, happened
2 the week prior that was on February 11th.

3 Q Okay. And how many is that total?

4 A I wasn't keeping count. I was hoping you were as I went
5 through.

6 Q Sorry. About seven or eight?

7 A I'm not even sure at this point, but yeah, there would
8 have been a few. And that didn't include -- there was another
9 one on 2/26 of 2020. And I think that was the last one that I
10 see in the notes prior to the file being closed on March 11,
11 2020.

12 Q Okay. And that would have been the day after he entered
13 this plea; correct? The March 11th?

14 A I'd have to look at the sentencing sheet, but that could
15 be correct.

16 Q Okay. Did you investigate any possible defenses that
17 were short of criminal responsibility or competency that might
18 have mitigated what he was facing?

19 A So please explain to me what you mean when you -- what
20 are you asking me?

21 Q Well, as I understand -- as it has been explained to me,
22 the victim -- alleged victim was involved was Mr. Dixon's
23 wife.

24 A That's -- that relationship, I think, was not precisely
25 what it was, but yes, that was the crux of it. The man who is

1 the alleged -- well, at this point, not alleged -- was the
2 victim in this case was dating the woman that he had been in a
3 relationship with long-term.

4 Q Okay. And did you investigate the impact that that had
5 on Mr. Dixon in terms of forming intent?

6 A Well, yeah, because that was the entire problem. I'm
7 sorry. I say "yeah." I should -- yes.

8 So when I spoke to Mr. Dixon, we went with the discovery.
9 We went over the allegations.

10 Q Okay.

11 A The relationship was, obviously -- the relationship
12 between this victim and his ex was, obviously, the point of
13 contention with this man. That was clear to me. Is that what
14 you're asking me? That was the problem.

15 Q Yeah, no, and to see whether that required any other
16 additional investigation.

17 A You mean as to whether he was set up or something? I
18 didn't know where to go with that.

19 Q No, I'm asking if you had or an investigator from your
20 office had a face-to-face with the alleged victim.

21 A I did not have one.

22 Q So you don't know whether he was reluctant and wouldn't
23 want to go forward, because had he and Mr. Dixon not been
24 friends for many years?

25 A So, yes, they were friends. I would not have known if he

1 wasn't going to go forward unless the solicitor had notified
2 me. And I contacted the solicitor, and I remember asking the
3 question about whether or not the victim was trying -- because
4 I do recall, at some point, Mr. Dixon saying he didn't think
5 they wanted to prosecute him. And I don't know where that
6 came from. I didn't think he had had contact with him out
7 there at the jail, but I still -- I think I inquired of the
8 solicitor about it. And at no point in time was I ever told
9 that there had been any effort by the victim in this case to
10 withdraw participation in the prosecution of that case. I was
11 never informed of that. And I did inquire at least one time
12 about it because Mr. Dixon said that.

13 Q Okay. Because that would -- that's more than a red flag.
14 That is like they're not going to have -- the solicitor's
15 office isn't going to have a witness; correct?

16 A That would have been important, yes.

17 Q Okay. Now, during the time that you represented
18 Mr. Dixon, did you ever contact J. Reuben, the medical unit,
19 and get his medical records?

20 A I personally wouldn't have. Typically, we have somebody
21 in our office who handles that for us when we file mental
22 health evals for clients, if it's needed or requested.

23 Q And who makes that decision, whether it's needed or
24 requested?

25 A Department of Mental Health will tell us if they want

1 certain records if the person says that they have a history.
2 Sometimes we have gotten those requests from them. And then
3 we'll forward those documents if we were able to procure them.
4 Obviously, some situations, we're not able to get those
5 records for people. And it depends on where they're asking
6 for what the records are for and where they are. It just
7 depends. It varies with different people.

8 Q So the answer to my question is you never saw those --
9 you never requested them?

10 A I did not, no.

11 Q Okay. And if Mr. Dixon made a request to talk to a
12 psychiatrist, either live or in a telephonic evaluation,
13 wouldn't that have been important to tell you how he was doing
14 there and whether or not things were going downhill?

15 A So two things in response. One -- and I would have
16 explained this to him at the time of the eval. The mental
17 health eval that we do for criminal court is not to, you know,
18 resolve mental health issues per se. It really is to
19 determine whether or not he's able to communicate with me.

20 He was doing that in spectacular fashion, to the point
21 that he was calling and writing to my boss, trying to give me
22 relieved from his case because he didn't like what I was
23 telling him, which indicated some level of understanding about
24 the things I was relaying to him.

25 But the criminal responsibility aspect, to me, was

1 important, which is why I also ordered it, because he said
2 that he wasn't in the right frame of mind. Those were his
3 words to me in the notes.

4 So I felt that was important, and that's why I organized
5 the eval. I didn't -- I can't arrange a telephonic, you know,
6 exam with a psychiatrist for him. I don't -- that's not what
7 I'm able to do.

8 Q No, and that's not what I'm asking.

9 A Okay.

10 Q I'm asking, if you had had those records, could they have
11 indicated to you other red flags that might have indicated
12 Mr. Dixon still had mental health issues and wasn't going to
13 be competent to enter the plea?

14 A You mean with the Department of Mental Health or for me
15 personally?

16 Q You as his counsel.

17 A Well, I will tell you this: I sent him because I felt it
18 was important. I can't answer your -- I can't answer your
19 question in the affirmative. What I'm going to tell you is
20 that, based on what he told me, I already wanted to get the
21 eval done. Period. I wanted him to have it because he said
22 he felt that there were concerns and issues about his frame of
23 mind. I wasn't going to just let that go.

24 As far as me looking at his records and making a
25 determination, I did not do that. I will freely admit I

1 didn't look at any records and say, okay, this bolsters our
2 position at DMH. And if I should have, then, you know, I will
3 certainly make changes going forward.

4 Q Now, Ms. Wilson, have you ever had individuals that you
5 felt needed the evaluations and you thought, okay, things are
6 going to be okay when they take their plea, but they have gone
7 downhill while being incarcerated?

8 A I have not had anyone show up for court that I have taken
9 through a plea who was mentally unable to go through the plea
10 process. The worse situation I have ever had was someone who
11 didn't speak English, who was, you know, having trouble
12 understanding certain concepts when we were going over the
13 rights. But, beyond that, no.

14 Q Okay. Did Mr. Dixon ever tell you, in any of your
15 interviews with him, he didn't care whether he lived?

16 A I don't have a note about that. And if you give me a
17 second, I'm going to just go back through these.

18 Q Sure, because -- yes.

19 A Because I would like to think that's something I would
20 have written down.

21 Q Sure.

22 A At no point, do I have a note that reflects that he said
23 he wanted to hurt himself.

24 Q If he had said that to you, would that have been one of
25 the reasons that you sent him for the mental health

1 evaluations?

2 **A** Based on my notes, the reason I wanted the mental health
3 eval was because he said he wasn't in the right frame of mind.
4 And immediately after I had that note from that jail visit is
5 when I started the process for the paperwork.

6 And, again, I can't say he didn't say it. I don't
7 remember that part. I would like -- just in the general
8 course of my taking notes on our conferences, I would like to
9 think that's something I would put in the system, in the
10 notes, just like I put in that he said he wasn't in the right
11 frame of mine. So, you know, if he said it, apparently, I
12 would have missed that, but I don't have recall or have
13 recorded that he said it to me.

14 **Q** Now, he entered his plea on March 9th. Was he actually
15 brought to court earlier than that? And I mean, like, the day
16 before?

17 **A** I don't -- I wouldn't recall that, and I don't have a
18 note. I can't say that he wasn't. Maybe he was scheduled and
19 then something didn't happen and then he got taken back and
20 had to come back. I don't -- but I don't know. I don't
21 remember.

22 **Q** Now, you mentioned people understanding the concepts
23 that -- and "consecutive" and "concurrent" are one of the
24 biggest.

25 **A** Mm-hmm.

1 Q Am I right? I mean, in --

2 A Generally, clients don't understand necessarily what
3 "concurrent" means or "consecutive." So, generally, I do try
4 to explain that to them. Usually we're talking about
5 concurrent instances.

6 In this particular instance, the consecutive was not what
7 we were seeking, and so it came up as a part of what Judge
8 Hyman said he was going to do.

9 Q Was the offer that you received always concurrent time?

10 A I'd have to look back, but I believe it was. And I can
11 just check real quick on the prior plea offer that we
12 received. And there were a couple.

13 The original one from February 2019 was dated a different
14 solicitor. And that one reflected eight to ten years, okay,
15 on the charges. And usually, unless stated, it's concurrent.
16 Okay? Stated otherwise.

17 The other one is from February 28th, 2020, in our office.
18 That one is dated with Mr. Spratlin, and it says that, on the
19 attempted murder, up to 30 years, violent, most serious. It
20 lists the warrant, and it says, The State will allow the
21 defendant to plead guilty to the lesser included offense of
22 assault and battery of a high and aggravated nature, zero to
23 20, serious and violent in parenthesis.

24 And it says, "The State will not make an offer as to the
25 amount of time to serve, leaving that in the sound discretion

1 of the Court."

2 Q Okay. So there was not, according to your notes, a
3 specific conversation about concurrent, consecutive time?

4 A I don't recall it. I have to assume that, at the time
5 that Judge Hyman was sentencing, it would have been after the
6 fact, which means the plea was already locked in. It's
7 certainly not something he told us he was going to do in
8 advance.

9 But as far as telling my client that there was a chance
10 that the judge could do it, it's possible that it did not
11 happen. And the only reason I would say that it may not have
12 happened is because it probably was unexpected. But, again,
13 I -- I don't know specifically if I would have gone over that
14 part or not. I can't say that with certainty.

15 Q The day of the plea, did Mr. Dixon indicate any
16 hesitancy, that he felt pushed into the plea?

17 A Give me one second while I get back to the notes screen.
18 I can't say specifically about that date. What I will tell
19 you is that, prior to the plea date, he had called the office,
20 as is notated by one of the staff, complaining about me, our
21 last meeting. Apparently, he wanted my boss to remove me and
22 told the staff that I wanted him to go to prison because,
23 apparently, I had relayed his plea offer to him and that was
24 not to his liking.

25 THE COURT: I'm kind of confused about the questioning in

1 this case. Judge John sentenced Mr. Dixon?

2 THE WITNESS: I think it was Judge Hyman. Am I wrong?

3 MR. RAY: Your Honor, as far as -- I'm not sure where the
4 question was going regarding consecutive --

5 THE COURT: I mean, I'm looking at the sentencing sheet.
6 It has Stephen John's signature on it.

7 THE WITNESS: Okay. I'm sorry. I thought it was Hyman.

8 THE COURT: And there's nothing about any consecutive
9 sentence. He pled guilty to one charge and got a ten-year
10 sentence, so I don't understand the --

11 MR. RAY: He was indicted just for the attempted murder.

12 THE WITNESS: Am I mixing up the previous case and this
13 one?

14 THE COURT: Yeah.

15 THE WITNESS: I'm so sorry.

16 THE COURT: Somebody is.

17 THE WITNESS: I think we both might be, when she went
18 down that line.

19 THE COURT: Yeah --

20 MS. GRABERT-LOWENSTEIN: I'm sorry, yeah.

21 THE COURT: Stop talking, please.

22 This gentlemen pled guilty to one count of ABHAN for a
23 negotiated cap of 12. He pled in front of Judge John, and he
24 got a 10-year sentence. There's nothing about consecutive or
25 concurrent that has anything to do with this case. There's

1 nothing about Judge Hyman that has anything to do with this
2 case. There's nothing about -- I mean, the plea offer was a
3 negotiated cap of 12, and he got a ten-year sentence, and he
4 only pled guilty to one charge, and it was in front of Judge
5 John. So I'm confused as to where the questioning, with all
6 the concurrent and consecutive --

7 MS. GRABERT-LOWENSTEIN: And that may be some of --

8 THE COURT: -- stuff going on.

9 MS. GRABERT-LOWENSTEIN: -- my confusion. I apologize.
10 I have no further questions at this time.

11 CROSS-EXAMINATION

12 BY MR. RAY:

13 Q Ms. Wilson, how are you?

14 A I'm fine. Thank you.

15 Q So would you please just go over the factual
16 circumstances giving rise to Mr. Dixon's indictment as you
17 remember it?

18 A Sure. What I recall is that there was -- the allegations
19 were that Mr. Dixon shot up the vehicle of this victim
20 multiple times, multiple shots. One of the shots, most
21 notably, if I recall correctly, missing the victim's head by
22 inches on the headrest of the car. The victim himself had no
23 actual injury other than maybe marks or scratches from -- I
24 want to say from the glass, because the shots went through the
25 window -- the driver's side window. But the holes were all

1 over the side of the door.

2 And the story was, especially after speaking to
3 Mr. Dixon, that the female -- the girlfriend in this case of
4 the victim was his ex. They had been in a long-term
5 relationship, if I recall correctly, and that's kind of what
6 spurred on this incident, what caused this incident to occur.

7 Q Okay. So you first -- you were appointed; is that
8 correct?

9 A That's correct.

10 Q To represent Mr. Dixon.

11 And I believe you stated you met with him about seven or
12 eight times in person?

13 A I don't recall the count, but I did list the times and
14 the dates. Some of the times.

15 Q Did you have conversation with him via written
16 correspondence or phone call?

17 A Usually, phone calls were the other form. I can check
18 and see if there are any letters. But, usually, when clients
19 call in, if I'm in there, I will generally take calls.

20 Q Okay. And you -- when you spoke with him, what sort of
21 conversations did y'all have about the case?

22 A As I stated previously, most of our -- the original visit
23 is just a meet-and-greet, so there is no discovery to go over.
24 Usually clients give me basic information about themselves.
25 Sometimes they want to talk about the case, and if they do,

1 generally, I will let them tell me what they want, but I
2 explain I can't go over anything specific with them.

3 But in following interviews or meetings, we had
4 discovery, so we would have gone over the discovery, over the
5 allegations. I would have offered him an opportunity to tell
6 me his version of the events. In his case, my notes reflect
7 that he had admitted to the allegations and told me that it
8 was about the relationships that, you know, were involved and
9 that's why this happened.

10 I think he was regretful for his actions, and most of the
11 conversations were about the discovery. However, towards the
12 end when it became clear to him -- because there was a big
13 push for, I think, some kind of a program, drug court or
14 mental health court, something like that, and the solicitor
15 was adamantly opposed, which, of course, always makes for
16 difficulties between attorney and client when they're not
17 likely to get the sentence that they would like.

18 So it became more contentious, and in -- the conversation
19 was more contentious. That's kind of how it went.

20 Q Okay. And he told you that he had some mental health
21 issues; correct?

22 A Yes.

23 Q Okay. Post-traumatic stress disorder, bipolar disorder,
24 anxiety disorder?

25 A Those sound accurate, based on what I have read, yes.

1 Q And were you aware of him being treated for those
2 disorders at that time?

3 A What I recall him saying, according to the notes here, is
4 that -- or, to the transcript -- is that he was receiving --
5 he was taking medicines.

6 Q Okay. And did you speak with him about how those mental
7 health disorders might affect his case?

8 A We talked about the fact that, if he wasn't able to know
9 right from wrong at the time of the offense, when he told me
10 he wasn't in the right frame of mind, we would have discussed
11 that, which would have been the basis for the eval request.

12 Q Okay. And he was evaluated?

13 A He was.

14 Q And I believe you stated, on page 4 in the transcript,
15 that you didn't see any basis for challenging the findings in
16 the eval report; is that correct?

17 A That would have been correct.

18 Q Why did you -- why did you not see a basis for
19 challenging it?

20 A Well, I -- generally speaking, he was able to discuss
21 this case with me. He was able to have many discussions with
22 me about his case, able to call in and request what he wanted
23 done and how he would like to see things play out, which, to
24 me, indicated an understanding of the processes and the
25 procedures.

1 I didn't -- I had no reason to think he couldn't
2 understand the conversations we were having, and we had them
3 frequently enough that, you know, certainly, if there was
4 something he wasn't getting, I'd like to think I would have
5 been aware of it. But more to the point, he was actively
6 participating in the conversation and telling me how he'd like
7 to see things progress. I took that as his understanding.

8 In addition, when he was actively participating in the
9 conversation about negotiating a plea offer, I also took that
10 as a sign of understanding. As far as the criminal
11 responsibility aspect, I had no basis to argue that he wasn't
12 able to know right from wrong. I just didn't have a basis for
13 that.

14 Q Okay. And, so just to be clear, he was found to be
15 competent. He was found to be criminally responsible. And
16 was he found to have the capacity to conform his behavior?

17 A I believe he was, but, again, I don't recall that
18 specifically at this moment, but I believe he was.

19 Q And I think you stated earlier, his motivation for
20 committing the crime was the relationship quarrel?

21 A Yes.

22 Q Okay. Now, as far as negotiating a plea, he was charged
23 with attempted murder, and you mentioned he wanted some sort
24 of probationary sentence or drug court?

25 A My notes reflected that there was conversations about

1 probation or a screen for drug court, working on getting him a
2 better deal. That was a large part of many of the
3 conversations at the jail.

4 Q Okay. Was it ever your understanding that he wanted to
5 take this all the way to trial?

6 A No. As a matter of fact, my notes reflect that, on
7 February 26th, I told him that I was preparing his case for
8 trial because the plea offer, which he had not yet accepted,
9 was out there, but that he had been scheduled for a trial
10 roster.

11 And I want to say it was for -- we got a notice that he
12 was going to start appearing on the March -- my notes reflect
13 the March 2020 roster. That was in February.

14 Shortly after that, we got some supplemental discovery.
15 And then I went out to the jail on the 26th and told him to be
16 prepared because that's where we were headed, and he was upset
17 with me. My notes says he got angry.

18 Q Okay. Now, he was just angry with what you were telling
19 him or -- as far as you recall?

20 A My notes reflect that, when he first started becoming
21 upset and getting loud, that he could leave and I called the
22 jail, Mr. Terry, the deputy out there, to come and get him
23 out.

24 And then he became angry again when I explained --
25 because he kind of calmed down for a second. He got angry

1 again, apparently, when I explained that he was No. 2 on the
2 roster, and, obviously, I have to be ready to go forward on
3 his case. He was upset about that as well. I have to assume
4 it was about the trial.

5 Q Okay. If you had gone to trial, what defense would you
6 have offered?

7 A At that time, I think I was going to try to just make
8 it -- personalize him to the jury and make it clear that this
9 was not an act that maybe he was, you know, really thinking
10 through; that maybe it was -- I mean, honestly, I didn't have
11 a whole lot, and I was hoping that maybe I could find some
12 holes in the State's presentation with their witness, but
13 there wasn't a whole lot for me to go off of.

14 This was relatively cut and dry, because the victim
15 actually saw him -- saw him at the time of the shooting, knew
16 it was him because they knew each other. I didn't have a
17 whole lot. I just didn't. And I was concerned about what
18 might happen to him after trial, but I wanted -- I didn't have
19 a whole lot of options left. I had tried everything he asked
20 for. I just -- I didn't have a whole lot. I just didn't.
21 And sometimes it's like that.

22 Q Okay. And did you review the elements of attempted
23 murder with him?

24 A Yes.

25 Q And the elements of assault and battery with a high and

1 aggravated nature?

2 **A** Yes. I tend to go over that with every client. And
3 that's not something that's specifically noted, but I tend to
4 make sure that clients know what the charges are and what the
5 State needs.

6 **Q** Okay. Are you aware of any communications or letters or
7 complaints he had that he made to other members of the PD's
8 office about you and about your representation?

9 **A** Well, for example, the note from February 26 was not a
10 call to me. It was to a staff -- one of the staff members
11 took that call where he was complaining and said he had
12 already written to my boss.

13 **Q** Okay. Do you remember what he said to your boss?

14 **A** I don't know, but I assume it was that he wanted me off
15 of this case.

16 **Q** Okay. And was that just because of just general
17 disagreement?

18 **A** I think it was about the plea offers, that he wasn't
19 getting the offer he wanted. And it's not my first time. I
20 mean, that happens a lot. At some point, they feel that
21 they're not going to get the result they would like, and
22 sometimes I'm not able to get it. And, when that happens,
23 then, typically, complaints start.

24 **Q** Okay. Now, what sort of investigation did you do as far
25 as speaking to witnesses or --

1 **A** At that point, I had not spoken to the actual witnesses.
2 I had contacted the solicitor about -- about, as I said
3 before, about whether or not -- because, at some point,
4 Mr. Dixon said to me that he did not feel that the victim
5 was -- wanted to prosecute him, I guess because of their
6 relationship. And I did check that out. But my notes here
7 say -- let's see. Hold on.

8 THE COURT: Everybody hold on one second. Just time out.
9 I'll be right back. Give me one second.

10 (Pause in the proceedings.)

11 THE COURT: Keep your seats. All right. Keep going.
12 Thank you.

13 **A** Okay. My notes -- I have two notes from February 9th --
14 excuse me. I'm sorry; I lost my place. February 11th, 2020.
15 One was where one of the staff went out to show him some of
16 the disks in his file. At that time, he was asking --
17 Mr. Dixon was asking if I could contact the victim to see if
18 he was willing not to press the charges.

19 And, I told -- apparently, the staff member told him they
20 would take that info and discuss it with me. So they put the
21 notes in the system so I could see that he was requesting it,
22 and he was, again, asking about a program of some sort.

23 Then my follow-up note says that he is aware of what his
24 plea offer is. Apparently, he said, at the previous
25 conversation with the staff member, he was unclear. So, of

1 course, I knew he knew. I had just seen him the prior week,
2 apparently, and that's what I've noted. And he was arraigned,
3 which typically means a removal of the plea offer. Okay? But
4 that he was not able to get a program, and we weren't going to
5 be able to get him into a program apparently because we asked
6 before for him multiple times. The State had declined. But,
7 the State -- my note says, additionally, he was told, on the
8 record by the State, that they will not offer a program
9 because of the nature of the offense. So we were really clear
10 about the direction we were headed at that point.

11 And then I have a note about the victim, even though the
12 victim -- sorry. Even though Mr. Dixon was concerned about
13 whether or not his victim was going to prosecute, I had not
14 been given any indication that the victim had refused to
15 cooperate. And even if the victim had, you know, certainly
16 the case wouldn't be able to go forward. And that's not
17 anything that I'd ever receive notice of from the State.

18 Q Okay. And so, nevertheless, you were able to negotiate
19 the lesser included of ABHAN with a cap of 12; correct?

20 A I was trying to cover my client to the best of my ability
21 given the circumstances.

22 Q Okay. Do you recall any statements you made in
23 mitigation at the end of his plea hearing?

24 A Not without referring back to the transcript.

25 Q Okay. Just briefly. I think we're on pages 14 through

1 17 of the transcript. And if you want to take a moment to
2 refresh your recollection.

3 **A** Sure, thank you. (Reviewing document.) Yes.

4 **Q** What was your general strategy in making that argument in
5 mitigation?

6 **A** That the victim was not actually injured. I mean, the
7 scratches from the glass that would have shattered would have
8 been minimally harmful. You know, and, again, not to downplay
9 it -- and I think I said this at the time, but just to
10 highlight that there was no bullet that even grazed his person
11 and that that was distinguishable from someone who had
12 actually been hit, who had actually suffered a physical wound
13 as a result of being shot in this case. And I guess the judge
14 did not find that terribly persuasive.

15 **Q** Okay. And on page 16 on the bottom, you mention his
16 mental health issues, specifically, his diagnosis and his
17 medications; correct?

18 **A** Yes.

19 **Q** And did he ever ask you about any questions about that at
20 the plea hearing?

21 **A** My client or --

22 **Q** Your client.

23 **A** I don't think so. I don't recall him interrupting me to
24 say anything.

25 **Q** But the record does reflect that you made the Court aware

1 of --

2 **A** Absolutely.

3 MR. RAY: No further questions, Your Honor.

4 THE COURT: All right. Redirect?

5 MS. GRABERT-LOWENSTEIN: Just a couple of questions, Your
6 Honor.

7 THE COURT: Sure.

8 REDIRECT EXAMINATION

9 BY MS. GRABERT-LOWENSTEIN:

10 **Q** Ms. Wilson, did you receive any investigative reports
11 once you requested them from the solicitor's office?

12 **A** I received discovery.

13 **Q** Did that include other investigative reports or -- let me
14 rephrase.

15 Did that include reports where they had -- the
16 solicitor's office, either one of the assistants or an
17 investigator with that office had talked to the victim -- the
18 alleged victim?

19 **A** I don't think so, no. You mean where the solicitor had a
20 conversation with the -- and sent me something?

21 **Q** Yeah. I'm asking if there were any reports that
22 indicated they spoke to the victim and what the victim's
23 attitude about the case was.

24 **A** No. If I recall correctly, the only conversation was the
25 one I had actually by -- I guess -- I don't remember if it was

1 by phone or in person -- with the solicitor about whether or
2 not this victim was cooperative.

3 Q Okay. The victim was in court the day of the plea;
4 correct?

5 A I believe so.

6 Q And did you take that opportunity to speak to him? It
7 sounds like you didn't.

8 A No, I wouldn't have.

9 Q And just one last question: At any time during a court
10 hearing, did Mr. Dixon try to get you relieved?

11 A During this hearing? During the plea, you mean?

12 Q Or any other previous one.

13 A I don't recall that specifically. I don't know if we
14 actually had that colloquy with the Court outside of what I
15 would have in my notes. For example, a hearing -- if it
16 happened during a hearing that day, I don't have it reflected
17 on here.

18 Q Okay. But he had sent complaints to your office?

19 A Absolutely. He had contacted my boss, and he was calling
20 the office.

21 Q Okay. If I could have just a second, I don't think I
22 have --

23 (Ms. Grabert-Lowenstein confers with the Applicant off
24 the record.)

25 BY MS. GRABERT-LOWENSTEIN:

1 Q Do you recall any conversation in October at the
2 arraignment?

3 A Where you're saying he asked to have me relieved?

4 Q Where he asked the judge at that time to relieve you.

5 A I don't recall it, but I'd have to assume that the answer
6 either was "we're not having the hearing" or I'm not getting
7 relieved because I was still on it. But he was asked by the
8 judge at the time of the plea if he --

9 Q I'm aware of that.

10 A Okay.

11 Q Okay. I have no further questions at this time.

12 MR. RAY: Nothing further from the State, Your Honor.

13 THE COURT: Have a good day.

14 THE WITNESS: Thank you, sir.

15 THE COURT: All right. Ms. Grabert-Lowenstein, you may
16 call your next witness.

17 MS. GRABERT-LOWENSTEIN: I will briefly call
18 Mr. Spratlin.

19 THE COURT: Okay. Come on up, Mr. Spratlin.

20 MARTIN SPRATLIN,

21 the witness, after having been duly sworn, was examined
22 and testified to as follows:

23 THE CLERK: Please have a seat. State your name for the
24 Court and spell it, please.

25 THE WITNESS: Martin Spratlin. First name, Martin,

1 M-a-r-t-i-n. Spratlin, S-p as in "Paul," r-a-t-l-i-n.

2 DIRECT EXAMINATION

3 BY MS. GRABERT-LOWENSTEIN:

4 Q Mr. Spratlin, you're currently employed with the
5 solicitor's office?

6 A Yes, ma'am, I am.

7 Q And, in that capacity, when did you get involved -- or
8 did you get involved in Mr. Dixon's case?

9 A I did. The case was originally assigned to Adam
10 Harrelson with our office, who I think started in 2017. He
11 went to the drug team, and the case was then reassigned to
12 Senior Assistant Solicitor George DeBusk. Mr. DeBusk, I
13 believe, had other matters going on, including a big trial and
14 some personal stuff going on, so I basically took the case
15 over in February of 2020.

16 Q And, prior to that time, had Mr. Harrelson ever conveyed
17 a plea offer?

18 A I believe so. I believe Assistant Solicitor Harrelson
19 relayed a plea offer that was referenced earlier on February
20 20th, 2019, for assault/attempted murder, possession of a
21 weapon during the commission of a violent crime, plead guilty
22 as charged with a range of eight to ten years.

23 Q Okay. And that doesn't necessarily indicate that there
24 hadn't been discussions going on or -- okay.

25 A No, it doesn't.

1 Q Now, from the time that you took the case over, did you
2 yourself ever have a conversation with the alleged victim?

3 A Yes, ma'am. I actually had several conversations with
4 both the victim and one of the witnesses in the case, which I
5 believe was the woman who was formerly involved with Mr. Dixon
6 that was now the wife of Mr. Neubauer, the victim.

7 Q They had actually gotten married?

8 A I believe they had gotten married. If not, they were
9 referring to each other as husband and wife. I recall that
10 specifically.

11 Q When he came to court, did your office subpoena him the
12 day of the plea?

13 A The victim?

14 Q Yes.

15 A Yes, ma'am. He was under subpoena. The case was on the
16 trial roster for that week, and he was one of the witnesses
17 that was issued a subpoena.

18 Q And so that doesn't necessarily mean he was happy to be
19 there and really cooperative?

20 A I have no indication that he wasn't cooperative. He was
21 always very cooperative with me. I actually will tell you
22 that I remember the day that I called him to tell him that we
23 were bringing Mr. Dixon up because -- I think it was a
24 Tuesday, and the case right before us has pled guilty, and we
25 were going to start trial possibly on Wednesday morning with

1 the witnesses from MUSC regarding the evaluation. And I
2 called Mr. Neubauer and told him about the plea, and he came
3 up.

4 Q Okay. And did he confirm to you that he and Mr. Dixon
5 had had a friendship for some time?

6 A Yes. They were, I think -- I don't know if I would say
7 friendship is what he told me. It was more of they knew each
8 other, they were friendly towards each other. I'm not sure
9 about how close a friendship they had.

10 MS. GRABERT-LOWENSTEIN: Okay. One second, Your Honor.
11 Thank you.

12 (Ms. Grabert-Lowenstein confers with the Applicant off
13 the record.)

14 BY MS. GRABERT-LOWENSTEIN:

15 Q Mr. Spratlin, do you remember if there was anything in
16 the record about Mr. Dixon and the alleged victim, who is also
17 referred to as Mr. Neubauer, had been friends for 20 years?

18 A Very well may be something in the record on that, but I
19 don't recall. But I do know they knew each other pretty much
20 growing up in the same area. Again, I would not say -- I do
21 not know how close of friends they were or how good a
22 friendship. They were friendly.

23 Q And Mr. Dixon had been with the girlfriend/"wife" for 17
24 years prior to this incident?

25 A I believe so. I believe there was -- I know there was a

1 prior relationship between the witness, which -- find her name
2 real quick. Actually, yeah, I have her down as a witness, a
3 Pamela Neubauer. So she was even using his last name --
4 Mr. Neubauer's last name.

5 I knew that there was a prior relationship between Pamela
6 Neubauer and the defendant that had gone on for quite some
7 time. I don't recall exactly how long it was. I do know that
8 there was a -- I think a stepchild. I'm not sure if that
9 stepchild preexisted the relationship. I think the stepchild
10 was in her teens.

11 But, yeah, there was a romantic relationship between
12 Mr. Dixon and Ms. Pamela Neubauer.

13 Q And, in your experience, as both a solicitor and a
14 defense attorney, does that sometimes -- when you get to the
15 crunch of trial, that that causes some difficulty with
16 cooperation or the testimony of a particular witness?

17 A I have seen that happen before, in my experience. I do
18 not recall having any concerns about that in this case.

19 MS. GRABERT-LOWENSTEIN: I have no further questions.

20 CROSS-EXAMINATION

21 BY MR. RAY:

22 Q Mr. Spratlin, how are you?

23 A Good, sir.

24 Q So you heard Ms. Wilson describe the facts of this case.

25 A Yes, sir.

1 Q Is that accurate, to your recollection?

2 A Yes, sir, minus a couple of little insignificant details
3 about the GPS data showing him laying in wait and that kind of
4 information that was available.

5 Q Okay. And so Mr. Dixon and Mr. Neubauer had been
6 friends; correct?

7 A I think so.

8 Q And then Mr. Dixon had put a bullet through the driver's
9 side window while Mr. Neubauer was going the road?

10 A There were several bullets in the car.

11 Q Okay. And so Mr. Neubauer wasn't pleased about that;
12 correct?

13 A Not to my knowledge.

14 Q And, as far as you're aware, Mr. Neubauer was going to
15 testify at trial, if he needed to?

16 A Yes. In fact, I had him in the court. If he wanted to
17 offer anything up to the Court, he could as well.

18 Q Okay. Do you think you could have gotten an attempted
19 murder conviction, in your professional opinion, at trial with
20 these facts?

21 A Yes.

22 Q Okay. Now, you heard Ms. Wilson's testimony about the
23 plea negotiation process?

24 A Yes.

25 Q Was that accurate, as far as your recollection?

1 **A** As far as I recall. I remember she did ask me about a
2 program -- as I said, I was the third solicitor on it --
3 specifically, I think drug court, and I made it very clear
4 that that was not an option given the seriousness of the
5 charges, the violent nature of these charges.

6 Additionally, I think I had originally made an offer that
7 was straight up to assault and battery of a high and
8 aggravated nature. However, I think, through negotiations,
9 she did ask me to put a number on it, and I did put a cap of
10 twelve.

11 **Q** And that was what ultimately Mr. Dixon accepted?

12 **A** Yes.

13 MR. RAY: Court's indulgence for just one moment.

14 (Pause in the proceedings.)

15 BY MR. RAY:

16 **Q** Do you recall seeing these mental health evaluation
17 reports?

18 **A** I do. I recall seeing the competency evaluation. The
19 criminal responsibility evaluation, I do not recall looking at
20 with any kind of detail.

21 **Q** Okay. Was there anything in the competency evaluation
22 that seemed off or inappropriate or incorrect?

23 **A** Not to my knowledge.

24 MR. RAY: Okay. No further questions, Your Honor.

25 MS. GRABERT-LOWENSTEIN: I have no further questions,

1 Your Honor, and I --

2 THE COURT: Have a good one.

3 THE WITNESS: Thank you, Your Honor.

4 MS. GRABERT-LOWENSTEIN: If I could just have a moment, I
5 don't think we're going to have any other witnesses.

6 THE COURT: Sure. Take whatever time you need.

7 (Pause in the proceedings.)

8 MS. GRABERT-LOWENSTEIN: Your Honor, we'll have no
9 further witnesses.

10 THE COURT: All right. And does the State wish to call
11 any witnesses?

12 MR. RAY: Your Honor, the State has no further witnesses.

13 THE COURT: Okay. All right. Any final thoughts?

14 MS. GRABERT-LOWENSTEIN: Well, I want to apologize for
15 Mr. --

16 THE COURT: No, you don't need to apologize. I just --

17 MS. GRABERT-LOWENSTEIN: That was --

18 THE COURT: I really do read these things.

19 MS. GRABERT-LOWENSTEIN: I know.

20 THE COURT: And I really do track with them, and that's
21 why -- you know, I try not to make a practice of interrupting
22 attorneys, but I was totally lost as to where we were going,
23 and then I realized that was the fact pattern from -- part of
24 the fact pattern from the previous case. And I interrupted
25 you and I apologize, but I want to make sure -- you know, when

1 people read these things on appeals, you know, I'm not sure
2 what they're reading sometimes, and so I think they can kind
3 of get lost in stuff like that. So that's why I stopped it,
4 to make sure that --

5 MS. GRABERT-LOWENSTEIN: Thank you for that, Your Honor.

6 THE COURT: You bet.

7 MS. GRABERT-LOWENSTEIN: You know, my only comments would
8 be I think the fact that Ms. Wilson did not investigate any
9 medical records and the fact that she didn't personally talk
10 to the victim was ineffective assistance of counsel, and so I
11 think we have made our case, and I will submit it to the
12 Court.

13 THE COURT: So your issue is -- besides the
14 talk-to-the-victim thing, that's one thing, but on the mental
15 health, your issue is she was aware that there was a mental
16 health issue. I mean, she tells the judge about that in the
17 sentencing. In the -- in her mitigation part, she goes
18 through the mental health things that she's aware about. And
19 you think she should have done more to investigate what
20 options were available to him because of the mental health
21 things that she did know about. Is that right?

22 MS. GRABERT-LOWENSTEIN: Well, I think that further
23 investigation may have brought her to be able to make
24 additional arguments in front of the Court.

25 THE COURT: All right. Great.

1 Anything from the State? You don't have to, but I don't
2 want you to feel like you have to.

3 MR. RAY: Well, Your Honor, the record clearly shows
4 Ms. Wilson was made aware of his mental health issues, put
5 them on the record, had him evaluated. The evaluations found
6 no issues that would render him incompetent or unfit to stand
7 trial.

8 So we would assert that there's no deficiency or no
9 prejudice. As far as the victim is concerned, the solicitor
10 testified that he was ready to testify at trial if he needed
11 to, so there's certainly no prejudice arising from that
12 allegation.

13 So, with that, we would just respectfully request that
14 the Court dismiss the allegations.

15 THE COURT: Okay. All right. I'll let y'all know my
16 decision.

17 (At 12:26 p.m., the above hearing concluded.)
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CERTIFICATE OF COURT REPORTER

State of South Carolina)
)
County of Horry)

RE: David M. Dixon v. State of SC

I, Bobbi J. Fisher, Registered Professional Reporter
(RPR) and Official Court Reporter III for the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the proceedings
had and evidence introduced in the hearing of the captioned
case in the Court of Common Pleas for Horry County, South
Carolina, on the 28th of October, 2021.

Submitted: May 31, 2022

Bobbi Fisher

Bobbi J. Fisher, RPR

Official Court Reporter III

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
David M. Dixon, SCDC No. 383201	)	Case No. 2020-CP-26-3336
Applicant,	)	ORDER OF DISMISSAL
v.	)	
State of South Carolina	)	
Respondent.	)	

This matter comes before the Court by way of Applicant David M. Dixon's June 2020 application for post-conviction relief. Respondent made its return and moved for a more definite statement on September 29, 2020. The Court convened an evidentiary hearing into the matter on October 28, 2021, at the Horry County Courthouse. Applicant was present at the hearing and represented by Attorney Carla F. Grabert-Lowenstein. Assistant Attorney General William H. Ray, of the South Carolina Attorney General's Office, represented Respondent.

Applicant was present at the hearing but did not testify. Attorney Kia T. Wilson and Assistant Solicitor Martin D. Spratlin were present and testified. The Court had before it Applicant's South Carolina Department of Corrections Records, a copy of the plea transcript, the records from the Horry County Clerk of Court's Office, and the pleadings. This Court has reviewed the record and pleadings, heard the testimony, observed the witnesses, and finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted by the Horry County Grand Jury for attempted murder at its March 2019 term. (2019-GS-26-01076). Applicant was represented by Attorney Kia T. Wilson and Assistant Solicitor Martin D. Spratlin, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On

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March 10, 2020, Applicant appeared before the Honorable Steven H. John, Circuit Court Judge, and pled guilty to the lesser-included offense of assault and battery of a high and aggravated nature with a negotiated cap of twelve years' imprisonment. Judge John sentenced Applicant to ten years' imprisonment. Applicant did not pursue a direct appeal of his conviction or sentence.

II. FACTUAL HISTORY

On November 13, 2018, Applicant shot at a vehicle driven by the victim. (Tr. 11). On the morning of the shooting the victim was driving to work when he saw Applicant appear alongside him and fire at least seven shots into the side of the vehicle. (Tr. 11 – Tr. 12). One of the shots very nearly struck the victim in the head. (Tr. 12). Applicant had previously been in a relationship with the victim's wife and had been threatening and harassing the couple, and even shown up at their house unexpectedly. (Tr. 11).

III. CURRENT APPLICATION

In his initial *pro se* PCR application, Applicant alleged he was being detained unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Counsel failed to conduct investigation and assist in defense.
2. Malicious prosecution
 - a. Charged with heavier charge than necessary by law
3. Due process violations
 - a. Not allowed by judge to represent myself *pro se* or relieve Counsel.
4. Not allowed to file motions.
 - a. Clerk refused to file motion on plaintiff's behalf.

Applicant, through counsel, amended his application on June 10, 2021, and alleged:

1. Ineffective Assistance of Counsel
 - a. Prior to the plea, trial counsel, Ms. Wilson, did not challenge a competency report. Ms. Wilson put on the record that neither she nor her client challenge the report plea transcript page number four (4). However, Ms. Wilson further states that Mr. Dixon does have some mental issue which she will put on the record on page number nine (9) of the plea transcript.

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Ms. Wilson outlined the factual circumstance prior to the shooting. This all paints to Mr. Dixon hitting "bottom."

The facts are Mr. Dixon was diagnosed with Post Traumatic Stress Disorder (PTSD), Bipolar Disorder, and Anxiety Disorder. Notwithstanding these medical impediments, Ms. Wilson at no time discussed his diagnosis regarding her duty to ensure her client (Mr. Dixon) was competent to understand and execute a plea or stand trial. [Please refer to the Plea Transcript page fifteen (15) to sixteen (16).]

- b. The facts recorded above also establish that Ms. Wilson was ineffective in not explaining additional facts that Mr. Dixon may not have been criminally responsible. With all relevant information known to Ms. Wilson, as defense counsel she failed to explain all aspects of the case and defenses to Mr. Dixon. As such counsel prejudiced Mr. Dixon in entering a plea to a lesser included offense of assault & battery for which he may well not have been criminally responsible. If he had fully understood the elements of this charge, he would not have entered a plea, thus prejudiced by a complete lack of communication from his trial attorney, Ms. Wilson.
- c. Mr. Dixon states in his petition that Ms. Wilson was uncommunicative, unavailable to investigate and advise Mr. Dixon. Absent proper investigation Mr. Dixon was left without proper advice and representation. Mr. Dixon's lack of counsel led to his entering a plea to which he lacked legal and reasonable knowledge, validity or intelligent consideration. He was thus prejudiced into an improper plea action to his detriment.

At the hearing, Applicant proceeded forward with the allegations raised in his amended application. The allegations raised in his initial application are waived to the extent that they are not alleged in the amendments, and will not be addressed herein.

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

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the following findings based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

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, 686 (1984). First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. 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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

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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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).]

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

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easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Challenge the Competency Report

Applicant asserts that Counsel was ineffective for failing to contest a competency report that found that he was fit to stand trial despite having knowledge that Applicant suffered from a mental illness. This allegation is without merit.

When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong *Strickland* analysis applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. *Ramirez v. State*, 419 S.C. 14, 21, 795 S.E.2d 841, 844-45 (2017). Specifically, when establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was . . . incompetent at the time of the plea." *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992); *See also Matthews v. State*, 358 S.C. 456, 458-60, 596 S.E.2d 49, 50-51 (2004).

At the plea hearing, the Court referred to a competency to stand trial evaluation that found Applicant had the sufficient factual and rational understanding of the proceedings against him, and the capacity to rationally assist Counsel in his defense. (Tr. 3, 23 – Tr. 4, 10). Counsel stated that neither her nor Applicant challenged those findings, but also informed the Court that he had mental health issues. (Tr. 4, 13 – 20). Applicant indicated that he understood. (Tr. 5, 2-3). Applicant told the plea judge that he was not suffering from any kind of physical, mental, or emotional problem that would prevent him from knowing what he was doing by pleading guilty. (Tr. 7, 21-24).

After the Court accepted the plea, Counsel stated that Applicant was diagnosed with PTSD, bipolar disorder, anxiety, and was taking a variety of medications for those issues. (Tr. 16, 18-22).

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She stated that he told her these medications “help keep him [stay] calm and relaxed.” (Tr. 16, 25 – Tr. 17, 1). She also stated that Applicant’s personal life caused him to “hit a spiral of sorts where he was somewhat depressed.” (Tr. 16, 4-8). However, she stated that he understood his responsibility concerning the crimes. (Tr. 18, 1-2).

Counsel testified at the evidentiary hearing that she was appointed to represent Applicant and met with him several times prior to the plea. She stated that he told her he was not in his right mind, but said that he did not want a mental health evaluation. She nevertheless had him evaluated for both mental health issues and competency. She did not recall the specifics of every mental health issue he had, but did recall that he suffered from PTSD and anxiety. She stated that she did not recall any expressing any indifference to his own wellbeing.

She stated that Applicant did not seem confused about his case at the time of the plea. She noted that Applicant was receiving medication at the time. She stated that she had spoken with Applicant about what effect his mental health issues might have on his case and he appeared to understand. She stated that she had no basis to challenge the report finding him competent. Assistant Solicitor Spratlin testified that he recalled the mental health issues and competency evaluation coming up, but there was nothing indicating he was not competent to stand trial.

This Court finds that Applicant has failed to prove that Counsel’s representation was deficient for failing to contest the competency report. The testimony shows that Counsel sought out the evaluation because of Applicant’s mental health history, but had no basis for challenging the report once it determined Applicant was competent. Applicant appeared to her to understand everything that she told him and was able to provide her with information to assist in his defense. Counsel nevertheless did make use of the mental health issues by offering them in mitigation. This was objectively reasonable under the circumstances.

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Additionally, Applicant has failed to prove that he was prejudiced by Counsel's performance. He has not produced the report itself, nor has he offered any evidence that conflicts its findings that he was competent. In short, Applicant has not met his burden of proving that there was a reasonable probability that he was incompetent to stand trial at the time of his guilty plea. Therefore the allegation must be denied and dismissed with prejudice.

Failure to Adequately Explain Applicant's Criminal Responsibility

Applicant asserts that Counsel did not adequately explain to Applicant that there may be a basis for him to be found not criminally responsible. This allegation is without merit.

At the evidentiary hearing, Counsel testified that she had no basis for contesting the competency report, nor did she have any basis for arguing that Applicant did not know right from wrong. She stated that she believed Applicant was evaluated for criminal responsibility and capacity to conform and was found both responsible and capable of conforming his behavior to the requirements of law. As mentioned above, the Assistant Solicitor stated that there were no red flags surrounding Applicant's competency or mental health that would have affected the plea.

Counsel testified that she met with Applicant numerous times, reviewed discovery, and discussed his mental health issues with him. She advised him on what effect that would have on his case. She stated that she tried to do everything he asked for and sought to have him evaluated. She discussed the charges with him, as well as what evidence the State had that could be used to meet its burden of proving his guilt beyond a reasonable doubt.

This Court finds that Applicant has failed to meet his burden of proving prejudice from Counsel's performance. It is unclear precisely from Applicant's allegations which facts that were not explained could have negated his criminal responsibility. However, it is clear that Counsel reviewed the evidence against him and discussed the elements of his offenses, based on her

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testimony. Her testimony also makes it clear that Applicant was competent and there was no basis for disputing his culpability on the basis of his mental health issues. Therefore, Applicant has failed to meet his burden of proving deficiency. Additionally, because Applicant failed to produce any reports indicating that he lacked criminal responsibility, or any facts supporting such a finding, he has not proven prejudice from Counsel's representation. As such, the allegation must be denied and dismissed with prejudice.

Failure to Investigate and Adequately Communicate with Applicant

Applicant asserts that Counsel failed to adequately communicate with him and investigate his case. At the evidentiary hearing Applicant focused on Counsel's failure to communicate with the victim of the shooting to investigate his story and his willingness to testify against Applicant at trial. This allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* "In particular, what investigation decisions are reasonable depends critically on

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such information.” *Id.*

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. *Id.* (citing *Davis v. State*, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Brevity of time spent in consultation with a defendant, without more, is insufficient to establish ineffective assistance of counsel. *Smith v. State*, 404 S.C. 493, 745 S.E.2d 378 (2012). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

At the plea hearing, Applicant stated that he was represented by Counsel, had pretty much told her everything he wanted to tell her about the case, and had enough time to talk to her. (Tr. 9, 13-21). He took an opportunity to speak with Counsel at the hearing before stating that he did not need any more time. (Tr. 9, 22 – Tr. 10, 12). He stated that he was satisfied with her representation and did not have any complaints. (Tr. 10, 13-17). The Assistant Solicitor noted that at the plea hearing that the victim did not wish to speak, but wanted a lengthy sentence and nothing more to do with Applicant. (Tr. 12, 17-19).

Counsel testified at the evidentiary hearing that she met with Applicant approximately eight times, and also spoke with him over the phone. She reviewed the discovery with him and discussed his version of events. She noted that during these meetings Applicant never indicated

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that he wanted to go to trial.

She described the incident as a dispute between Applicant and his ex-girlfriend who was seeing the victim. She stated that Applicant committed the crime out of jealousy. She stated that she did not meet with the victim, who was a friend of Applicant's prior to the shooting. She stated that she spoke to the prosecutor about the victim after Applicant told her that the victim did not want him prosecuted. She was informed that this was not the case. The Assistant Solicitor testified that the evidence showed Applicant had lied in wait, ambushed the victim, and fired several shots. He stated that the victim was not pleased about this, and would have testified at trial if needed.

This Court finds that Applicant has failed to meet his burden of proving that Counsel's preparation or investigation was deficient. The evidence shows that she met with him multiple times, reviewed the evidence, and did attempt to contact the victim when Applicant told her that he did not want to pursue the charges. However, once she found out from the Assistant Solicitor that the victim did want to testify against Applicant, there was nothing that she could do. Interviewing an uncooperative witness would not only have probably been impossible, it would have been pointless, especially in light of the fact that Applicant never expressed a desire to go to trial. Applicant has failed to meet his burden of proving deficient representation.

Additionally, Applicant has failed to show that he was prejudiced by Counsel's performance. The victim did not testify at the evidentiary hearing. It is unknown whether his testimony would have been beneficial to Applicant. Without it, Applicant cannot show prejudice from Counsel's failure to interview the witness. The Assistant Solicitor's testimony indicates that it likely would not support Applicant's claims. Furthermore, there is no evidence rebutting Counsel's testimony that Applicant never intended to go to trial. Therefore, he has failed to meet his burden of proving that but for Counsel's errors he would not have pled guilty. As such, the

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application for post-conviction relief must be denied and dismissed with prejudice.

V. 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.

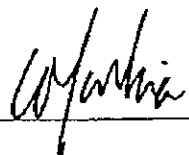
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC 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. Applicant's 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 be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2 day of March, 2022.


 ROBERT E. HOOD
 Presiding Judge
 Fifteenth Judicial Circuit


 _____, South Carolina

WITNESSES

James L Rhodes Jr Conway Police Department

C W / 11/12/18

ARREST WARRANT NUMBER

2018A2620400923

CDR: 3410 16-03-0029

DOA: 11/14/2018

ACTION OF GRAND JURY

MAR 13 2019

TRUE BILL

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2019GS2601076

The State of South Carolina

County of Horry

Adam C. Harrison

18H06265

COURT OF GENERAL SESSIONS

March, 2019 TERM

THE STATE

vs.

David Mark Dixon

/ M

4301 Gary Rd

Conway, SC 29528-4956

DOB: [REDACTED]

SSN: [REDACTED]

ATTORNEY: Kia T. Wilson

Indictment for

ATTEMPTED MURDER

Jimmy A. Richardson, II, Solicitor

ORIGINAL

DATE RECEIVED FROM
GRAND JURY

RENEE N. ELYS
CLERK OF COURT
HORRY COUNTY, SC

2019 MAR 14 AM 11:02

FILED
HORRY COUNTY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

INDICTMENT

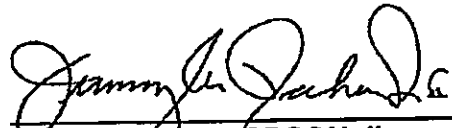
At a Court of General Sessions, convened on March 13, 2019, the Grand Jurors of Horry County present upon their oath:

ATTEMPTED MURDER

CDR: 3410 16-03-0029

That David Mark Dixon did in Horry County on or about November 13, 2018 with intent to kill Carl Neubauer, attempt to kill the victim with malice aforethought, either expressed or implied in violation of Section 16-3-29, S.C. Code of Laws, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR