

Date 6/14/13

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Chief Justice JEAN TOAL,

JUN 17 2013

S.C. SUPREME COURT

Mr. Toal I am writing to ask you make issue
to fault show you that my sentence is wrong
And that there was in fact a conflict in my
case and that my attorney James Check by his
own words, that he was ineffective assistance,
and that the judge played a part in this plan
which he should not have done. And that he
show prejudiced to one party which was me.
And that the D.A. came to me with a re-comm.
that I chose to take rather than to stand trial.
And a recommendation is for a lesser sentence
so that for the D.A. really tricked me out
of my plea. I plead for a lesser sentence so
how could he enhance my sentence to a greater
sentence?. I really hope a pray that you give me
some help in this matter

I thank you for your time.

I was unable to make copies
so will you please send me
copies back of every thing?

Jeffrey Duke 131171

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Issue: Applicant was denied Sentences promised to him from Solicitor, as these were Sentences was pre-arranged/negotiated by accommodations through Solicitor's Office to Case Counsel. As plea deal/offer sheet was signed and confirmed on trial record by Solicitor as quoted to Sentencing Judge.

Applicant will make contentions and take his positions by the following legal authorities, as:
Reed v. Beck, 333 S.C. 676, 511 S.E.2d 396 (2d App 1999);
and as State v. Custodio, Supr. quoting State v. Abrift, cited: 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994) and see also State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1988). U.S. v. Ringling, 988 F.2d 504 (4th Cir. 1993):
Re: Case at bar is one that is consisted of a sentence promised but was not imposed because the Sentencing Judge participated in plea bargain based upon him overlooking the plea agreements established between defense Counsel and Solicitor's Office Counsel, whereas if Applicant failed to accept the plea offers from the Solicitor by the grace time the plea offers would have been withdrawn from being offered and Applicant would have faced harsher penalties and longer sentences and been prosecuted for all charges, as reverse Applicant shows by records that hereas he was only to receive a sentence of five (5) years^{AND} probation with restitution with a ten (10) year kicker if the probation was violated. and as of the results the Judge taking upon himself to ignore the Constitutional rights of the Applicant in plea trial, the Judge disregarded the plea agreement made and sentenced

Applicant further argues that it is well settled law that the Supreme Court has ruled a guilty plea rests upon a contract principles and the State can be required to fulfill the terms of its promise to forego further prosecution of the accused when such forbearance is a part of the benefit of the bargain; Shiff, Spe. Quoting Santobello v. New York, 404 U.S. 257 (1971). Applicant will show evidence that his sentences are illegal because they are out of compliance with the legislation laws amending, etc., it is hereby compelled upon the per Court to reevaluate this claims and correct as it being sentencing the Applicant to the 5 years that he plead guilty to receive as the Solicitor confirmed to record, the sentencing judge, illegally enhanced the applicant's case by his prior history from NCIC record, by this ~~scenario~~ scenario, the NCIC was off limits to the judge's discretion because the Solicitor downplayed case as he have the legal rights to do so, the Solicitor having the ~~rights~~ victims's wellbeing in play by keeping Applicant ~~from a long sentence~~ so he could pay restitution to the victims instead of putting the applicant in prison, here it will be a judicial duties to correct as the laws calls for the per Court to do so.

Conflict of Interest Issue: additional mandates: As:

U.S. v. Tatum, 943 F.2d 370 (4th Cir. 1991), advocacy of Counsel is impaired by previous source, regardless of whether the defendant waived his rights to conflict free representation
Wheat v. U.S.

~~OOOOO~~, 486 U.S. 153, 108 S.Ct. 1192 (1988),
Petitioner's concerns stated about conflict was ignored, by the Court and the Counsel should have known about the Applicant's correspondence to the Clerk, the Court and to the Chief Public Defender who was fully aware of the Counsel he appointed to case, results to an ineffective assistance of Counsel; Case must be granted relief and as is requested for the 5 yrs. probation, to 10 yrs. suspended.

POST - CONVICTION RELIEF (P.C.R.) GROUNDS:

A. Ineffective Assistance of Counsel

1) Counsel was ineffective due to their own personal bias against Applicant;

2) Ms. Price, Applicants' trial counsel, was obligated to defend Applicant, but Mr. Cheek was responsible for pleading Applicant out;

3) Applicant wrote numerous requests to Ms. Price that went unanswered;

4) Mr. Clay Allen was so uninformed that he didn't even know that Applicant had ever been seen by Ms. Price, and that Mr. Cheek was actually representing Applicant;

5) Mr. Cheek and Mr. Allen exhibited unethical behavior for not providing Applicant with appropriate, reasonable representation;

6) The ineffective assistance rendered by Applicants' counsel meets both prongs of the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), in that counsels' representation and behavior was unbecoming a professional attorney, and that behavior "prejudiced" the outcome of Applicants' proceeding;

7) The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

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with the witnesses against him; to have compulsory process of obtaining witnesses in his favor; and to have the assistance of counsel for his defense"; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9L.Ed.2d 799, 93 ALR.2d 733 (1963), and concurring cases.

In Gideon the Court held that the U.S.C.A. Sixth Amendment also establishes the right to an attorney in federal criminal prosecutions. In the present case, we find a determination that a defendant charged with a felony, including state crimes, was entitled to the assistance of counsel. The case of Argersinger v. Hamlin, 407 U.S. 25 (1972), further expanded the rights of an indigent (someone without money) defendant to counsel in all criminal prosecutions carrying a sentence of imprisonment: Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972): "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

Further in Gideon, supra, the Court held: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." U.S. v. Wetch, 7 F.3d 422 (5th Cir. 1993): "Failure of the court to advise defendant of the statutory minimum sentence is a violation of defendants rights. U.S. v. Toothman, 137 F.3d 1393 (9th Cir. 1998) "Erroneous information given to defendant by the government, the court, and defense counsel, concerning applicable sentencing guideline range was grounds for allowing defendant to withdraw his guilty plea."

- B. Conflict of Interest: Due Process: 5th Amendment to the United States Constitution.

No person shall be held to answer for a capital offense or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

14th Amendment to the United States Constitution (§1):

All persons born or naturalized citizens in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

B 1) Applicant notified Clay Allen of the Public Defenders' Office and advised him of the conflict of interest between Mr. Cheek and one of the victims in the case. Mr. Allen responded by telling Applicant that Mr. Cheek was not involved. In the event that Mr. Cheeks' name appears on the Sentencing Sheet, Mr. Allen was either untruthful regarding this issue, or uninformed;

2) The fact that Mr. Cheek and Ms. Price are in the same Office is enough to require a pro bono lawyer to show conflict of interest right there.

3) P.C.R. attorney must use all correspondence as exhibits attached to the Argument.

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C. Misapplication of Sentencing Guidelines/Statutes:

Section §16-13-10 Forgery; Pursuant to South Carolina Code of Laws Title 16, Chapter 13 Forgery, Larceny, Embezzlement, False Pretenses . . .

A) It is unlawful for a person to:

(1) Falsely make, forge, or counterfeit; cause or procure to be falsely made, forged, or counterfeited; or wilfully act or assist in the false making, forging, or counterfeiting of any writing or instrument of writing;

(2) Utter or publish as true any false, forged, or counterfeited writing or instrument of writing;

(3) Falsely make, forge, or counterfeit, alter, change, deface or erase; or cause or procure to be falsely made, forged, counterfeited, altered, changed, defaced, or erased any record or plot of land; or,

(4) willingly act or assist in any of the premises, with an intention to defraud any person.

B) A person who violates the provisions of this Section is guilty of a:

(1) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both, if the amount of the forgery is five thousand dollars or more;

(2) felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both, if the amount of the forgery is less than five thousand dollars.

If the forgery does not involve a dollar amount, the person is guilty of a misdemeanor and, upon conviction, must be

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fined in the discretion of the court or imprisoned not more than three years, or both.

D. The sentence is invalid and has to have the enhancement as mentioned in current case, must be in the same form or another;

- (1) Either the sentencing judge has to make the defendants aware of this during the sentencing proceeding; or
- (2) The enhancement must appear on the Sentencing Sheet.

E. That the court erred in imposing separate penalties for several counts of the same type, and by reason of the fact that the offenses were of the same character and grew out of the same transaction, and were in effect parts and aspects of one offense. Court is directed by Section 17-55-32 to treat an offense or any number of offenses which have been committed at time that they may be consolidated and charged as one crime.

F. A plea agreement rests on contractual principles and each party should receive the benefit of their bargain; citing Clark v. State, 440 S.E.2d 341 (1984). A guilty plea which is based on a plea bargain which is not fulfilled can not stand; Clark v. State; Opinion No. 24398, Filed March 25, 1996; Published Opinion.

(1) A plea agreement must be at least reasonable, somewhat equitable for all parties, and must be for a lesser included offense.

(2) In theory, plea agreements are supposed to help both sides limit costs, time, and resources in going to trial. The plea is supposed to give some benefit to the defendant in exchange for giving up their right to trial.

BINDING v. BLIND PLEA AGREEMENTS

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(3) You may hear plea agreements described as "binding" or "blind". A binding plea is one where the plea agreement is made for a specific sentence. A blind plea agreement contains only a recommendation for a specific sentence. If a plea is binding, the accused may withdraw the plea if they do not receive the sentence specified in the plea agreement. You cannot withdraw a plea under a blind agreement, simply because you do not receive the recommended sentence.

(4) All counts should have come under the "crime spree" Doctrine, which states, that during the sentencing phase consolidation should be done with all crimes of the same nature; S.C.C.L. §17-25-50.

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In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333, (1980) it was ruled: A state criminal trial, a proceeding initiated and conducted by the state itself, is an action of the state within the meaning of the Fourteenth Amendment. If a defendant's retained counsel does not provide adequate legal assistance guaranteed by the Sixth Amendment, a serious risk of injustice infects the trial itself. When the state obtains a conviction through such a trial, it is the state that unconstitutionally deprives the defendant of his liberty. Thus, failings of retained counsel in a state proceeding cannot provide the basis for federal habeas corpus relief.

"[A] defendant is entitled to a presumption of prejudice if he can demonstrate that his attorney labored under an actual conflict of interest and that the actual conflict of interest adversely affected his lawyers' performance."

INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel claims can be very difficult to prove. For every successful claim, there are hundreds that fail. The vast majority of claims in the area fail because they do not meet the two part test identified in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). You must be able to show that your counsel's representation fell below an objective standard of reasonableness and that you were prejudiced by your counsel's errors to the extent that there is a reasonable probability that the outcome of your case would have been different if not for your attorney's poor representation. To prove that counsel's representation fell below an objective standard of reasonableness, you must overcome a strong presumption that the attorney rendered adequate assistance and that his actions were outside a wide range of what is considered professionally competent assistance.

Medina v. Barnes, 71 F.3d 363 (10th Cir. 1995):

"[P]etitioner has alleged sufficient prejudice resulting from counsels' failure to investigate the relationship between Myers and victim to entitle Petitioner to habeas corpus relief for ineffective assistance of counsel."

U.S. v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984): "The presumption that counsels' assistance is essential requires us to conclude that a trial is unfair if ;the accused is denied counsel at a critical stage of the trial. Similarly, if counsel entirely fails to subject the prosecutions' case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."

Williams v. Washington, 59 F.3d 673 (7th Cir. 1995): "An attorney rather clearly has a duty to familiarize himself with the discovery materials provided by the state. Because counsel failed in this regard here, his behavior was not objectively reasonable under Strickland."

"Counsels' lack of familiarity with the case, combined with his failure to investigate, provided Emmaline with a trial significantly different than the trial she might have recieved if represented by a competent attorney. There exists, in short, a reasonable probabilitry that the outcome would have been different. We believe that counsels' various failures have called the fairness of her proceeding into question."

U.S. v. Stearns, 68 F.3d 328 (9th Cir. 1995): "Stearns pled guilty, was sentenced, and, he says, wanted to appeal. He claims that he did not consent to his trial counsels' failure to file a notice of appeal on his behalf. If not, he has been denied effective assistance of counsel." The Ninth Circuit held that a habeas corpus petitioner needed only to show that counsels' failure to file a notice of appeal was without the petitioner's consent.

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The Supreme Court, however, in Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), rejected the Ninth Circuits' rule regarding counsels' failure to file notice of appeal as inconsistent with Strickland. The Court held that counsel was constitutionally ineffective for failing to file a notice of appeal, when [1] counsel did not consult defendant when there was a reason to think either that a rational defendant would have wanted to appeal, or that defendant reasonably demonstrated to counsel that he was interested in appealing; and, [2] the defendant was required to demonstrate that there was a reasonable probability that, but for counsels' deficient failure to consult with him about an appeal, the defendant would have timely appealed.

CASE LAW FOR INDICTMENT

EX PARTE Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887): "The instant that the court amends the indictment, the court loses jurisdiction. At that point in time, there is nothing that can cure that defect. It is a jurisdictional defect. Upon an indictment so charged, the court can proceed no further. There is nothing for which the prisoner can be held to answer. A trial on such indictment is void."

U.S. v. Clark, 139 F.3d 485 (5th Cir. 1998): "An indictment is sufficient in a constitutional sense if it (1) enumerates each prima facie element of the charged offense, (2) notifies the defendant of the charges filed against him, and, (3) provides the defendant with a double jeopardy defense against future prosecutions"; United States v. Flores, 63 F.3d 1342, 1360 (5th Cir. 1995)."

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ARGUMENTS OF LAW

1. Applicants' plea agreement was for a five (5) year sentence, and not to exceed five years. This cap, along with five (5) years probation, was the terms offered by the Solicitors' Office and agreed to by Applicant and Solicitor. These conditions were contracted by and through a verbal agreement between the Solicitor and Applicant.

In U.S. v. Wolff, 127 F.3d 84, 326 U.S. App. D.C. 416 (C.A.D.C. 1997), the prosecution failed to argue for downward departure as agreed to in the plea agreement/bargain. In Margalli-Olvera v. I.N.S. 43 F.3d 345 (8th Cir. 1994) it was ruled that ambiguity of language in plea agreement is construed in favor of defendant and against the government. It was found in U.S. v. Taylor, 77 F.3d 368 (11th Cir. 1996) that reversal is required where government promised in plea agreement to recommend a ten year sentence, and the advocated position of the P.S.R. (Pre-Sentencing Report) called for sentencing range of 151 months to 188 months (emphasis added).

For clarification, the word government can be defined as any governing body of civil organization. The AMERICAN HERITAGE DICTIONARY states: Government: (1) The act or process of governing, especially the administration of public policy; (2) the means by which a governing agent or agency uses authority; (3) a governing body or organization; (4) a political science.

The individual states have a contractual obligation to the federal government to prosecute all crime. The county, city, and municipal governments also are under contract to the State Legislature [government] to prosecute all crime for the State.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984): Ineffective assistance of counsel (I.A.C. claims) claims must meet the two-pronged test of: (1) counsels' performance below an objective standard of reasonableness, and, (2) counsels' deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome of the proceedings. both prongs of the test must be met.

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U.S. v. Cronin, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984): "The presumption that counsels' assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of the trial. Similarly, if counsel entirely fails to subject the prosecutions case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."

In the present case, State v. Jeter, attorney Cheeks (who should have been relieved as Applicants' counsel) failed his obligation to insure Applicants' adversarial test, even if plea was fair; the Good Faith Rule here was broken; there could be no confidence in attorneys' representation. Applicant states that a vacation of his guilty plea as involuntary, unintelligent, and unknowing is the proper remedy to correct the case at bar, otherwise, justice will not be served.

2. Applicant submitted five (5) INMATE GRIEVANCE REQUEST FORMS to the Public Defenders' Office, addressing specifically four to Ms. Andrea Price and one to Mr. Clay Allen & Ms. Price together; none of the GRIEVANCES were answered. Applicant then corresponded with the Clerk of Court, Ms. M. Hope Bleckley. Applicant explained his concerns about the conflict of interest with Mr. Cheeks, and requested from the Clerk to have Mr. Cheeks removed/relieved as Applicants' counsel. The Clerk wrote Mr. Clay Allen and Mr. Allen then wrote Applicant, however, the letter to Applicant from Mr. Allen, of the Public Defenders' Office, is suspect for the reason that Mr. Allen knew, or should have known, if attorney Cheeks was affiliated with any crime victim organization. Applicant states that Mr. Allen, at the least, upon being notified should have taken the measure to discover if Applicants' concerns were valid. Unfortunately, Mr. Allen shirked his responsibility and duty to Office, and the prejudicial effect rendered to Applicant went unheeded.

3. Attorney Cheeks stated in court, on the record, that he could

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6. Judge Roger L. Couch was the trial judge, the resentencing judge, and the judge who heard Applicants' appeal; Applicant never had an opportunity for a fair and impartial hearing, free from bias and prejudice, as the record clearly demonstrates that both Applicants' trial counsel and the judge who officiated harbored pre-conceived opinions regarding Applicant before Applicants' proceedings were accomplished. Applicant states that testimony by Mr. ^{cheek} Allen and remarks from the judge support this claim. Applicant was subjected to prejudice in his proceeding, and that prejudice caused harm that is absolutely forbidden by the U.S. Constitution, as well as the S.C. Constitution.

7. At the trial/plea bargain proceeding, the judge failed to inform Applicant that the court was not going to accept the recommendation made by the State, an error by the court and a violation of Appellants' rights to a fair and impartial trial proceeding by the fact that established law dictates that the court, in the event it decides to disregard the States' recommendation, must allow the accused to withdraw their guilty plea. The judge in this case failed to grant Applicant the opportunity to withdraw his guilty plea. Applicant states the claim that he would have withdrawn his plea and stood trial should he have been fully informed of the consequences of his guilty plea before sentencing.

8. After Appellant was notified that Ms. Andrea Price was appointed as his counsel through the Public Defenders' Office, Applicant wrote to Ms. Price. When a reasonable time had elapsed and Ms. Price failed to respond, Public Defender James Cheeks entered the negotiated plea in Applicants' representation. Applicant considered standing trial by jury, but acting under the advice of attorney ~~Robert Sneed~~ ^{JAMES CHEEKS}, who advised that the plea would produce more beneficial results than a jury trial. Applicant and Solicitor entered into a verbal agreement at that time for Applicant to receive a five year prison term with a five year probation consecutive sentence in exchange for Applicants' guilty plea.

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indictment numbers - NOT FOUR - and none of the indictment numbers state 'subsequent to' on them, putting statements made by the Solicitor in contradiction with the facts of the record; see Transcript, page 16, lines 10 - 23, where the Solicitor either was untruthful, or omitted facts for enhancement purposes. Applicant states the appearance of prejudice can be drawn from this manner of unethical court decorum between the Solicitor and the judge. Applicant further states that some of the offenses for which he was made to answer jurisdictionally belong to the Magistrates' Court.

17. Trial Transcript, page 17, lines 1 - 18, the Solicitor issues a feeble plea recommendation, in the light of their former firm recommendation of five years with five years probation.

18. Trial Transcript, page 19, lines 9 - 12, Applicant declares that the conflict of interest issue should have been re-stated, and at lines 19, 20, court error exists where all indictments do not carry a statutory penal code of a 10 year maximum sentence.

19. Trial Transcript, page 20, lines 3, 4, the judge states the indictments were properly before the court; Applicant denies this finding, and so objects. Applicant states the claim that all the indictments are not legislatively correct, and do not comport with the authorized forms as issued by the Office of the Attorney General, so approved by the General Assembly of South Carolina, for the reason that none of the indictments bear the Attorney Generals' numbers on them.

20. Trial Transcript, page 20, lines 19 - 21, the judge is prohibited by SCCL to sentence Applicant for Forgery to 30 years because the plea was mandated by law to be for a lesser included offense only. Applicant states that the sentencing abused his discretion of authority regarding this matter.

21. Trial Transcript, page 26, lines 14 - 18, the judge accepted

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9. In Applicants' Trial Transcript, page 4, lines 12 - 14, the judge is recorded as stating he is marking all of the indictments, yet, further in the Transcript, page 4, line 25 through page 5, line 4, shows that the Grand Jury did not present the indictments spoken of. On page 5, line 12, the judge failed to finish his statement - A TRUE BILLED INDICTMENT.

10. Attorney James Cheeks is the Attorney of Record on the cover page of the Trial Transcript.

11. The judge is required by Rule to examine each Defendant on plea qualifications separately; the record establishes this error of omission by the trial judge in Applicants' proceeding.

12. Entry of a guilty plea on a Defendants' mistaken belief that the plea bargain was conditional and preserved certain non-jurisdictional issues; U.S. v. Pierre, 120 F.3d 1153 (11th Cir. 1997).

13. Failure of the court to tell Applicant that he had the right to withdraw his guilty plea if the court refused to impose the sentence recommended by the State, is a violation of Applicants' constitutional right; U.S. v. Zickert, 955 F.2d 665 (11th Cir. 1992).

14. Trial Transcript, page 13, lines 9 - 11, show that Applicants' case would not have been before judge Couch unless upon presentment of indictment, the exception being that a waiver was made on the record before the court. Transcript, page 13, lines 19 - 24, show that the subpoenas are to be issued or the trial court date.

15. Trial Transcript, page 15, lines 3 - 5, states the judge qualified all for plea status; this ended the question.

16. Trial Transcript, page 16, lines 10 - 13 lists only three

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the plea, which establishes by the record that he accepted Applicants' plea agreement with the State [Solicitor].

22. Trial Transcript, page 28, shows clearly and convincingly that a conflict of interest existed, AND INFLUENCED APPLICANTS' PROCEEDING.

23. Applicant asks what dispositions were made on the 1985 Petty Larceny, 3 counts House Breaking, and Grand Larceny?

24. Applicant asks the question concerning the 1986 Burglary Second charge: What was the disposition?

25. Applicant raises the question of the disposition regarding the 1991 Conspiracy and Attempt To Possess Cocaine charge.

26. Applicant raises the matter of the disposition of the 1992 Joyriding charge, stating that it was a Magistrates' charge.

27. Applicant offers the 1994 Trespassing After Notice charge as a Magistrates' charge.

28. Applicant shows that the 1996 Possession of Marijuana, Driving Under Suspension, and Shoplifting were also Magistrate Court charges.

29. Applicant would show the 1997 Criminal Domestic Violence as being a Magistrate Court charge, with disposition at that level.

30. As to the 1999 Petty Larceny charge, what was the count and disposition?

31. As to the 2000 Property Crimes/Offense Third or subsequent times, what type of property crimes and disposition?

32. Applicant would ask WHERE is the accuseds' copy of the Flow

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Chart? Applicant states this is a BRADY MOTION VIOLATION.

33. Applicant would seek to know if attorney Cheeks and the then Clerk of Court, Marc Kitchens, were friends at the time of Applicants' proceeding.

34. Trial Transcript, page 32, lines 20, 21, the judge committed an error: there were over 20 charges, not convictions, where the dispositions and jurisdiction issues were not given on the record. These factors weighed heavily, and influenced severely, the sentencing enhancement capability against Applicant.

35. Trial Transcript, page 33, lines 16 - 25, the judge made a statement into the record which implies a private, colloquium conversation, perhaps stemming from an inappropriate ex parte conversation between the judge and attorney Cheeks about Applicants' case and plea; Applicant states that the Department of Corrections offers no corrections, as the name would suggest, but rather instead functions as a department of corruptions, as was stated in the State Newspaper. The sad and shameful truth is that the department of corruptions exists exclusively as a warehouse, a human repository, where individual inmates, as ex-regime commander Jon Ozmint stated, either find a way to rehabilitate themselves in some form or fashion, or they resign themselves to an environment where no rehabilitative measures are provided. Applicant states that sentencing any individual to long time periods creates super-criminals, exclusively in the application of the departments' school of perfecting criminal behavior, as Ozmint observed.

36. Trial Transcript, page 34, lines 1 - 9, the judge injects sincere bias against Applicant by actually testifying for the State, and goes so far as to make a sardonic remark (line 6) that was improper, unethical, prejudicial, and in violation of the judicial cannon of ethics.

~~Attor~~ Attorney was effective for not objecting to the Judge remark because he should have stayed in position of neutrality which plea are true

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37. The Judicial Cannon which is the oversight for all courts and their Chief Officers, prescribes that every judge will maintain a position of neutrality, and express NO opinion as to the case he administrates, otherwise, the judge would show impartiality and prejudice to one of the parties in the legal debate before him. Applicant states that all of his charges should have been consolidated pursuant to State v. Hamilton and Spree.

38. The consecutive sentencing was done in a vindictive manner, as the Trial Transcript clearly reflects. The Solicitor prejudiced Applicant in the sentencing by inflaming the passion and anger of the judge. Trial Transcript, page 34, lines 17 - 20, shows where the judge states 8 other, non-related, charges, and then sentences the Applicant to 10 years, to run consecutively to all except 09-1413, whereas the plea agreement/bargain constructed by the SOLICITOR, was fully and totally violated, and therefore Applicants' guilty plea is null and void; Applicants' guilty plea must be vacated, and re-sentencing conforming to the bargain agreed to in the plea negotiation is in the interest of equity and justice.

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ALLEGATION

10,A. Applicant was denied effective assistance of trial counsel guaranteed by the U.S.C.A. Sixth Amendment.

11,A. Applicant was denied his constitutional right during all stages of his guilty plea due to a conflict of interest. Applicants' trial counsel admitted to divided loyalties to both parties in Applicants' guilty plea; attorney James Cheeks, at the time of Applicants' guilty plea, was associated with the Spartanburg Community Memorial Committee, which was a victim in this case.

FACT

Criminal Law 641(5)

In order to establish a violation of the Sixth Amendment right to the effective assistance of counsel based on a conflict of interest, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyers' performance; a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief; U.S.C.A. Const. Amend. 6; Duncan v. State, 315 S.E.2d 809 (S.C. 1984). Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979) states that an actual conflict of interest occurs . . . when a defense attorney places himself in a situation inherently conducive to divided loyalties . . . if a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it's shown that the attorney owes a duty to defendant to take some action that could be detrimental to his other client; Jackson v. State 495 S.E.2d 768 (S.C. 1998); Cuyler v. Sullivan, 46 U.S. 335, 100 S.Ct. 170, 864 L.Ed.2d 333 (1980).

ARGUMENT

Applicant contacted the Public Defenders' Office by way of request forms to Ms. Andrea L. Price, Esquire. Applicant not once, but **five times** tried to get his MOTION OF DISCOVERY filed concerning all pending charges against him, however, Ms. Price never contacted Applicant with the requested information. Attorney Clay Allen responded to Applicant stating that Ms. Price had given Applicant a copy of the requested material, but this was not true.

Applicant stated to the Public Defenders' Office that attorney James Cheeks was associated with the victim in several of the charges, but no disposition or resolution was ever made regarding this claim; no investigation was done to determine to what degree attorney Cheeks was associated with the Memorial Committee. The Office offered the statement: "I do not know if Mr. Cheeks is indeed associated with that Committee, but even if he is, Mr. Cheeks is not a witness in this matter . . . Ms. Price will insure that no confidential information about your involvement, if any, is given to Mr. Cheeks!"

Applicant, by the promise of EXHIBIT 2, was insured by the Circuit Public Defender Clay T. Allen that James Cheeks would not have anything to do with Applicants' case; see EXHIBIT 2. This assurance was given because of the association declared by Applicant.

When Applicant appeared before the court for sentencing he was represented by Public Defender James Cheeks. Mr. Cheeks representation resulted in Applicant being sentenced to an aggregate total of FORTY (40) years, when a five year sentence with five years probation had been offered by the State in exchange for Applicants' guilty plea. Applicant states that the forty year sentence does not comport with the statutory penal sentencing codes; see remaining issues.

QUESTION: Why did attorney Clay T. Allen insure Applicant that attorney James Cheeks would not have anything to do with Applicants' case, yet was in fact the attorney of record at the time Applicant was sentenced? It appears that the assurance given to Applicant regarding attorney Cheeks' non-involvement in Applicants' case was a prevarication.

CONCLUSION

Applicant states the logical conclusion to be deduced from the foregoing facts presented is a determination that Applicants' conviction and sentence must be vacated by reason of an involuntary, unknowing, and unintelligently entered guilty plea. Applicant states this court should agree with him that a conflict of interest unduly prejudiced the outcome of Applicants' plea proceeding, and his conviction and sentence should, at the minimum, be reversed and remanded for a new proceeding.

ALLEGATION

10,B. Applicant was denied effective assistance of counsel guaranteed by the U.S.C.A. Sixth Amendment.

11,B. Counsel failed to object to the excessive sentence given by the court when the sentence exceeded maximum statutory codes. Applicant was denied this right, and Applicants' sentence is in violation of SCCL Code §17-27-20 A(4) under the PCR Act, where Applicants' sentence exceeds the maximum authorized by law.

FACT

It is important to remember that judges have discretion in sentencing within statutory limits; State v. Sidell, 262 S.C. 397, 206 S.E.2d 2 (1974). Also, a sentence is not excessive if within statutory limitations (which do not violate the prohibition against cruel and unusual punishment) and not the

result of partiality, prejudice, or corrupt motive; Cummins v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Wood v. State, 257 S.C. 179, 184 S.E.2d 702 (1971).

See: Sentencing Guidelines, S.C. Code of Law 1976 §16-13-10B; §16-13-240(3); §16-13-30A; 16-13-180(2).

CODE OF LAWS OF SOUTH CAROLINA (1976)

11,B. §16-13-10,B. Forgery less than \$5,000

(B). A person who violates the provisions of this section is guilty of a:

(2). felony and upon conviction must be fined in the discretion of the court or imprisoned not more than five years, or both, if the amount of the forgery is less than five thousand dollars.

§§16-13-240(3) Breach/obtain signature or property under false pretenses, value \$1,000 or less.

A person who by false pretense, or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:

(3). A misdemeanor triable in magistrates' court if the value of the property is one thousand dollars or less. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment of the grand jury, Not more than five years.

11,B. §16-13-30(A) Petit larceny; grand larceny

(A) Simple larceny of any article of goods, choses in action bank bills receivable chattels, or other article of personality of which by law larceny may be committed, or of any fixture, part, or product of the soil severed from the soil by an unlawful act, or has a value of one thousand dollars or less is

petit larceny, a misdemeanor, triable in the magistrates court. Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury.

§16-13-180(2) Receiving Stolen goods less than \$5,000.

It is unlawful for a person to buy, receive or possess stolen goods, chattel or other property if stolen. A person is guilty of this offense whether or not anyone is convicted of the theft of the property. A person who violates the provision of this section is guilty of a:

(2) Felony, and, upon conviction, must be fined not less than one thousand dollars, or imprisoned not more than five years if the value of the property is more than one thousand dollars but less than five thousand dollars.

Compare codes to indictments; codes match these!

ARGUMENT

It is clear that by reviewing the Sentence Sheets and indictments that the sentencing judge exceeded the guidelines, and violated S.C. Code of Law (1976) and §17-27-20(A)(4). Counsel did not object, or properly inform Applicant that the court was going to exceed the five year sentence promised in the plea bargain, or take any act of effective representation when Applicant was sentenced to four ten year consecutive sentences on original misdemeanor charges.

When Applicant entered a guilty plea he was expecting some relief and benefit from the plea bargain offered by the Solicitor. Counsel should have, at all costs, represented Applicants' plea to the court in Applicants' best interest.

Because the court was going to enhance Applicants' charges to this level, counsel should have advised Applicant that the

sentence was going to exceed the five years Applicant expected, thus giving Applicant the opportunity to withdraw his guilty plea, WHICH WAS NOT GOING TO BE ACCEPTED BY THE COURT. Applicant was deprived and unconstitutionally denied the entitlement to voluntarily, knowingly, and intelligently make the decision to either choose a jury trial, or, enter a plea that the court would honor. These facts establish violations of Applicants U.S.C.A. 5th and 6th Amendment rights.

CONCLUSION

Applicant makes the request to be permitted to retract his guilty plea, or to be resentenced under the correct guidelines of the applicable S.C. Code of Laws (1976).

ALLEGATION

10,C. Applicant was denied effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution, and by Article 1, §3 and §14 of the South Carolina Constitution at the time of Applicants' guilty plea.

11,C. Trial counsels' acts or omissions during plea agreement fell below the professional standard required of attorneys in a criminal proceeding, and resulted in prejudice to Applicant when the court rejected the States' recommendation of the offer made to Applicant in exchange for his guilty plea. Trial counsel failed to move the court to withdraw Applicants' guilty plea in the instance of the four consecutive ten year sentences being imposed. See: Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052-2075 (1984).

FACT

When a defendant enters into a plea agreement the negotiation rests on contractual principles, and each party

should reap the benefit of their bargain; Thrift v. State, 440 S.E.2d 341 (1994) (A guilty plea which is based on a plea bargain which is not fulfilled cannot stand); Clark v. State OP. No. 2439 Filed 3/25/96 Published Opinion.

Applicant states the fact that his counsel failed to move the court, or even file a post-trial motion to alter or amend the sentence. Applicant was left without proper representation in his effort to prepare a pro se motion on 11/10/10, which was denied with no explanation. See: MOTION AND ORDER, attached as EXHIBIT #3.

ALLEGATION

10,C. Applicant was denied effective assistance of counsel during his guilty plea, as guaranteed by the 6th Amendment to the U.S. Constitution, and by Article 1, §§ 3 and 14 of the S.C. Constitution.

11,C. Trial counsels' acts or omissions during Applicants' plea agreement fell below the acceptable standard, and proved prejudicial to Applicant when the court rejected the States' recommended sentencing. Trial counsel should have filed a Motion to Withdraw Applicants' guilty plea at the moment Applicant was sentenced to four consecutive ten year sentences. See: Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

FACT

When a defendant enters a plea agreement the agreement rests on contractual principles, and each party should reap the benefit of their bargain; Thrift v. State, 440 S.E.2d 341 (1994) (A guilty plea which is based on a plea bargain which is not fulfilled cannot stand); Clark v. State, OP. No. 24398, Filed 3/25/96; Published Opinion.

Applicants' trial counsel failed to file any motion for altering or amending Applicants' improper and unlawful sentence. Applicant was left on his own, unskilled and uneducated in the law, to try to move the court for correction of his sentence. Applicant did file such motion, which was denied without opinion; see: MOTION and ORDER, attached as EXHIBIT #3. Applicant was not aware that he could appeal the denial of the ORDER.

ARGUMENT

11.C. Applicant arranged and signed a plea agreement with the Solicitors' Office on 10/25/10, on which agreement Applicant entered a guilty plea to five counts of forgery and two counts of petit larceny, with all sentences negotiated to run concurrent, and not to exceed five years. The remaining charges of receiving stolen goods, two counts, and one count of breach/obtaining signature of property under false pretenses, valued at \$1,000, with a sentence of ten years suspended to five years probation, to start upon release from the S.C. Dept. of Corrections. This was a legal, binding contract between Applicant and the Solicitor. Applicants' attorney should have, at all costs, attempted to represent the plea agreement to the court, for the purpose of allowing Applicant to withdraw the guilty plea if the attorney was unsuccessful in persuading the court to accept the negotiated plea agreement. At the minimum, Applicants' attorney should have followed the rejected plea agreement/bargain with a motion in Applicants' defense. Applicant did not receive effective assistance of counsel, and was actually prejudiced by counsels' failures to represent Applicant at critical stages in the plea proceeding, which resulted in NO plea proceeding at all! Applicant would have faired no worse if he had proceeded to trial against the charges against him, which were wrongly enhanced and imposed consecutively. Applicant states that his trial counsel failed miserably in all respects during the proceeding - where Applicant went in expecting a five year sentence with a five year probation attached and was sentenced to FORTY YEARS.

not give Applicant his best representation - DUE TO THE FACT THAT HE WAS ONCE THE ATTORNEY FOR THE MEMORIAL ORGANIZATION. This testimony alone is sufficient to warrant a decision that a conflict of interest was assuredly a factor in Applicants' proceeding, and that prejudice can be presumed from that conflict.

4. Applicant states the claim that his sentence exceeds the maximum sentence permitted by S.C. Code of Laws. This claim is supported by the penal code under SCCL §16-13-10 Forgery; Title 16, Chapter 13: Forgery, Larceny, Embezzlement, False Pretences, et al.

5. In Applicants' case the applicable sentencing statute is SCCL §16-13-10(B), which enumerates that a conviction of forgery of less than \$5,000.00 value carries a prison sentence of 0 to 5 years. On Applicants' Sentencing Sheet there appears the error of law stated as 0 to 10 years. The Solicitors' Office improperly and incorrectly prepared the Sentencing Sheet to reflect that Applicants' offense was a Property Crime, yet there is no SCCL § Section referencing a property crime. The record of the Transcript will expose the sentencing judge asking if the offense was a property crime. Applicant states that because the Sentencing Sheet designates 0 to 10 years the Solicitor stated that it was permissible because Applicant had two or more offenses, however, the Solicitor showed to the court that the two or more offenses were property crimes. When Applicant filed a Motion To Alter Or Amend Sentence he appeared before the same sentencing judge, who stated that the 0 to 10 year penal code " . . . says it all", and that the code does not have to state that the offense was a property crime! Applicant states that this manner of personal reasoning injected by the judge is preposterous, and has no place in the judiciary system in South Carolina, yet that was the 'finding of fact and conclusion of law' the judge used to justify his ruling.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
FEB - 7 AM 8:32
M. HOPE BLACKLEY

QUESTION: Why didn't Applicants' trial counsel attempt to fairly and honestly represent Applicant in the midst of his dire situation?

CONCLUSION

Applicant concludes from the foregoing, and prays this court will agree, that he must be allowed to withdraw his guilty plea for further proceedings, or be resentenced with the terms agreed to in the original plea bargain.

1 they're doing cause I guess you think it's right or it's
2 what you ought to do or that society somehow owes it to you,
3 and I can assure you society does not owe you the
4 opportunity to victimize people especially dead people down
5 here on the south side of town. when you start stealing
6 from dead folks, pretty low. That's my opinion. You know,
7 right now, that's the one that counts. So, it's come to, to
8 a point where the only way we protect ourselves from you is
9 to take you out of our society. A Judge has no episcoped

10 All right. I'm through preaching cause it won't do any
11 good.

12 I've signed the restitution order.

13 On Cases 2009-1416, to 2009-1414, an 2009-1415, I have
14 sentenced you to ten years on each of those. I've run it
15 consecutive to each other, and to your probation violation.
16 So, that's 35 years.

17 The other charges I have sentenced you to ten years run
18 consecutively with the exception of case Number 2009-1413.
19 That one I have sentenced you to ten years suspended to time
20 served with probation for five years. I have ordered the
21 probation to begin upon your release from prison. I have
22 ordered the restitution to be paid all under that particular
23 case. I've ordered payment of Public Defender's fees under
24 that case. Again, all other charges are ten years run
25 concurrent.

Mr. Jeffrey E. Baker 131471
L. E. I. Chest South 1240
990 Wisconsin Hwy
Bismarck S.D. 58110

(ATTN) Chief Justice Stanley
The Supreme Court of South Dakota
Post Office Box 11330
Columbia S.D. 57211

JMS 1/22/74