VOLUME I OF II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2022-001341

Case No. 2020-CP-42-01278

Deven Michael Ford,

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

DEVON M. FORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)

STATE OF SOUTH CAROLINA,) TRANSCRIPT
) OF
PLAINTIFF,) RECORD
)
vs.) 05-GS-42-3376
) 05-GS-42-3377
DEVON MICHAEL FORD,)
DEFENDANT.)

December 5th, 2005
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE DOYET A. EARLY, III, JUDGE.

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

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ASSISTANT SOLICITOR
Attorney for the State

MICHAEL BARTOSH
PUBLIC DEFENDER
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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(There were no exhibits marked or testimony taken during this hearing.)

P R O C E E D I N G S

SOLICITOR COLER: May it please the Court, Your Honor.

Judge, before you is Devon Michael Ford. Mr. Ford is represented by Mike Bartosh.

THE COURT: Turn around and face me, son.

SOLICITOR COLER: Represented by Mike Bartosh of the Public Defender's Office. Mr. Ford is here to plead guilty to two indictments.

On Indictment 05-GS-42-3376, he's pleading guilty to one count of murder. On Indictment 05-GS-42-3337, he's pleading guilty to one count of assault and battery with intent to kill.

As Your Honor knows, the murder carries 30 to life, and the assault and battery carries zero to 20. State's recommending that the assault and battery charges, the punishment run concurrent with whatever Your Honor gives him on the murder charge.

MR. BARTOSH: And Your Honor, we'd be entering this plea under North Carolina versus Allford.

THE COURT: Mr. Ford, would you raise your right-hand and be sworn?

(Whereupon, the defendant was placed under oath at this time.)

THE COURT: Put your hand down.

Now, hold on.

What's all this going on back here?

SOLICITOR COLER: Your Honor, this is the other victim, Mr. Martin. He's, he's presently in the custody of the Department of Corrections. But he's here for the trial. So, I thought we'd bring him in here. He's standing in here.

THE COURT: That's fine.

Officer, thank you.

All right. All right. Mr. Bartosh, do you represent Devon Michael Ford on both of these indictments?

One for murder, that's 3376, and the other one is for assault and battery with intent to kill, which is 3377?

MR. BARTOSH: I do, Your Honor.

THE COURT: And have you explained to him the charges contained in the, each indictment, and the possible punishment, i.e. on murder is 30 to life in prison without parole?

MR. BARTOSH: Yes, sir.

THE COURT: And on assault and battery with intent to kill, up to, zero to 20?

MR. BARTOSH: That's correct, Your Honor.

THE COURT: And have you also explained to him that these are classified as violent and most serious on both, and the prior, and the ramifications that may give him in

the future?

MR. BARTOSH: Yes, sir, I have.

THE COURT: And have you also explained to him this is what we are generally refer to as an 85 percent -- well, no, strike that. That's not correct.

On the murder charge, you do day for day?

MR. BARTOSH: Yes, sir, I've explained that to him.

THE COURT: And it's my understanding he wishes to enter a plea under North Carolina versus Allford or on Allford versus North Carolina?

MR. BARTOSH: That's correct Your Honor.

THE COURT: And have you, sir, in reviewing all of the evidence, do you believe that, if this case went to trial, the State would prove beyond a reasonable doubt the guilt of your client both on the murder and the assault and battery with intent to kill?

MR. BARTOSH: I believe they could, Your Honor.

THE COURT: Have you explained to your client that, if I accept this plea under Allford, that I have to treat it as a guilty plea and the Department of Corrections treats it as a guilty plea?

MR. BARTOSH: I have.

THE COURT: Is it your opinion that the State could prove beyond a reasonable doubt his guilt, and that he wants to take the benefit of the bargain, that is that the two

sentences would run concurrently?

MR. BARTOSH: Yes, sir, I've gone over the, the evidence against him, and I think he believes that, that were he to go to trial, that it would be likely that he would be convicted, and also he gets the benefit of the recommendation of concurrent time.

THE COURT: All right. Mr. Ford, please listen to me. If I ask you anything you don't understand, say judge, please repeat it.

Is that fair?

DEFENDANT: Yes, sir.

THE COURT: First of all, how are you this morning?

DEFENDANT: I'm, I'm -- you know what I'm saying?

THE COURT: Huh?

DEFENDANT: I'm -- I guess you could say I'm all right, you know what I'm saying, cause some things I don't understand.

THE COURT: Well, what don't you understand?

DEFENDANT: About the arm---

THE COURT: About the what?

DEFENDANT: About the day for day thing and about some more evidence that we ain't able to bring up.

THE COURT: Well, your lawyer tells me you want to enter a plea under North Carolina versus Allford, which says that judge, I've reviewed all the evidence, and I believe

that the State could prove, beyond a reasonable doubt, my guilt, and the State is offering to allow these two sentences to run concurrently, run at the same time, and you want to take the benefit of that bargain, and you don't want to run the risk of trial where you might get an X amount of sentence on the murder, and behind that, consecutive on the assault and battery with intent to kill.

DEFENDANT: Yes, sir, that's the reason why they came with the plea because they say I can catch a life sentence.

THE COURT: No, sir.

You may be found guilty by a jury and I can sentence you anywhere from 30 years to life. I don't know what I would do.

DEFENDANT: Yeah. Yes, sir.

THE COURT: But you got to tell me that, that you, you believe the State can prove you guilty beyond a reasonable doubt. If you don't want to do that, we'll stop right now and I got a jury coming at 2:15. We can draw your jury, and we'll go through the trial. So, whichever one you want to do.

If we go through the trial, and you are convicted for murder, I must give you a minimum of 30 years if you're convicted, and you do that day for day.

DEFENDANT: Yes, sir.

DEFENDANT: I can sentence you anywhere from 30 to

life. If you're convicted of the other situation, assault and battery with intent to kill, I can give you anywhere from zero to 20 and I can run those sentences on top of each other, which means concurrent, or I can run them consecutively, which means you serve one and then you serve the other.

So, be glad -- if you're not sure and you're not ready to tell me that you think the State can prove you guilty beyond a reasonable doubt --.

DEFENDANT: Yes, sir.

THE COURT: -- we'll stop right now and we'll draw the jury at 2:15, and we'll start your trial.

Which one you want to do?

DEFENDANT: We don't have to draw the jury.

THE COURT: I know we don't have to.

DEFENDANT: I'm saying I don't want to draw the jury, Your Honor.

THE COURT: Do you believe, from your review of the evidence with your lawyer, that if this case went to trial, the State could prove your guilt beyond a reasonable doubt both on the murder and the assault and battery with intent to kill?

DEFENDANT: Yes, sir.

THE COURT: And you don't want to take that risk and you want to get the bargain they've offered you, which is I

sentence you under the murder anywhere from 30 to life, and the assault and battery with intent to kill runs on top of that.

Is that what you want?

DEFENDANT: May you repeat that for me, please?

THE COURT: Yes, sir.

The benefit of the bargain -- the bargain is that they are recommending that the two charges, your sentence on both charges run concurrent as opposed to consecutive. It means you run, you do the time together as opposed to consecutive, which means you do the time on one and then you do the time on the other one.

You understand that?

DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

(Pause.)

DEFENDANT: Yes, sir.

THE COURT: Have any questions you want to ask me?

DEFENDANT: No, sir.

THE COURT: All right. Let me ask you a few questions.

You understand that, under the murder charge, I must give you a minimum of 30 and I can give you up to life in jail where you never get out.

You understand those charges and that possible punishment?

DEFENDANT: Yes, sir.

THE COURT: Do you understand, on the assault and battery with intent to kill, I could give you anywhere from zero to 20 years?

DEFENDANT: Yes, sir.

THE COURT: All right. So, you understand the nature of the charges and the possible punishment, is that correct?

DEFENDANT: Yes, sir.

THE COURT: And understanding that, do you still wish to enter a plea under Allford versus North Carolina, which I just explained to you what it's about, or do you want me to bring the jury in at 2:15, and we try the case?

Which one would you rather do?

DEFENDANT: I go -- I'd rather go with the plea, Your Honor.

THE COURT: All right. Now, do you understand, by going with the plea, that you give up your Constitutional right to remain silent?

You have to talk with me like you're doing.

You understand that?

DEFENDANT: Yes, sir.

THE COURT: And you also give up your Constitutional rights to a trial by jury. The jury is waiting and ready to go. And if we start the trial, you will have the right to confront and cross-examine everybody who testifies against

you through your lawyer.

You will have the right to present your own case. That is put up your own witnesses, any exhibits, or evidence that you may have, and you can testify in your own defense.

If you exercise your Constitutional right to remain silent, then I would tell the jury they could not hold your failure to testify against you in any manner whatsoever, and I would further instruct them or charge them that they couldn't even consider the fact that you didn't testify when they deliberated whether you were guilty or innocent.

You would be presumed innocent throughout the trial under the Constitution, and the State would have the burden of proving you guilty beyond a reasonable doubt to a jury of 12 people. And in order for that jury to convict you, all 12 would have to unanimously agree that you were, in fact, guilty. And even if found guilty, you would still have the right to an appeal.

Now, do you understand your rights to trial by jury?

DEFENDANT: Yes, sir.

THE COURT: All right. Understanding that, do you wish to enter this plea under North Carolina versus Allford or do you want me to set the case for trial?

DEFENDANT: May I ask my lawyer something please?

THE COURT: Yes, sir.

(Pause.)

THE COURT: Any questions?

You don't have to do this. If you feel uncomfortable, we'll back off and start your trial at 2:15.

DEFENDANT: Only, only question I'd like to ask you, Your Honor, is about the, by me pleaing, is the appeal, and then I'll plea about the appeal.

MR. BARTOSH: Your Honor, I think what Mr. Ford's concern is that when the Court told him that he, by entering this plea, he's giving up all his constitutional rights as far as jury trial, remain silent, confronting the witnesses against him. But he feels he also gives up his right to an appeal, and I've explained to him that he does not. He can still appeal the, the sentence of the Court.

THE COURT: Sure.

DEFENDANT: Okay.

THE COURT: But the only appeal you would have is whether or not you knowingly and voluntarily and intelligently, intelligently made. I'm asking you all those questions now. But you would still have the right to an appeal, and I'll go over that with you in just a few minutes.

DEFENDANT: Yes, sir.

THE COURT: But do you want to give up your right to trial by jury?

DEFENDANT: Yes, sir.

THE COURT: And enter this plea under North Carolina versus Allford?

DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you anything, held out any hope of reward, or threatened you in any manner in order to enter this plea?

DEFENDANT: No, sir.

THE COURT: Are you satisfied with the representation provided by Mr. Bartosh?

Satisfied with your lawyer?

MR. BARTOSH: Are you satisfied with my representation?

DEFENDANT: No.

THE COURT: Okay.

MR. BARTOSH: Thank you.

THE COURT: All right. We'll stand aside and we'll start at 2:15 drawing the jury.

Thank you.

And I'm not gonna take a plea at 2:15. That's it.

MR. BARTOSH: Yes, sir.

(Whereupon, Court was in recess for the lunch hour.)

THE COURT: All right. Mr. Bartosh, I understand you've had some counseling with your client over lunchtime, and I understand he wishes to continue with his plea.

MR. BARTOSH: That's correct, Your Honor. In talking with Mr. Ford, I believe he, he misunderstood the question

that the Court had asked him about the---

THE COURT: Well, it's a pretty easy question.

Anyway, I'll ask it again, very simply, are you satisfied with the representation provided to you by Mr. Bartosh?

DEFENDANT: Yes, sir.

THE COURT: Do you think he's had enough time so he can spend with you to understand all of the case, share with you all of the evidence, enough time to research the law, and to investigate the facts so he can properly represent you here today?

DEFENDANT: Yes, sir.

THE COURT: Is there anything else you want him to do other than speak up on your behalf before we proceed today?

Anything else you want him to do?

That's a simple question.

DEFENDANT: Anything else I want him to do?

THE COURT: Other than speak up on your behalf.

What else you want him to do?

DEFENDANT: He already, he already done it.

THE COURT: What's that?

No, you got to tell me.

DEFENDANT: I'm talking about the things that he told me that he was gonna say. I don't, I don't know the things that he say he was gonna say.

THE COURT: Well, he's gonna speak up when it's his turn to speak.

That's what you want him to do, right?

DEFENDANT: Yes, sir.

THE COURT: Tell him -- he's gonna -- you want him to tell me about your good side?

DEFENDANT: Yes, sir.

THE COURT: All right. Well, he'll do that.

Are you today under the influence of any alcoholic beverages, drugs, or prescription medication?

DEFENDANT: No, sir.

THE COURT: Are you today unaware of any mental, nervous, or emotional condition which would keep you from understanding what we're doing here today?

DEFENDANT: No, sir.

THE COURT: Have you understood all my questions?

DEFENDANT: Yes, sir.

THE COURT: Understood your conversations with your lawyer?

DEFENDANT: Yes, sir.

THE COURT: Understand what Mr. Coler has had to say to me?

You know what we're doing here today, right?

DEFENDANT: Yes, sir.

THE COURT: Are you entering this plea under Allford

versus North Carolina because you believe that if the case went to trial, the State could prove, beyond a reasonable doubt, that on January, I'm sorry, that on or about December 7th, 2004, you did, with malice aforethought, kill one Ikethia, Ikethia Davis by shooting her and also committing a violent injury upon one Jonathan Martin?

Do you believe, after all the evidence is in, the State could prove, beyond a reasonable doubt, that you're guilty of these two offenses and you don't want to take that chance and you want to take the benefit of the bargain, that is a consecutive, a concurrent sentence, is that correct?

DEFENDANT: Yes, sir.

THE COURT: Any questions before I accept your plea?

DEFENDANT: No, sir.

THE COURT: All right. I find your decision to enter a plea under Allford to be freely, voluntarily, and intelligently made. You've had the representation of competent counsel in Mr. Bartosh who you say that you're satisfied with, and I will accept your plea.

If you disagree with my sentence or these proceedings, you have ten days from today's date to file a notice of intent to appeal.

Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Thank you.

Mr. Coler.

SOLICITOR COLER: Thank you, Your Honor.

May it please the Court.

Judge, this incident happened back on December 7th of 2004. Almost one year ago on Wednesday. That day, the victims, Jonathan Martin, standing to my left, and Ikethia Davis, who is deceased, were following the defendant and a man named Ken Lilly. The defendant and Lilly were in a red Suburban, and the victims were in a, a white Maxima.

They were going somewhere to pick up some money. The testimony would of been that Lilly and Devin Ford were going to get some money that Devon owed to Jonathan Martin. They got out into the country, in Spartanburg County, and after a while Mr. Martin got the Suburban, being driven by Mr. Lilly and Mr. Ford being the passenger, to pull over.

When the car pulled over, Mr. Martin pulled his car up to the driver's side of the Suburban. While Mr. Martin, in the driver's seat of his car and Mrs. Davis in the passenger seat were talking to Ken Lilly whose the driver of the Suburban, the defendant, Devon Ford, got out of the passenger's side of the red Chevy Suburban, came around, and came up to the passenger window of the Maxima, and fired at least four, perhaps as many as seven shots, into the Maxima. Several of those shots hit Jonathan Martin, and -- but he survived the gunshot wounds.

One of those shots hit Ikethia Davis, struck her in the right chest. It was downward angled generally front to back. So, it went in like that and into her abdomen and, and lodged, the bullet lodged itself in her chest. Mr. Martin pulled off immediately and took off and drove as fast as he could. He drove about 3 miles till he got to a restaurant, Fast T's. He rolled out or got out of the car and went into Fast T's and got help. Mrs. Davis stayed in the car. EMS arrived and took both to the hospital.

Mr. Davis was treated and did survive his gunshot wounds. Mrs. Davis expired at about four o'clock the next morning after several surgery attempts.

The police quickly developed Devon Ford as a suspect because Jonathan Martin knows him from growing up with him in Greer, and Ikethia Davis also knew him, has even perhaps dated or seen him on previous occasions.

She gave a dying declaration of who the shooter was. Mr. Martin identified the shooter for the police. The testimony at trial would of also come from Ken Lilly, the driver of the Suburban, that Devon Ford was the shooter in this case.

Based on all that, he was charged with murder and, and one count of ABWIK, and is offering his plea today.

He does have a prior record I'll be glad to share with the Court at the appropriate time. I also have Ikethia

Davis' mother, Kim Davis, here, Your Honor. If the Court would entertain the, the, her speaking at the appropriate time. And, as you can see, Mr. Martin is here if he has anything to do, relay to the Court, we'd ask you to---

THE COURT: All right. Give me his prior record.

SOLICITOR COLER: 2001, Mr. Ford was convicted of trespassing.

2002, possession of marijuana.

2004, possession of crack cocaine.

THE COURT: All right, sir. Be glad to hear from you. Your name?

MR. MARTIN: I'm Jonathan Martin.

THE COURT: Anything you want to tell me?

MR. MARTIN: (Nods negatively.)

THE COURT: Ma'am, your name?

MRS. DAVIS: My name is Kimberly Davis. I'm Ikeithia's mother.

THE COURT: Yes, ma'am.

MRS. DAVIS: I lost my child in this. I mean I know it can't bring her back, you know, and I'd do anything to bring her back if I could. But---

THE COURT: I understand.

MRS. DAVIS: I ask you for the max for him, you know. Like I said, I lost a child. At least he's still living. I just ask for the max for him that justice will be served so

we won't have to worry, my family, and put this thing behind us.

THE COURT: Mr. Bartosh.

MR. BARTOSH: Thank you, Your Honor.

Your Honor, in discussing the evidence with Mr. Ford, this would be a triable case, but for the dying declaration by, by Mrs. Davis. I don't think that -- the witnesses that the State would call all have contradictory statements, and, and it would be -- it would just be a question of who the jury believed. However, with Mrs. Davis' dying declaration, I don't think that really would -- I think there's a, an excellent chance Mr. Ford would be convicted based on, based upon.

Your Honor, I don't think there's doubt this was a drug deal that Mr. Ford and Mr. Martin were -- Mr. Martin was his supplier. He, he had, he had, had sold some fake drugs to Mr. Ford. He had paid him some money, but still owed him about $500, and they were on the way, depending on whose version of the facts you believe, they were on the way for Mr. Ford to get Mr. Martin's money or Mr. Martin to get Mr. Ford his money. But at any rate, that's what the trip was about.

And at some point it, it turned bad. I don't mean to excuse it in any way what happened, Your Honor. But unfortunately, Mrs. Davis just happened to be caught in the

middle of all this, and she's the one that paid the price. And, and from talking with Mr. Ford, he's very remorseful about it. But it, it's, it's just an awful awful tragedy.

He's 21, Your Honor. He went to the ninth grade. As the Court well knows, mandatory minimum for murder is 30 years day for day. He would be 51 when he got out if the Court were to give him the mandatory minimum.

Your Honor, he has no history of violence, no convictions for any crime of violence. Mr. Martin is serving a five year sentence for common law robbery in which he pistol whipped a, a person and took their money.

So, we just ask, Your Honor, if you would, consider the mandatory minimum, Your Honor.

THE COURT: Mr. Ford, anything you want to tell me? Anything you want to tell me?

DEFENDANT: He -- Mr. Bartosh take care of it for me, Your Honor.

THE COURT: Mr. Bartosh will take care of that for you?

DEFENDANT: The only thing I like to say, Your Honor, is that I have a 16 month old child out there right now. And from what Mr. Bartosh is stood there and told me that, that, that North Carolina plea, what's that called, Your Honor?

THE COURT: Allford.

DEFENDANT: Yeah. Yes, sir, the -- what's that called?

MR. BARTOSH: Well, Your Honor, I think what, what Mr. Ford would like for everyone to know is that he is not -- he's pleading under North Carolina versus Allford.

THE COURT: I understand.

MR. BARTOSH: He's not admitting to, to doing this. However, he feels that it's in his best interest to enter this plea because, knowing the evidence, that he believes there's a good likelihood he'd be convicted.

Is that---

DEFENDANT: Yes.

MR. BARTOSH: Is that it?

DEFENDANT: Yes, sir.

And what was that again you said, that ten day, ten day thing I have a thing to do, Your Honor, please?

THE COURT: I said if you're not satisfied with these proceedings or my sentence you have ten days to file a notice of intent to appeal.

DEFENDANT: Yes, sir.

THE COURT: There ain't no sense in pleading if you're gonna appeal. Why are you -- you don't have to do this. I'll back out of it right now. We'll let a jury decide if you're guilty or not guilty.

DEFENDANT: We'll go ahead with it, Your Honor.

MR. BARTOSH: With the plea?

DEFENDANT: With the plea.

THE COURT: Well, you know you're going to jail for a long time. I don't have any choice unless you consider over 30 years a short time.

You want to back out of it?

Got a jury ready to go. They may find you not guilty. You go home. They may find you guilty, and you're looking at, anywhere from life, 30 to life plus 20.

Your choice.

DEFENDANT: We'll go ahead.

THE COURT: I'll let you back out right now.

DEFENDANT: We'll go ahead with the plea, Your Honor.

THE COURT: That's because you believe, from reviewing all the evidence, that you feel the State could prove your guilt beyond a reasonable doubt, and you want to take advantage of this concurrent sentence, is that correct?

DEFENDANT: Yes, sir.

THE COURT: Ask him whatever you want to ask him.

(Pause.)

THE COURT: Now, last chance, my jury is sitting there waiting. They're ready to come out here and draw a jury for you. I will allow you to withdraw your plea unless you are totally convinced, from review of the evidence, that the State could prove you guilty beyond a reasonable doubt.

Now, you want me to go forward or do you want let's stop and let's draw the jury?

You may walk home tonight. You may go to jail for whatever I'm giving you now or more. I don't know what would happen.

DEFENDANT: We can go ahead with the plea, Your Honor.

THE COURT: You want to tell these people you're sorry?

(No response.)

THE COURT: You don't have to. That's fine.

DEFENDANT: But, but, but what I'm sitting up here---

THE COURT: No, sir, I don't---

DEFENDANT: What I want to say was I'm sorry that it happened.

THE COURT: Gentlemen, look here.

(Whereupon, a bench conference was held at this time.)

THE COURT: All right. Let the record reflect I had a bench conference with both lawyers.

And I'll ask you one last time, Mr. Ford, I'll be more than glad to set this plea aside. I'll be more than glad to let you exercise your right to trial by jury.

But if you tell me that you believe the State can prove, beyond a reasonable doubt, that you're guilty on both of these things and you don't want to take that risk and you want to take the benefit of the bargain, I'll do that for you.

The last chance.

What do you want to do?

DEFENDANT: I'll go ahead with the plea, Your Honor.

THE COURT: All right, sir. On Indictment 05-GS-42-3376, for murder, Sentence of the Court you be committed to the State Department of Corrections for a period of 37 years.

On the assault and battery with intent to kill, you be committed to the State Department of Corrections for a period of 20 years.

That is to run concurrent with 05-GS-42-3376.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: Thank you.

SOLICITOR COLER: Thank you, Your Honor.

THE COURT: Good luck.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 5th day of December, 2005.

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

December 22nd, 2005

Pamela E. Green

PAMELA E. GREEN, Court Reporter

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Devon Ford, Appellant.

Appeal From Spartanburg County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2007-UP-365
Submitted September 14, 2007 – Filed September 17, 2007

APPEAL DISMISSED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Office of the Attorney General, all of

Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

PER CURIAM: Ford appeals his Alford plea, arguing it did not comply with the mandates of Boykin v. Alabama, 395 U.S. 238 (1969). After a thorough review of the record, counsel's brief, and Ford's pro se brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss Ford's appeal and grant counsel's motion to be relieved.[1]

APPEAL DISMISSED.

HEARN, C.J., and HUFF and KITTREDGE, JJ., concur.

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

FORM 5

STATE OF SOUTH CAROLINA)
)
County of Spartanburg)
)
Devon M Ford 312731)
Full name and prison number (if any) of Applicant)
)
v.)
)
State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

2008-CP-42-0395

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 Lieber Corr Inst

2. Name and location of Court which imposed sentence Spartanburg County

3. Name(s) of co-defendant(s) (if any) Kim Lilly

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed;

(a) 05-GS-42-3376 murder

(b) 05-GS-42-3377 AWIK

LPC

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) Dec 7, 06

(b) _____

(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?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The South carolina court of appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. Sep 17, 07

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished opinion No. 2007-UP-365

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

2008 JAN 21 AM 11:33

(c) _____

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

(a) Conflict of interest

(b) ineffective assistance of Counsel

(c) involuntary Guilty plea

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

(a) See Atachment

(b) counsel failed to investigate

(c) counsel misled me on my plea

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

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. Anders Brief

ii. pro se brief

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. State of South Carolina court of appeals in Columbia

ii. State of South carolina court of appeals in Columbia

iii. _____

iv. _____

2008 JAN 24 AM 11:33

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Aug 8, 06

ii. Sep 7, 06

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. _____

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FILED

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) Cause my appellate lawyer would not raise them
(b) for me, meaning all three issues in
(c) 10

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

(a) your arraignment and plea? yes
(b) your trial, if any?
(c) your sentencing? yes
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
(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. Mike Bortesh 258 North church Street Spartanburg S.C 29306
ii. Mike Bortesh 258 North church Street spartanburg S.C 29306
iii. Robert M Dudek, P.O Box 11589 columbia S.C 29211-1589

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

i. general Session
ii. general Session
iii. South carolina court of Appeals

2000 JAN 24 AM 11:33 CLERK'S OFFICE

34 36

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

Vacate sentence or new trial

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

no

STATE OF SOUTH CAROLINA)
County of ~~Spartanburg~~ Dorchester) VERIFICATION

I, Devon Ford, 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.

Devon Ford

2008 JAN 24 AM 11:33

SWORN to and subscribed before me this 18th day of January, 2008.

Virginia L Miller (L.S.)
Notary Public

My Commission Expires: 4/4/2017

Revised 3/2003

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

I, Devon Ford, 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.

Devon Ford
Applicant

SWORN or affirmed to and subscribed before me this 18th day of January, 2008.

Virginia Walker
Notary Public

My Commission Expires: 4/4/2017

2008 JAN 24 AM 11:33

36 38e State

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CA 24

SCDC FINANCIAL ACCT'G
07 DEC 11 PM 12:07

INMATE TRUST FUND ACCOUNT REPORT
for SOUTH CAROLINA COURT FILING FEES

INSTRUCTIONS TO INMATE: Complete top portion then give to your mailroom. When returned from Accounting, you must mail this form with any payment to the Court.

By signing my name below, I am asking the Financial Accounting Office of the South Carolina Department of Corrections to complete this report. In accordance with SC Code of Laws §24-27-100 and 150, I authorize payment of the full filing fee. If I have insufficient funds in my account at this time to pay the court's full filing fee, I authorize SCDC to deduct the initial and subsequent payments until payment is completed.

INMATE NAME (print): Deven Ford

SCDC # 312731 INMATE SIGNATURE: Deven Ford

I plan to file this action in the SC County of Spartanburg

2008 JAN 24 AM 11:33

The section below is for SCDC - Financial Accounting Branch's use ONLY.

(1) Total deposits to inmate's account for preceding six months' period* ..... $ 90.00

(2) Twenty percent (20%) of line 1 ..... $ 18.00

(3) Account balance - current date ..... $ .27¢

(4) PAYMENT AMOUNT ** (lesser of line 2 or line 3)

Enclosed check # _____ $ 0

**NOTE to COURT: If payment is for partial fee, Court must notify SCDC once case is accepted and filed. Send notice with case # and balance owed to address below. SCDC will NOT process any additional payments until notification is received from Court.

South Carolina Department of Corrections
Financial Accounting - Room 234
PO Box 21787
Columbia, SC 29221-1787

*Admission date is noted here if inmate incarcerated less than six months ___/___/___.

M. Haselden 12/12/07

Prepared by Financial Accounting Branch - SCDC Date

cfile\scinst5\prepared 7/97

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG

INDICTMENT NO: (A) 05-GS-42-3376 (B) 05-GS-42-3377

DEVIN FORD #312731.....PETITIONER

-vs-

STATE OF SOUTH CAROLINA; and
ATTORNEY GENERAL, HENRY McMASTER.....RESPONDENT

2008 JAN 24 AM 11:33

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
BROUGHT PURSANT TO; S.C. CODE ANN. § 17-27-20
THROUGH § 17-27-160

Respectfully Submitted,

/s/ Devin Ford

Submitted this _____ day of _____, ~~2006~~ 2007

INEFFECTIVE ASSISTANCE OF COUNSEL

(1) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purpose of legal representation and of the law itself. Some of the rules are imperatives; cast in the terms "shall" and "shall not". These define proper conduct for purpose of professional discipline.

(2) As a representative of clients, an attorney performs various functions. As a advisor, under Rule 2.1, an attorney provides a client with an informed understanding of the clients legal rights and obligations and explains their practical implications. As advocate, under Rule 3.1, an attorney zealously asserts the clients position under the rules of the adversary system. As a negotiator, under Rule 1.1 through 1.4, an attorney seeks a result advantageous to the client but consistent with requirements of honest dealing with others In all professional functions, an attorney should be competent, prompt and diligent.

(3) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time, and unreasonable delay can cause a clients needless anxiety and undermine confidence in the attorney's trustworthiness. The rules of Professional Conduct's purpose are to regulate and guide the legal profession by defining proper ethical conduct. LANGFORD b. STATE, 310 S.C. 357, 426, S.E.2d 793 (S.C. 1993)

(4) Once an attorney accepts a representative of a client, the attorney has a duty to keep in touch with the client such that they may be advised of the progress of the case. MATTER OF LEPPARD, 272 S.C.414 252 S.E.2d 143 (S.C. 1979). The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do. See Rule 1.4 (a) (b), Rules of Professional Conduct. Therefore, Applicant is depended upon council's objectivity and ability to give is undivided loyalty. IN RE CONWAY, 305 S.C. 388, 409, S.E. 2d, 357 (S.C. 1991).

(5) The guiding principal is that an attorney should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and the clients' overall requirements as to the character of representation. When an attorney deals with a client, the burden is on the attorney to show in fairness. ALALA v. PEACHTREE PLANTATIONS, INC., 292 S.C. 160, 355 S.E. 2d 286 (S.C. App. 1987). Neglecting to timely accomplish necessary task for the client, and failing to adequately prepare for representation of the client, through meaningful investigations and communications, demonstrates an intolerable degree of ineptitude and indifference. In RE GAINES. – S.C. –, 309 S.E. 2d 5 (S.C. 1983). An attorney, specially instructed, is liable for losses resulting from a failure to follow a client's instructions. McCoy v. Hydrick, 143 S.C. 135, 141 S.E 2d 174 (S.C. 1928).

(6) It is the duty of an attorney dealing with client to use due care to ascertain the scope of client's authority. FRASIER v. PALMETTO HOMES OF FLORENCE, INC., 323 S.C. 240, 473 S.E. 2d 865 (S.C.App.1996). Bothe the attorney and client have authority and responsibility in the objectives and means of representation. However, the client has ultimate authority to determine the purpose to be served by legal representation, within the limits impose by law and the attorney's professional obligations. See Rule 1.2, Rules of Professional Conduct. An Attorney should neither do anything nor leave anything undone which tends to bring the profession into disrepute or to lessen in any degree the public's confidence in the profession. NORRIS B. ALEXANDER, 246 S.C. 14, 142 S.E 2d 214 (S.C. 19650. The duty of an attorney to make full disclosure to the client of all relevant material facts is fundamental to the relationship of attorney and client. DARBY v. FURMAN CO., INC., 334 S.C. 343, 513 S.E. 2d 848 (S.C. 1997). Inefficient office systems do not excuse an attorney from neglecting a legal matter of professional obligation to the client. MATTER OF BURNER, 321 S.C. 465, 469, S.E.2d 55 (S.C. 1996).

Continuing from Question 11 Conflict of interest 4139

When d fired my first public Defender (Chris Brough) Aug 17, 05 at civil Court for not following the professional rules of Conduct not comeing to see me or anything Bostock was not suppose to Be asign to my case which d stated on record on my transcript as well

Corpus juris Secundum 22 states

Criminal Law 641.5 (6) 641.11

if one member of a law firm has a conflict of interest the conflict is imputed to all members of the firm in the context of a criminal case, Thus, an attorney should not accept or continue representation if the attorneys partner or associate would Be Disqualified from accepting or continuing the same employment Due to a Conflict of interest and if attorney is Disqualified By Reason of a conflict no other partners or associate of the firm may continue with the representation.

40 Cont'd from Question 12 Involuntary Guilty Plea

plea was involuntary cause counsel failed to do a proper investigation if counsel would have. Did a proper investigation I would not have plead guilty. Counsel also mislead me on my plea as well.

2000 JAN 24 AM 11:33
PARK HILLS, MO

continueing on Question 11

ineffective Assitance of Counsel

The applicant was Denied and Deprived of the effective Assitance of counsel When counsel failed to (1) object to the imposition of the sentence of 37 yrs Which is in excess of the statutory amount Required By law.

(2) When He failed to properly Research the applicants case. AND Insure that procedurel Due-process of law was Applied in applicants case in Declaring the current and correct Law and the count not Exceeding it's Jurisdiction in imposing punishment.

Had Counsel properly investigated applicants case He would have seen petitioner did not commit this crime as prosecution says plus He would have found that the petitioner could not Have Been sentenced in Excess of the standard Range and Such Exposure is to Be found By a jury not a Judge citing Ring V Arizona 536 U.S 584, 602, 609

2008 JAN 24 AM 11:39

42-44

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SPARTANBURG	)	C/A NO: **08-CP-42-395**
Devon Ford	)	
Petitioner	)	**Second Amended Petition for Post Conviction Relief**
v.	)	
The State of South Carolina	)	
Respondent	)	

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 AUG 27 PM 2:48
MARC KITCHENS

Petitioner moves to amend his Petition. The Second Amended Petition is attached.

DAVID C. ALFORD, P.C.

David C. Alford
P.O. Box 6326
Spartanburg, South Carolina 29304
(864) 574-0870
Attorney for Applicant

Spartanburg, South Carolina
August 22, 2008

HENRY MCMASTER
ATTORNEY GENERAL

August 20, 2008

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2008 AUG 27 PM 2:48
MARC KITCHENS

David C. Alford, Esquire
David C. Alford, PC
Post Office Box 6326
Spartanburg, South Carolina 29304

RE: **Devon M. Ford v. State of South Carolina**
2008-CP-42-0395

Dear Mr. Alford:

I received the enclosed correspondence from the above applicant on July 28, 2008. I am forwarding it to you for handling as you deem appropriate.

Sincerely,

Michelle J. Parsons

Michelle J. Parsons
Assistant Attorney General

MJP/aam
Enclosure

8:12-cv-02266-GRA-JDA Date Filed 11/08/12 Entry Number 14-1 Page 46 of 162

Deven M. Ford 312731
L.C.I. Ashley A29
P.O. Box 205
Ridgeville, S.C. 29472.



Attorney General Henry McMaster
P.O. Box 11549
Columbia, S.C. 29211

FIRST CLASS MAIL

IN THE STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

CA/No. 08-CP-42-0395

DEVON FORD #312731.....PETITIONER,

-VS-

STATE OF SOUTH CAROLINA, and

ATTORNEY GENERAL, HENRY McMASTER.....RESPONDENT,

AMENDED POST CONVICTION RELIEF

APPLICATION AND MEMORANDUM OF LAW

IN SUPPORT BROUGHT PURSUANT TO: RULE 15(a) SCRCP

Respectfully Submitted,

/s/ Devon Ford

Devon Ford #312731

IN THE STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

DEVON M. FORD #312731) CA/No. 08-CP-42-0395

PETITIONER,)

-V-)**MEMORANDUM OF LAW IN SUPPORT**

STATE OF SOUTH CAROLINA; and)**OF AMENDED APPLICATION FOR**

ATTORNEY GENERAL, HENRY McMASTER)**POST CONVICTION RELIEF**

RESPONDENT,)**PURSUANT TO: 15(a) SCRCP**

COMES NOW, Devon Ford, by and through attorney of record (David C. Alford) asking this Honorable Court to amend the original post conviction relief application in the above captioned case number pursuant to Rule 15(a) SCRCP.

Respectfully Submitted,

/s/ Devon Ford

Devon M. Ford #312731

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SENTENCE THAT WAS HANDED DOWN BY THE COURT THAT WAS CONTRARY TO LEGISLATIVE INTENT?

FACTS

During Petitioner's plea hearing the following colloguy between the Court, Petitioner's Counsel Mr. Bartosh and Solicitor Coler was recorded:

> SOLICITOR COLER: As Your Honor knows, the murder carries 30 to life [Tr.p.3, L.14].
>
> THE COURT: And have you explained to him the charges contained in the, each indictment, and the possible punishment, i.e. on murder is 30 to life in prison without parole?
> MR. BARTOSH : Yes, Sir [Tr.p.4, L.15-19]
>
> THE COURT: I can sentence you anywhere from 30 to..[Tr.p.7, L.25]...Life. [Tr.p.8, L.1].
>
> THE COURT: And you don't want to take that risk and you want to get the bargain they've offered you, which is I...[Tr.p.8, L.24-25]...sentence you under the murder anywhere from 30 to life. [Tr.p.9, L.1].
>
> THE COURT: All right. Let me ask you a few questions. You understand that, under the murder charge, I must give you a minimum of 30 and I can give you up to life in jail where you never get out. [Tr.p.9, L.20-23].
>
> THE COURT: Well, you know you're going to jail for a long time. I don't have any choice unless you consider over 30 years a short time. You want to back out of it? Got a jury ready to go. They may find you not guilty. You go home. They may find you guilty, and you're looking at anywhere from life, 30 to life plus 20. [Tr.p.23, L.1-7].

> THE COURT: All right, sir On indictment 05-GS-42-3376 for murder, Sentence of the Court you be committed to the State Department of Corrections for a period of 37 years. [Tr.p.25, L.2-5].

Now, in turning to South Carolina's statutes, S.C. Code Ann. §16-3-10 (murder) and §16-3-20 (A)(punishments for murder) "A person who is convicted of or pleads guilty to murder must be punished by death; by imprisonment for life, or a mandatory minimum term of imprisonment for thirty years.

In defining a mandatory sentence it is actually a "fixed sentence", SEE Blacks Law Sixth Edition at P.1363 (fixed sentencing statute specifies the exact penalty that will follow a conviction of each offense). And a maximum sentence, (the minimum time in which an offender must spend in prison before....release.), See Blacks Law Sixth Edition at P.1363.

DISCUSSION

Petitioner contends that counsel should have objected to the erroneous sentence that was handed down by the Court. Just the failure of an objection to preserve this issue for appellate review deserves emphasis. The Sixth Amendment guarantees the right to counsel in all felony prosecutions. Johnson v. Zebat 304 U.S. 458, 462, 58 S.Ct. 1019. Implied in that right to counsel is the right to the effective representation, whether counsel is appointed or retained. Powell v. Alabama 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed 158 (1932); Stokes v. Peyton 437 F.2d 131, 136 (4th Cir.).

The records are prima facie evidence that the Court and the Prosecution labored under the same misconception regarding the scope of the statute under which Petitioner was sentenced. See the recorded colloguy supra. In turning to the statute for the penalties of murder it is clear there are only (3) possible sentences, "death...life,....or thirty years. Thus, rendering Petitioner's sentence [unauthorized] as a matter of statutory law. The effect of the imposition of an unauthorized sentence is thus stated in 21 Am.Jur.2d Criminal Law Section 535: "A judgement by a court in a criminal case must conform [STRICTLY] to the statute, and [ANY] variation from it's provisions, either in character or the extent of punishment inflicted, renders the judgement void. See State v. Moore 255 S.E.2d 448, Id at 449.

Unauthorized: is that which is done without authority, as a signature or endorsement made, without actual, implied or apparent authority and this includes forgery. See Blacks Law Dictionary Sixth Ed. at p.1523.

Penal statutes are to be construed against the State and in favor of the defendant. State v. Blackmon 403 S.E.2d 660 (1991). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute accordingly to it's literal meaning. Miller v. Aiken Op. No. 25976 (S.C.Sup.Ct.filed May 2, 2005)(Shearouse Adv. Sh.No.19, at 16). Furthermore, to cement Petitioner's contention this Court should commend the Honorable Judge Victor Rawls for having the courage to up hold the very statute in which

Petitioner was sentenced under. SEE State v. Douglas, Helen Op.No.3772 (S.C.Sup.Ct.filed June 1, 2004)(Shearouse Adv.Sh.No.22, at 53, quoting "During sentencing the trial judge stated "the sentence of the Court with regard to murder, and I will tell the open courtroom there is [sic] only two choices. It's either thirty years or life, period".

Surely Counsel should have researched the applicable laws in which Petitioner was charged. Further Counsel should have at least objected and preserved this issue for appellate review. The prejudice incurred is easily seen for Petitioner has been subjected to a sentence that is clearly seven (7) years out side the statutory guidelines. Petitioner respectfully asks this Court to vacate the sentence and conviction and remand for a new trial based on the unconstitutional sentence.

In United States v. Naftalin 99 S.Ct. 2084, the United States Supreme Court said: "This is a criminal case and we have long held that "ambiguity concerning the ambit of criminal statutes should be resolved in the favor of lenity. U.S. v. Culber 435 U.S. 371, 379, 98 S.Ct. 112, 116, 55 L.Ed.2d 349 (1978) quoting Rewis v. U.S. 401 U.S. 808, 91 S.Ct. 1056, 1059; and the defendant may not be subjected to a penalty unless the words of the statute plainly impose it. U.S. v. Campo-Serria-No 404 U.S. 293, 297, 92 S.Ct. 471, 474, quoting Keppel v. Tiffin Savings Bank 197 U.S. 356, 362, 25 S.Ct. 443, 445 (1905) in the instant case the Judge has clearly manufactured ambiguity where none exist.

For the aforementioned violations of Petitioner's rights Petitioner will forever pray that this Court will grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO EXPLAIN TO PETITIONER THE CONSEQUENCES OF HIS PLEA, THUS VIOLATING THE MANDATES OF BOYKIN-V-ALABAMA?

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE PLEA COURT FAILED TO ADVISE PETITIONER OF THE FULL CONSEQUENCES OF HIS PLEA?

ISSUE (D) WAS PETITIONER DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WHEN COUNSEL AND THE PLEA COURT FAILED TO APPRISE PETITIONER OF THE MANDATES OF S.C. CODE ANN. §24-21-560(D), WHICH RESULTS IN DOUBLE SENTENCING AND THUS RENDERING PETITIONER'S PLEA AND SENTENCE UNCONSTITUTIONAL?

TO SAVE THE COURT'S TIME PETITIONER WILL ADDRESS THESE ISSUES TOGETHER SINCE THE FACTS OF ONE ENCOMPASS THE OTHER.

FACTS

As was noted in issue (A) Petitioner ultimately plead guilty to murder and assault and battery with intent to kill. Petitioner was sentenced to 37 years for the homicide and an additional 20 years for the assault and battery with intent to kill.

Yet, a stringent review of the plea colloguy reveals that Petitioner was never apprised of the consequences of his plea by either the Court or Counsel.

DISCUSSION

In order for a defendant to knowingly and voluntarily plead guilty, he [must] have a full understanding of the consequences of his plea. Hinson v. State 297 S.C. 456, 377 S.E.2d 338 (1989); State v. Hazel 275 S.C. 392, 271 S.E.2d 602 (1980); Dover v. State 304 S.C. 433, 405 S.E.2d 391 (1991). In the case at bar the record is conclusive that neither Counsel nor the plea Court advised Petitioner of the mandates of S.C. Code Ann. §24-21-560 and that Petitioner could actually end up serving (74) seventy-four years in prison instead of the (37) thirty-seven years that was handed down by the Court.

A defendant's understanding of his plea includes the comprehension of the scope of the possibilities that might be issued in the case. United States v. Griffin 641 F.Supp. 1546 (1986); Williams v. Doughlin 664 F.Supp. 655 (1987); Iasea v. Samm 800 F.2d 861 (9thCir); Fixel v. Slanksky 648 F.Supp. 1139 (1986). Thus Petitioner's plea was given involuntarily and in violation of the mandates of Boykin v. Alabama 395 U.S. 238 (1969), because Petitioner was not fully apprised of the sentencing consequences thereof.

Moreover, and to cement Petitioner's claim that Counsel and the Court were unfamiliar with the mandates of S.C. Code Ann. §24-21-560, with the law under which Petitioner was sentenced. A [sentence] cannot be truly given unless Counsel and most of all, the Court possess a full understanding of the law. Nevertheless, the records are conclusive and the record speaks for itself, and

what is proven cannot be denied.

In Bailey v. U.S. 116 S.Ct. 501 (1995), the Court held "the involuntary nature...constitutes a fundamental defect in his conviction which inherently results in a complete miscarriage of justice. Also see Abrue v. U.S. 911 F.Supp. 203, 208 (quoting Hill v. U.S. 82 S.Ct. 468, 471 (1962).

In addition the Seventh Circuit has held that the failure to inform a defendant of a mandatory parole term is a violation of due process,' implicitly recognizing it to be a "direct consequence" rather than a collateral consequence of the plea. U.S. ex rel Baker v. Finkerbeiner 551 F.2d 180, U.S. ex rel Johnson v. DeRobertis 718 F.2d 209, 210-211. In the instant case Counsel nor the Court advise Petitioner that he [must] serve additional time pursuant to a Community Supervision Program.

Now, lets go straight to the heart of Petitioner's claim. The sentence imposed by the Court was imposed under a statute that is unconstitutional. In essence, an unconstitutional law is no law and a conviction under it is not merely erroneous, but it's illegal and void, and cannot be legal cause of imprisonment. Ex parte Hollman 79 S.C. 9, 60 S.E. 19 (1908).

The crux is in 1996, the legislatures enacted S.C. Code Ann. §24-21-560, which is to be read in conjunction with S.C. Code Ann. §24-13-100 "no parole offenses". Both are penal and should be construed strictly against the State and in favor of the defendant. State v. Blackmon 403 S.E.2d 660 (1991).

Regardless of the ultrasophisticated terminology used in

§24-21-560, section (D) clearly contains a latent defect that is undubitably double sentencing, Section (D) states in pertinent part...."The maximum aggregate amount of time the prisoner may be required to serve...may not exceed the length of incarceration imposed for the original no parole offense.

Therefore, this Court, must look to §24-21-560(E) to digest the full scope of the statutory scheme. §§(E) reads: "a prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence.

So Petitioner's contentions are two fold, in such that he was not advised of the 2 year community supervision program nor was he advised of the fact he could actually serve the actual amount of the original sentence again. The Fifth Amendment guarantee, is enforceable against the States through the Fourteenth Amendment of the United States Constitution, and protects against [multiple punishments] for the same offense. North Carolina v. Pearce 395 U.S. 711, 89 S.Ct. 2072 (1969). The double jeopardy clause also prohibits increase in Petitioner's sentence when legitimate expectation of finality has attached to the sentence. United States v. Difrancesco 101 S.Ct. 426 (1980). It is also fundamental common law as well as constitutional rights of Petitioner against the peril of [double punishment]. A guilty plea does not waive constitutional claims...reagrdless of guilt. Pearce Id.

Indeed the record is conclusive that Petitioner did not have a full understanding of the consequences of plea, and was further denied the effective assistance of counsel as guaranteed by the Sixth Amendment, simply because Counsel failed to research the law in which Petitioner was sentenced under. South Carolina Code Ann. §24-21-560(D), when read in conjunction with §24-21-560(E) is clearly a latent defect amounting to double sentencing that is strictly prohibited by the Fifth Amendment of the United States Constitution.

It sometimes happens that a plea which seems "prima facie" just nevertheless, is injurious and unequal. The precise issue now before the Court.

Petitioner contends that he was denied the effective assistance of counsel when Counsel failed to advise Petitioner of the consequences of his plea, and further the prejudice incurred is coupled by the fact that Counsel didn't object when the Court didn't explain the consequences to Petitioner.

This conclusion is consistent with common sense. For it would be an astounding proposition if the State of South Carolina could benefit from a complete denial of specific provisions of the United States Constitution. In short, the South Carolina Legislator's enacted a mechanism and standard intended to deceitfully gain double mileage from one conviction. Surely, when there is a conflict between a statute and the Constitution...."The Constitution overrides. Anton v. S.C. Coastal Council 469 S.E.2d 604 (S.C.1996).

Petitioner respectfully asks this Honorable Court to grant the requested relief of the granting of a new trial. For this relief Petitioner will forever pray.

58 60

IN THE STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

DEVON M. FORD #312731) CA/No. 08-CP-42-0395
PETITIONER,)
-V-)
STATE OF SOUTH CAROLINA; and) **CERTIFICATE OF SERVICE**
ATTORNEY GENERAL, HENRY McMASTER)
RESPONDENT.)
)

I, Devon Ford, do hereby swear under that penalty of perjury that the original and (1) one copy of the enclosed amended post conviction relief application and memorandum of law is support were placed in a properly addressed, sufficient postage affixed envelope and placed in the U.S. Mail and mailed to the Clerk of Court for Spartanburg County, P.O. BOx 3483, Spartanburg, SC. 29304-3483. I further state that a copy of the aforesaid was also mailed to the Respondent, Attorney General, Henry McMaster, P.O. Box 11549, Columbia, SC. 29211.

Respectfully Submitted,
/s/ Devon Ford
Devon Ford #312731

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 5 DAY OF July, 2008
Ronald W Berry
NOTARY PUBLIC
MY COMM. EXPIRES 5 Apr. 2016

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

STATE OF SOUTH CAROLINA)
)
-vs-)
) TRANSCRIPT OF RECORD
Censored) Censored
)
Defendant.)

49 USC 1144(5)

November 15, 1999
Lexington, South Carolina

B E F O R E:

HONORABLE WILLIAM P. KEESLEY, Judge.

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

TRACEY L. CARROLL, Deputy Solicitor
Attorney for the State

SALLY J. HENRY, Assist. Public Defender
Attorney for the Defendant

L. COCONUT PANTSARI, R.P.R.
Circuit Court Reporter

(EXHIBIT "A")

That means that under that law, you cannot be released sooner than 85 percent of the time that you are sentenced to serve. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

THE COURT: That's no guarantee you get out in 85 percent. That's just the soonest you could get out. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, with no-parole offenses, they added a provision that requires supervision when you come out. So when somebody is released on a no-parole offense, they automatically come out on a two-year period of supervision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if you violate the terms of the supervision, you can be punished a year in prison just for violating supervision. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Now, the way they wrote that law, it provides that you can serve up to the original amount of the sentence again just in probation or supervision violations if you continue to violate the terms of supervision.

So I don't know if y'all have worked out anything on this case or not. It says without negotiations. But just to use round figures, if I gave you a ten-year sentence and you got out in eight and a half, and you violated the terms of the supervision, you can be made to go back and do the one and a half left on the ten, plus a year.

THE DEFENDANT: Yes, sir.

THE COURT: When you get out then, you come out on supervision. If you mess up, you can do a year on that. So you could actually do up to 20 years if you had a ten-year sentence. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that this conviction will Censored

THE DEFENDANT: Yes, sir.

THE COURT: Censored and if you don't do that, you can be put in prison for that. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Are you okay? Do you need some time?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Why don't you have a seat.

MS. HENRY: Thank you, Your Honor.

(Whereupon there was a recess in the proceedings, and no further proceedings were reported.)

*** END OF REQUESTED TRANSCRIPT OF RECORD ***

C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal, in the Criminal Court for Lexington, South Carolina on the 15th day of November, 1999.

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

February 21, 2003

L. Coconut Pantsari

Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
	2008-CP-42-0395
Devon M. Ford, # 312731, Applicant, v. State of South Carolina, Respondent.	RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 24, 2008, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted during the August 2005 term of the Spartanburg Grand Jury for Murder (05-GS-42-3376) and Assault and Battery with Intent to Kill (05-GS-42-3377). He was represented by J. Michael Bartosh, Esquire. On December 5, 2005, the Applicant pled guilty to the indicted charges. He was sentenced by the Honorable Doyet A. Early, III, to a confinement for a period of thirty-seven (37) years for Murder and twenty (20) years for ABWIK. The sentences were to be served concurrently.

A timely notice of appeal was filed on the Applicant's and a brief pursuant to Anders v. California, 386 US 738 (1967). The Court of Appeals affirmed the conviction on September 17, 2007 (State v. Ford, 07-UP-365). The remittitur was issued on October 3, 2007.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the guilty plea

transcript, and the records from the Applicant's direct appeal.

II.

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

1. Ineffective assistance of counsel;
2. Conflict of Interest; and
3. Involuntary guilty plea.

III.

Respondent interprets the second allegation as ineffective assistance of counsel as well. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance

must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

S. PRENTISS COUNTS
Assistant Attorney General

By: Charles A. McLellan for
ATTORNEYS FOR RESPONDENT

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

Apr. 9th, 2008.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Devon M. Ford, Applicant, vs. State of South Carolina, Respondent.	2008-CP-42-0395 **AFFIDAVIT OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return of the Respondent in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

David C. Alford, Esquire
David C. Alford, PC
Post Office Box 6326
Spartanburg, South Carolina 29304

Anne A. Mueller
Legal Assistant for the Respondent

DATED this 9th day of April, 2008.

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF SPARTANBURG)

DEVON FORD,) TRANSCRIPT
) OF
APPLICANT,) RECORD
)
vs.) 08-CP-42-0395
)
STATE OF SOUTH CAROLINA)
)
RESPONDENT.)

September 18th, 2008
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

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

DAVID ALFORD
ESQ.
Attorney for the Applicant

MICHELLE J. PARSONS
ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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P R O C E E D I N G S

THE COURT: All right. You may call the next case.

MS. PARSONS: Sorry, Your Honor.

The State calls Devon Ford, 2008-CP-42-0395. Mr. Ford was indicted in August of 2005 in Spartanburg County for murder and assault and battery with intent to kill. He was represented by Mike Bartosh who is since deceased. For -- December 2000, 5th, 2005, he pled guilty to the indicted charges.

He was sentenced to 37 years for murder and 20 years for ABWIK. They were set to be served concurrently. An Anders brief was filed on his behalf. The Court of Appeals affirmed his conviction, and the remittitur was issued on October 3rd, 2007.

MR. ALFORD: Thank you, Your Honor.

As a preliminary matter, I'd like to file a motion for a continuance. As I understand the situation, this case was scheduled previously this week. Due to my trial -- it was suppose to go Monday. We, we first continued all these and then we reset them for today.

THE COURT: Yes, sir.

MR. ALFORD: As I understand, talking to my client, that he was told I think yesterday to be prepared to come up. Normally they are given adequate time and notice that

they're gonna be coming up for PCR. Because of that, there's, you know, various stuff he wanted to be able to bring. Possibly two additional witnesses to get word to me, which I understand were in a message to my office from yesterday, which I haven't been in my office about five minutes since yesterday afternoon. We do have his mother here.

But because of the nature of the rescheduling and the adequate time to make sure that he had all his stuff with him, he feels he's prejudiced cause he has some notes he wanted to make sure that he was able to submit to the Court. He has put together a pretty extensive communication to me of what we want. And I understand he would want to add, you know, maybe his notes that he is looking at.

And on that basis, I would request a continuance so that he would be properly prepared in terms of, of notice to come up for today or for the next hearing.

THE COURT: Well, now, be sure I understand you, he's, he's -- he feels like there's some information he should of brought with him?

MR. ALFORD: As I understand it, yes, sir.

THE COURT: And there's two witnesses he wanted to call?

MR. ALFORD: In, in addition to his mother. He got -- we got word to his mother. He got word to his mother.

There's a brother and sister he wanted to call.

THE COURT: Where are they located?

MR. ALFORD: That I don't know, Your Honor. I will, I will, I will submit to the Court that he, supposedly yesterday in a phone call, and I believe, I believe him, that they'll be a message for me in the office to try and request them to come. Mother got the word and apparently came. But he also had some papers or some documents that he wanted to bring that were his notes.

THE COURT: Now, can you tell me what, a little bit about what these witnesses might be testifying to?

If I -- if you're wanting me to continue the case, I need to find out if they are material or necessary---

MR. ALFORD: Well---

THE COURT: ---or we can proceed with the hearing today and leave the record open to receive additional testimony at a later time. So, I'm trying to figure out exactly what we're talking about as far as these witnesses are concerned.

MR. ALFORD: Okay. And Your Honor, I'll submit to the Court that the, the existence of these witnesses is -- I've, I've just learned of them. So, the, the brother/sister, Selena Mills and a Mark Ford, were apparently at the scene and can---

THE COURT: Scene of the crime?

MR. ALFORD: Scene of the crime. Well, they were at

the scene of the crime.

Now, in terms of an ineffective assistance of counsel, if I understand it, and I, and I may be misspeaking here, is that at the day of the trial one of the testimonies is gonna be is, is they weren't called -- in other words, at the, the trial that he was---

THE COURT: Well, this was an Alford plea.

MR. ALFORD: Okay.

THE COURT: I just looked at the transcript.

MR. ALFORD: Right. But he's saying that, that, at that time, that Mr. Bartosh was not prepared, did not have witnesses that, you know, could of helped him at the trial, and, and I'm assuming that these two individuals would have been witnesses at the trial and apparently were not called.

THE COURT: Well, there was no trial.

MR. ALFORD: There was no trial. I understand that.

THE COURT: You know, at a, at a guilty plea, the only witnesses that a person, or a, even an Alford plea, that a defendant is allowed to produce are people who wish to speak in mitigation for sentencing. They don't speak as to whether or not he should or shouldn't offer a plea. So, I'm just trying to find out what these people are gonna be speaking as to.

APPLICANT: May I speak?

THE COURT: Talk to your lawyer, sir.

(Pause.)

MR. ALFORD: Part of the issue we're raising is Mr. Bartosh not being prepared for trial, had not interviewed these two persons as potential witnesses. And because they had not, he felt prejudice that they would of gone to trial if he had known he had witnesses I guess to corroborate or support his story. One of the issues is, is that apparently Mr. Bartosh never interviewed or talked to these, these two family members.

THE COURT: And you're saying they would offer some testimony as to his guilt or innocence of the crime?

MR. ALFORD: Well, I guess it would be obviously for the innocence of him.

THE COURT: Well, now, did this plea take place on the eve of trial?

So, the case had been called for -- I'm gonna ask the State now.

You reviewed the file, Ms., Ms. Pearson---

MS. PARSONS: Parsons.

THE COURT: Excuse me. Parsons.

MS. PARSONS: I have reviewed the file. I'm not sure if they -- you're right. They did have a jury ready, yes, sir.

THE COURT: Okay. All right. What's the State's position as far as the continuance is concerned?

MS. PARSONS: The State's position is that this case has been on the roster for a long time. It wasn't continued until very late last week, and then it almost immediately was put back on the schedule when we began discussing it, putting it on today, on Monday. So, we're talking about a period of a few days when it was taken off of the schedule.

I think maybe it was continued Thursday or Friday with discussions of putting it back on on Monday. I notified SCDC that they were coming on Tuesday. Today's Thursday. I'm thinking he had plenty of time to identify to his attorney about his intent to bring his witnesses.

We're here today. We have members of the victim's family here today. We're set to go forward. He hasn't shown that these witnesses are material, and, furthermore, he had time to notify his attorney and failed to do so.

THE COURT: Anything further, Mr. Alford?

MR. ALFORD: I'm instructed that my client says he wants to proceed anyways, Your Honor.

THE COURT: Is that true, sir?

APPLICANT: The reason why I just told him that, I said we can go ahead and proceed if you want to. If you don't want to give me no continuance, we'll go ahead and proceed. That's what I just told him.

THE COURT: Well, sir, I hadn't made a ruling on the continuance. If you wish to proceed, I will proceed.

APPLICANT: No, sir, I would like the continuance so I can be better prepared for this because they came and got me on short notice. On Wednesday, they just came and rushed me up out the dorm to come to Court and I wasn't prepared. I forgot my documents I wanted to present to the Court right now today. And this -- and then at SCDC, we don't have no phones where like we can call or whatever collect like the county. We have to be on my telephone sheet so I can contact them to notify him of this and contact my witnesses.

Your Honor, that's the reason why he didn't have no witnesses on the stand. This is my first time talking to him since --.

THE COURT: When's the first time you talked to him, Mr. Alford?

MR. ALFORD: Well, we've been communicating. We came up -- I know they were suppose to be over here one time before. We filed two, we filed two amendments to the PCR.

THE COURT: All right. I'd ask the attorneys to approach briefly.

(Whereupon, a bench conference was held at this time.)

THE COURT: All right. I inquired of the attorneys as to whether or not a, a continuance had been granted in this case earlier. I've asked them to put on the record their responses.

Is that a correct statement of our bench conference,

Mr. Alford?

MR. ALFORD: Yes, sir.

THE COURT: And Ms. Parsons, Ms. Parsons, you had some information you shared with the Court. I ask you to put it on the record at this time.

MS. PARSONS: Thank you, Your Honor.

The State would submit that there has been one prior continuance in this case. Additionally, the applicant has been in communication with his attorney as evidenced by two amended applications. Further, I would say that the applicant has not demonstrated sufficiently that he would have been prepared had this case gone forward on Monday on its scheduled time since he had not communicated up until Monday his intent to call these witnesses. So, I don't think the scheduling change has been a factor here.

THE COURT: Mr. Alford.

MR. ALFORD: Well, I'll stick with where I was before, Your Honor. I understand that and I can't explain that except for the fact it was a quick rescheduling. They pulled him out and there are some documents that he informed me that he wanted us to be able to---

THE COURT: All right. I'm gonna deny the continuance.

You may call your first witness, Mr. Alford.

MR. ALFORD: Thank you, Your Honor.

I'll call Mr. Devon Ford.

THE COURT: Come forward to be sworn, sir.

DEVON FORD, being first duly sworn, testified as follows:

THE COURT: Have a seat in the witness stand please, sir, and if you would, please state your name for the record.

WITNESS: Devon Ford.

THE COURT: Mr. Alford, it's your witness.

MR. ALFORD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mr. Ford, who was your attorney in this case?

A Mr., Mr. Mike Bartosh.

Q Okay. And you've -- if your -- you should have -- and I apologize, Your Honor. I probably should of just made sure. I had a second amended petition for post-conviction relief. I wanted to make sure that we had that.

THE COURT: I'll -- if I don't have it I'll let you know.

You may proceed.

MR. ALFORD: Thank you, Your Honor.

Q Mr. Ford, in that, you had several issues you've raised arguing ineffective assistance of counsel.

The first one I'd like to talk about is, as I understand it, you were sentenced to 37 years.

A Yes, sir.
Q Can you explain to the Court the issue you have with that?
A Well, if I'm not mistaken, which I had the, the murder statute right here, right here on 16-3-20, the, the conviction for murder, it states a person who's convicted or pleads guilty to murder must be punished by death, by death, by imprisonment for life, or the mandatory minimum term of 30 years.
Q Okay. And if I understand it right, your issue is the sentence of 37 years would be in contravention to what's allowed under the statute?
It should of been 30 years?
A Yes, sir.
Q Okay. And we'll, and we'll get to that.
Now, the -- for the record, Your Honor, the transcript, if it's in, the page, as well as Page 25, Page 25 of the transcript, I can turn it in as an exhibit, but -- and, and as shown on the sentencing, the indictment for murder, Sentence of the Court is you're committed for a period of 37 years. The, the assault and battery was a period of 20 years. It runs concurrently.
The issue is, and I'll sort of make this argument later, but I just want to, since we didn't really have opening, the first issue deals with the constitutionality of

that statute, and that's raised a certain Issue A of the PCR.

Following your, your plea, did your attorney object to the imposition of 37 years, Mr. Ford?

A No, sir.

Q Okay.

A Mr. Alford, may I ask you a question please?

Q (Nods affirmatively.)

A Can I go ahead and present my three issues that I have on the, on my PCR conflict starting with the conflict of interest?

THE COURT: Let him go.

MR. ALFORD: Thank you, Your Honor.

Q Please proceed, Mr. Ford.

THE COURT: Yes, sir.

A All right. Your Honor, on the day that -- while I was in the county jail, starting from December of '04, I had an attorney named Christopher Brough. Christopher Brough was on my case from December I think 7th to August 17th. I was having plenty of problems with him not coming to see me, not being in contact with me, not doing anything to help me with my case.

So, I had wrote some people in Columbia or whatnot, and I had asked them can they relieve this man's counsel on my case. So, on August 17th, which is, here's a copy of the

transcript right here for an exhibit, I went in front of judge -- excuse me. I had all my stuff written down, but I forgot it at the county.

I went in front of Judge Mark Hayes August 17th of 2005, and I had stated everything to him about what Mr. Brough was doing.

Now, from what I read in the law books, Procedure S-22, it states if your counsel has been relieved or you have any problems with counsel, that no other attorney from that law firm may be prohibited to be on your case. So, that's why I'm stating my conflict is my first issue for conflict of interest, and here's my copy of the transcript.

THE COURT: Mr. Alford, do you want to get that---

MR. ALFORD: Yes, sir.

THE COURT: ---and make that a part of the record?

MR. ALFORD: Yes, sir, I will.

This is a copy of the---

THE COURT: Just one second. Show it to the -- have you seen this, ma'am?

MS. PARSONS: No, I haven't seen this.

Your Honor, I have no objection. I would just ask for a copy to be given at some point for our files.

THE COURT: All right.

WITNESS: I've got another of it for you if you need it.

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MS. PARSONS: Thank you.

THE COURT: That will be marked as Applicant's Exhibit No. 1.

MR. ALFORD: And for the record, Your Honor, this is Transcript of Record August 17th, 2005, before the Honorable J. Mark Hayes.

(Whereupon, the transcript was marked as Applicant's Exhibit No. 1 and received into evidence at this time.)

WITNESS: All right. May I start my next issue?

THE COURT: Pass that up to me.

Thank you, sir.

Go ahead.

A All right. Starting on my conflict, on my ineffective assistance of counsel issue -- I'm sorry.

THE COURT: That's all right.

Go ahead.

A I been stuttering a lot.

Mr. Bartosh is, was on my case from August 17th to December 5th, which is three months and five days while he was on my case. During that whole three months and five days Mr. Bartosh failed to come see me except for like three times. He failed to communicate with me, failed to, to appear upon blank do anything for me till like three, three days, I'm gonna say three times right before trial.

Now, the whole time while I was asking Mr. Bartosh to

come see me I was writing him numerous letters asking can you please come see me.

THE COURT: Now, any time during that period of time were you objecting to Mr. Bartosh representing you?

WITNESS: Was I objecting?

THE COURT: Yes, sir.

WITNESS: Did I---

THE COURT: Did you file a motion with the Court to have him relieved---

WITNESS: Your Honor?

THE COURT: ---during that period of time that you were meeting with him?

WITNESS: Oh, no, sir.

THE COURT: All right. Go ahead. I'm listening.

A Okay. Now, while we was -- while he was on my case or whatever, I kept asking him can you present certain evidence for me as in my witnesses and other evidence that I kept asking him to please represent for me.

Now, as we going onto the, to this case, and on February, in February 2000, 2000, February, February 9th, 2007, I wrote SLED on the Freedom of Information Act, present this as evidence as well, asking, asking for my ballistics test with my pistol.

Now, SLED wrote me back February 26th, 2007, 2007, stating that my pistol is not a match to the victim's body.

Now, the whole time I kept asking Mr. Bartosh can he get my ballistics test for me. He kept telling me they did not have them, they did not have them, they were not ready.

So, that was one part of the reason why I pled guilty because I didn't see no -- I didn't have no evidence or seen this man was trying to help me. And then in April, on April the 6th, 2006, while I was in SCDC, some more evidence came up where the victim did not have no gunshot residue on her shirt cause the prosecution is stating that I ran to the car and shot the person in point blank range, which I'm gonna put these, both these in for Court Exhibits.

Now, the way that the, the way the victim got shot and killed, she was in the passenger side of the vehicle, and I have the, the exhibit, you know what I'm saying, from looking at the, looking over my cases this whole three years I been down. The driver of the vehicle, which is my codefendant, Kim Terrance Lilly, the way she got shot was in a downward area. They was in a Maxima. The car we was in was in a Suburban. Now, a Suburban sits higher than a Maxima.

The way the victim got shot was in a downward area showing that she got shot from the driver's door, and apparently, and the evidence is showing that the real killer is on the street and that Mr. Bartosh would of properly, in investigating my case, he would of seen that, that I did not

commit this crime, Your Honor.

Q All right. Let me stop and get these marked. We've got, we've got three exhibits, which is your Freedom of -- your FOI request. You've got your -- let's see. These would be different. One is firearms ballistic and one is the trace evidence. If we could mark these as Petitioner's 2, 3, and 4, Your Honor.

MS. PARSONS: Your Honor, may I see them before they're marked?

THE COURT: You may.

(Whereupon, the Freedom of Information request was marked as Applicant's Exhibit No. 2. Two SLED reports were marked as Applicant's Exhibit Nos. 3 and 4. The above exhibits were received into evidence at this time.)

Q Have you talked about that yet?

A It's just a copy of a piece of paper where I wrote to SLED.

Q Okay.

A You can put that in evidence as well if you want to.

Q Yeah, I think you've testified that you received this.

May we continue, Your Honor?

THE COURT: Yes, you may.

Q Mr. Ford.

A And I continue, as if you look on my Transcript Page 6, Lines 21, 22, when I asked the judge, the judge -- they

asked me was there anything that I don't understand. When I said about the day for day thing, about some evidence that we're not able to bring up, this was evidence I was stating the whole time about my pistol.

And as we go on, as I been down, I wrote the South Carolina Offices of, Office of Indigent Defense, the South Carolina Office of Indigent Defense asking them what all did Mr. Bartosh do for me as in what everything he did or whatnot, and they sent me a letter stating that my attorney did not submit no time sheet on -- they only provided funds for expert witness, which I did not see no expert witness nor hear anything about no expert witness.

Now, to me getting into, coming in with the conflict of interest, I feel that if it wasn't for the conflict of interest, that Judge Early would not have put this man on my case. He would of properly tried to help me, which I feel I was---

THE COURT: Now, Judge Hayes put him on your case.

WITNESS: I mean -- I'm sorry. Hayes. I'm, I'm tongue tied. I'm sorry.

THE COURT: Go ahead.

A Judge Hayes would of not put Mr. Bartosh on my case, I feel he would of properly investigated for me. But for the, the people that I wrote, it was making his, his employees look bad and him as well. So, I feel if he wouldn't of put

this man on my case, which prejudiced me, I would of had a fair trial, and just I feel I was prejudiced in the field -- and I -- excuse me.

The reason why I say I'm prejudiced because if Mr. Bartosh would of properly investigated my case I would of had a fair trial and I feel I was prejudiced if Judge, that was Mr. Hayes, right?

Hayes did not have put him on my case, I would of had a fair trial, and I'd like to put this in evidence as well from South Carolina Office of Indigent Defense where they wrote me.

THE COURT: Any objection?

MS. PARSONS: No objection, Your Honor. I'd, again, just like a copy.

THE COURT: It will be received as marked, and be marked.

(Whereupon, the letter was marked as Applicant's Exhibit No. 5 and received into evidence at this time.)

A Here you go, Mr. Alford, the exhibit that I, how the victim got shot in the downward area as well. Put it in evidence.

(Whereupon, the diagram was marked as Applicant's Exhibit No. 6 and received into evidence at this time.)

A Mr. Alford?

Q Yes.

A Can I see you for a minute please?

MR. ALFORD: May he, Your Honor?

THE COURT: Yes, sir.

(Pause.)

MS. PARSONS: Your Honor, again, before we go any further, I'd like to get those copies.

MR. ALFORD: I, I didn't hear that, Your Honor.

THE COURT: You would like to see the copies?

MS. PARSONS: Yeah, do you mind, before we continue just so I can be looking at them?

MR. ALFORD: Yeah, I'm sorry. Please the Court.

WITNESS: Can you find that other envelope for me too please?

THE COURT: We have a copying machine if you'd like to make some copies.

MR. ALFORD: May have to, Your Honor. I had a stack of them. I had three sets.

THE COURT: All right. What do you wish to have copies of?

MS. PARSONS: The SLED reports.

WITNESS: I got some for you if you need it I believe.

THE COURT: Mr. Bartosh -- I mean -- Mr. Bartosh.

Mr. Alford?

MR. ALFORD: Yes, sir.

THE COURT: See what's, see what he's got copies of.

MR. ALFORD: All right.

(Pause.)

MR. ALFORD: Your Honor, may we proceed?

THE COURT: Uh-huh. (Affirmative).

Did you produce copies for her?

MR. ALFORD: Yeah, I think the only one that I think we're short.

MS. PARSONS: This will suffice at this point.

THE COURT: You're okay?

MS. PARSONS: Yes, sir.

THE COURT: All right. She's okay.

WITNESS: May I say something to my lawyer please before---

MR. ALFORD: Oh.

(Pause.)

A For my third, for my third issue, Your Honor, I'm raising counsel misled me on my plea as well. If we go to the Transcript Page 13, Lines from 8 to 12, the Court asked me are you satisfied with the representation provided by Mr. Bartosh, and Mr. Bartosh asked me again are you satisfied with my representation, and I stated no on the record.

Now, we went to stand -- the judge stated that we was going to go to trial at 2:15 and draw the jury. He said he was not gonna take no plea anymore after that.

Now, the whole time during, on break, when we stepped out of the conference room, Mr. Bartosh kept saying -- I kept saying I'm going to trial, I'm going to trial, I don't care if you don't have evidence or what. I'm not pleading to no 37 years. I'm not pleading to no 30 years to something I did not do. I kept telling him I'm not pleading to something I'm not gonna do.

So, he tell me I'll get you five years for involuntary manslaughter and five years for ABWIK, would I plead guilty. So, I tell him to go ask my mother if she thinks should I plead to five years for involuntary manslaughter and five years for ABWIK. So, my mother tells me go ahead and do it. It'd be the best thing. I'll be home in no time.

So, I comes back in after the break or whatnot like an hour or so later and continue the plea. As in -- as we continued the plea, and you can go look on -- my whole intentions was coming back to get five years for involuntary manslaughter and five years for ABWIK. So, my whole intentions was that's the only thing I know I'm coming back to plead to.

So, we're going on the transcript, on Page 14, starting from Lines 13 to 25, the Court asked me is there anything else you would want him to do other than speak up on your behalf before we proceed today, and I say anything else you want me to do. He said other than speak up on your behalf.

And I told the judge he already done did it. The Court said what's that, you know, you got to tell me. And on Lines 23, 25, I'm told -- I'm talking about the things that he told me that he was gonna say. I don't know. I know the things that he say he was gonna say, and the whole time I was sitting there talking about the five years for ABWIK and the five years from involuntary manslaughter.

As we go on through, go on through the plea, he's -- they talking, and the solicitor talking, everybody keep talking. So, my whole mind intention is I'm gonna be getting five years for involuntary manslaughter and five years for ABWIK.

Now, as we, as we go to Page 21, Lines, Lines 14, Lines 14 through 16, the Court asking Mr. Ford, is there anything you want to tell me, anything you want to tell me, and I stated Mr. Bartosh gonna take care of it for me, Your Honor. So, the judge said, on Line 18, Mr. Bartosh will take care of it for you, and I stated to him, on Lines 19 through 23, the only thing I'd like to say, Your Honor, is that I have a 16 month old child out there right now. And from what Mr. Bartosh stood here and told me that, that, that North Carolina plea -- what's that called, Your Honor?

The whole time while we went on break and we went on trial I kept asking him certain questions because I did not understand nothing about this plea. That's why I asked

earlier as I put it on the record, on Page 6, about the, the day for day thing. On Page 6, Lines 21, 22, about the day for day thing, about the evidence we ain't bring up, and I'm asking about this North Carolina plea. The only thing Mr. Bartosh was sitting up there just giving me the run around telling me okay, the North Carolina plea on day for day and then coming back telling me I'm gonna get five years for involuntary manslaughter leaving me straight confused the whole time.

So, that's why I was asking the judge questions. And then, as we go back, that's why I stated on the, on the record earlier I was not happy with this man representation thinking the judge gonna take this man off my case because what I was period point showing, this man is not trying to help me. Three months and five days is not enough time to prepare for no murder, murder trial.

So, as we go on, as we go on through the transcript, the -- well, I'm going to go to line -- I'm going to go to page, I'm going to go to Page 23. Well, you know you going to jail for a long time. I don't have the -- the judge say well, you know you going to jail for a long time. I don't have any choice unless you consider 30 years a short time.

So, as we -- I'm, I'm -- when he saying 30 years, I'm thinking in my mind why is this man sitting up here telling me I'm 30 years. So, as -- on page -- we go on down. I ask

the judge can I ask him a question, and then the judge was like ask him whatever -- ask him, on Line 17, ask him whatever you want to ask him, and I asked Mr. Bartosh I say why this man sitting up here talking about 30 years and you just tell me I'm about to get five years for involuntary manslaughter or five years, and five years for ABWIK.

So, he telling me just be easy. Everything is still going as fine. Everything still gonna go as planned. So, I said all right. We kept proceeding. And then we -- as we going to the Page 24, the judge kept on saying you, you may walk home tonight, you may go to jail for whatever. I'm giving you now or more. I don't know what, what happened.

THE COURT: That had to do with the jury trial?

WITNESS: That's still, still talking about the jury trial because the whole time the judge kept looking at me seeing I didn't want to proceed with this plea cause I kept -- me and Bartosh kept arguing the whole time. So, he keep asking he like do you want to take a plea, do you want to, do you want to take this trial. We got that trial sitting here waiting on you. The judge, as you can see in the whole transcript, the judge keeps saying -- and then we go back to Page 22, Line 19, the judge say they ain't no sense in the pleading if you're going to appeal. Why argue -- why don't you do -- you don't have to do this. I'll back out of it right now. We'll let a jury decide if

you're guilty or not.

So, the whole reason why I'm kept continuing I'm gonna plead because the man kept telling me I'm gonna get five years for assault and battery with intent to kill and five years for ABWIK. So, as we go on to Page 24, I'm thinking when they, when the Court, when the judge stopped and said gentlemen, look here, and asked -- a bench conference was held at this time on Page 24, Lines 13. I'm thinking the whole time they going to talk about this plea with this man telling me what I'm about to go get.

Then next thing, you know, we go to, we go to Line 24 and 25. This is the last chance, what you want to do. I told, I told him we can go ahead with the plea, Your Honor, and this man sit up here and sentenced me to 37 years to the Department of Corrections. And me and Bartosh started arguing at this point in time and then the judge forced all us to get up out the courtroom, till, start saying all type of stuff.

So, my third, my third issue for ineffective assistance of counsel, counsel misled me on my plea. Telling me I was gonna get five years for involuntary manslaughter and five years for ABWIK.

Now, if counsel wouldn't of misled me on my plea I would of proceeded on going to trial. And, again, I'm stating on the record, again, if counsel would of properly

investigated my case, I would of proceeded on going to trial, Your Honor, and my mother right here today to testify on this, on my behalf -- well, Bartosh stated to her as well about me getting five years for involuntary manslaughter and five years for ABWIK.

THE COURT: Anything further, sir?

MR. ALFORD: There is a -- the, the argument that you---

WITNESS: Can I say something to you before you---

(Pause.)

MR. ALFORD: Your Honor, there's a, there's sort of a fourth issue that was raised. It's, it's actually part of the, the argument called Issue D in the amended PCR and that sort of deals with the double sentencing issue. It goes along with the 37 years. Mr. Ford has set out his argument and this goes back to having his notes so that he could coherently explain to the Court his understanding of the double sentencing.

I mean I, I think I can. But in fairness to the Petitioner, we wanted to be able to address his understanding of how that comes about. That is an issue that, that, to me, is, is related back to the sentencing under the---

THE COURT: Whether or not -- you're asking whether or not -- he's raising the issue of whether or not the Court

had the right to sentence him to 37 years?

MR. ALFORD: Well, that's one. And then two, there's a, there's another issue he's raised in his, in his brief, and that's more of a legal argument.

THE COURT: Today would be the day to explain that to me then.

MR. ALFORD: Okay. And, and that's why we had asked for a continuance cause this is where his notes are---

THE COURT: I already ruled on that.

MR. ALFORD: I understand, Your Honor.

Q Okay. Let me hand this to you, Mr. Ford.

Now, as I understand it, you've been sentenced to 37 years. You have the -- go to the last page.

(Pause.)

Q Okay. Put that into the record?

A Yeah.

MR. ALFORD: Okay. Your Honor, for this issue on double sentencing, the Petitioner has asked to make sure that it is in the record. It is attached and included in the, in the amended post-conviction relief starting on Page 7, 8, 9, 10, and 11. I don't, I don't know this is a factual issue. This is more of a legal argument. I could read it. I know Mr. Ford would like me to, but it is in the record.

THE COURT: I'll read it.

MR. ALFORD: Excuse me, Your Honor?
THE COURT: If it's in the petition I'll read it.
MR. ALFORD: It is, it is in the petition included in each of the amended petitions, those pages.
THE COURT: Okay.
MR. ALFORD: I know Mr. Ford wants to make sure that that is before the Court and part of the record, and I think I could -- we can, we can assure him it is as part of the record.
THE COURT: It is.
MR. ALFORD: So -- and that deals with the issue number four.
Q Is there anything else you'd like to---
A The last -- I'd like to present my last argument, involuntary guilty plea, how my plea was involuntary. That's what I'm up to.
Q Okay.
A My opportunity?
THE COURT: You're on the stand.
A My last argument is that my plea was involuntary. To start off, the reason why I say that my plea is involuntary, I was not knowingly that my pistol did not match the victim's body, Your Honor. I was not knowingly that this evidence was being withheld from me. If I was knowingly and had intelligently mind state of knowing this, I would not

have pled guilty to no murder charge cause evidence is appeared and showing that I ain't killed nobody this night, Your Honor.

And to state again, while my plea was involuntary, because I not knowingly I was gonna come in this courtroom December I think 5th knowing I was gonna get 37 years cause counsel misadvised me telling me I was gonna get five years for ABWIK and five years for---

THE COURT: You've, you've covered those grounds already. Let's get on to the---

WITNESS: That's---

THE COURT: ---the new stuff.

A That's why I'm stating that my plea was involuntary, it was an involuntary guilty plea, and it prejudiced me from having a fair trial. If counsel would of proper investigated my case I would of had a fair trial.

THE COURT: Anything else, Mr. Ford?

WITNESS: No, sir.

THE COURT: You may cross-examine -- anything else, Mr. Alford, before we---

MR. ALFORD: No, Your Honor.

THE COURT: You may cross-examine, Ms. Parsons.

MS. PARSONS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. PARSONS:

Q Now, Mr. Ford, do you admit being at the scene?
I know you testified here today about what kind of car you were driving and what kind of car the victim was driving.
A To put on the record, I was not driving. I was a passenger.
Q Okay. So, you were a passenger at the scene?
A Yes, ma'am.
Q And you also admit to carrying a gun?
A Yes, ma'am.
Q Okay. Is one of the reasons that you pled an Alford guilty plea because both the victim that survived and the victim that deceased identified you as the shooter?
A They stated I was. The victim who lived stated in the transcript for my motion for discovery, he stated that he heard the victim say that was me that had shot him. That's why I presented the evidence as well to show everything what the prosecution was stating was negative.
Q Okay. So, when the prosecutor said that the victim gave a dying declaration that you were the shooter, that the surviving victim identified you as the shooter, that the driver of the Suburban identified you as the shooter, do you remember that at trial, I mean at your guilty plea?
Do you remember the solicitor giving those facts?
A Yes, ma'am.

Q Okay. Now, the State's facts, was that one of the reasons you chose to plead guilty, because they were gonna present that at trial?
A May you repeat that one more time please before I make my---
Q Did you plead guilty because the State was gonna present that evidence at trial, that three people at the scene identified you as the shooter?
A The only reason why I pled guilty was because my codefendant and the victim that lived was all against me and that my attorney did not present any evidence to prove otherwise of what the prosecutor was stating.
Q So, you were gonna plead guilty to avoid the testimony of the codefendant and the victim that survived?
A Ma'am?
Q So, you were gonna plead guilty to avoid the testimony of your codefendant and the surviving victim?
A Yes, ma'am, because without the evidence that I needed, which what I finally got from SLED --
Q Okay.
A -- shows that if I without the evidence that I just got from SLED, and with them prosecuting, with them stating that I did this, I kind of figured that they was gonna say, find me guilty of the charges.
Q Okay. Now, do you remember the judge telling you that,

because of the murder charge, he could not give you less than 30 years?

A At that time I was really blind to the fact because the only thing I was thinking about was what Bartosh was saying.

Q But did you hear the judge tell you that?

Do you remember agreeing that you understood that?

A As I recall, yes, ma'am.

Q Okay. So, even though Mr. Bartosh was telling you some things, the judge, who's in charge of the show, told you that he could not give you less than 30 years and you said that you understood that?

A Yes, ma'am.

Q Okay. Do you also recall the judge giving you multiple chances at a trial in front of a jury?

A Yes, ma'am, I remember he kept on stating we can go to trial. But like I kept presenting and all saying, stating, why can't we bring up this evidence. That's the reason why I did not want to go to trial from the beginning because this man would not help me or present the evidence and call my witnesses as well. That's why I was proceeding with the plea because I knew, without this man probably investigating my case nor trying to help me at all, ain't no way I could win cause I seen all odds was against me.

Q Okay. So, you remember giving up your right to a trial by jury?

A Yes, ma'am.
Q Okay. Do you also remember the judge telling you that the only appeal you would have from this will be whether your appeal was knowingly and voluntarily and intelligently made?
A Yes, ma'am.
Q And that you told him that it was all those things?
A Yes, ma'am.
Q Do you remember telling the Court that no one promised you anything in order to get you to plead?
A Where is that at?
Q Page 13, Line 4.
A May you repeat that one more time please?
Q Uh-huh. (Affirmative).
Do you remember telling the Court that no one promised you anything in order to get you to plead?
And if you'll see, Line 7 is your response.
A Yes, ma'am, I remember stating that. That was right before I stated I was not happy with his representation.
Q Okay. But you did tell them that no one had promised you anything?
A Yes, ma'am, because at that time Bartosh hadn't promised me anything. That after I told, after we went to jury -- what's the -- recess.
Q Okay.

A He didn't promise me anything until after recess.
Q Now, after recess, you came back and you told the Court that you were satisfied with his representation.
A Yes, ma'am.
Q Okay. Now, when you are telling the Court that there's something else you want your attorney to handle for you---
A What page are you on?
Q Let me find it. Page 21, Line 19. Well, actually it starts out at 14, Line 14, and the, the judge is asking you if there's anything you want to say.
Do you remember saying my attorney is gonna take care of it for me?
A Yes, ma'am.
Q And then the Court kind of asked you a little bit more about that and he said what are you talking about, and you said the only things I'd like to say are that I have a six month old child---
A Sixteen.
Q Sixteen month old child and that I would like a North Carolina plea.
Do you remember that?
A I asked him what was the North Carolina plea.
Q Okay.
A That's what I asked him.
Q Now, you ended up getting an Alford plea, is that

correct, which means you did not admit guilt in Alford to, the North Carolina v. Alford plea?
A Can you like bring to an understanding of what you're trying to say?
Q Were you able to plead under North Carolina v. Alford?
A Yes, ma'am, I was pleading up under North Carolina versus Alford as I recall.
Q Okay. Now, earlier today, when you gave your testimony, you sort of indicated that that time period when you went back and forth with the judge that we just looked that what you were really meaning to say was that Mr. Bartosh was gonna take care of a five year deal for you?
A Yes, ma'am.
Q Okay. But the record sort of reflects that you were actually talking about an Alford plea, isn't that right?
A Mr. Attorney General --
Q Yes.
A -- the whole, the whole time, just to, to let you know---
Q Uh-huh. (Affirmative).
A -- I was ignorant to what was really going on. Only thing I knew the whole period of time was we just come in here to plead and for what Bartosh had told me. The only thing he reminded me, told me to say was just say yes and state, stay strictly to what the judge wants you to do. So,

the only thing, when I came back in, was just yes, sir, yes, sir, instead of all that stuttering and stuff I was doing ahead of time that you can see during the whole transcript.

Q So, it's your testimony here today that you weren't actually looking for an Alford plea, but that you were talking about a five year deal that you and Mr. Bartosh had discussed?

A Yes, ma'am, that's what I was looking for was that five year, five years for involuntary manslaughter and five years for ABWIK. That's what I was looking for the whole time we came back to plead after recess.

Q Okay. And even though the judge never mentioned it when you were pleading, you still thought that that had somehow been arranged?

A Yes, ma'am, because when they -- from when he told me to ask him whatever I, whatever you want to ask him on Page 23, Lines 17, that's what I asked Bartosh. And from -- and then on Page 24, when they went to the bench conference, on Line 13, that's what my whole understanding I thought what was going on.

Q So, when the judge gave you time to express to him, to tell him what you were thinking Bartosh was gonna do for you, why did you not choose then to talk about the five year deal y'all had talked about?

A Because the whole time I been thinking that is the

judge getting real mad at me during the whole time I told him. I'm not happy with this man's representation. He was leading me no choice in being like okay, you, you don't -- you're gonna plea or we'll go and take a jury trial, and that's why I asked the judge earlier what's up with this evidence that we're not able to bring up.

So, the whole time, while we doing this plea, I felt the judge been against me, Mr. Bartosh been against me, the witnesses been against me, even my codefendant been against me, and, you know, as you can see, when I -- the only trust I had was Bartosh.

Q Okay.

A That's the only trust that I had, and that's the only trust that I been looking for. And then when they went to that bench conference, that's where my whole intentions was because I was nervous and scared at the period of point in time the whole time. That why I was stuttering during my whole transcript. So, that's why I thought what was gonna happen, when he went to the bench conference, everything was going as Bartosh had planned.

Q So, even though you thought it was important to tell the judge about your baby and to tell the judge about the Alford plea, you didn't want to anger him by mentioning the five year deal?

A When the judge asked me that, when I said about my

baby, I was just period point stating -- can we go back to what page that was on?

Q 21.

A All right. When he asked me is there anything that you want to tell me, the only reason why I told him about my child, I was just like being leniency as in asking like for leniency as when I remember pleading to in drug charges one time before they asked me do you have a job or whatnot. I just like, you know, I have a 16 month old child. That's the reason why I stated that, and I wasn't stating about no five years for involuntary manslaughter and five years for ABWIK because the simple fact, like I told the judge, Bartosh would of had everything for me on pages, on Page 14.

Q Okay. No more questions. Thank you.

THE COURT: Redirect?

MR. ALFORD: No, sir.

THE COURT: You may step down.

MR. ALFORD: Like to call Mrs. Avery Waddell to the stand.

THE COURT: Come forward to be sworn.

AVERY WADDELL, being first duly sworn, testified as follows:

THE COURT: Have a seat in the witness stand please. Once seated, state your name for the record.

WITNESS: Avery Waddell.

THE COURT: Mr. Alford, your witness.

MR. ALFORD: Thank you.

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mrs. Waddell, what is your relation to Mr. Ford?

A He's my son.

Q Okay. Were you present on December the 5th, the day of the plea?

A I was at the trial, yes.

Q Okay. Were you present with Mr., when Mr. Bartosh talked with your son?

A No, I wasn't present with him and, when they had their conversation. He talked to me later.

Q Okay. And, and what did he say later?

A He told me that he was gonna try and get the manslaughter charge, involuntary manslaughter charge five years.

Q Okay. And were you able to talk to him after the sentencing to discuss why he didn't get the five years, why he got the 37?

A After the sentencing, we didn't talk about that. What he told me, he said he could do an appeal. He was allowed to do an appeal. And that -- for like a PCR, cause the appeal would probably be turned down. For the PCR, to do ineffective counseling.

Q Okay. Now, you had contacted his office prior to December, correct?
A Yes, I had.
Q How did you contact his office?
A I had wrote a letter and I also got an appointment with him and I went down to talk to him.
Q Okay. Now, you didn't have any facts about the actual incident, did you?
A No.
Q Okay. Did he discuss with you in anyway as to the, what evidence there was?
A No, only thing he said was that he was waiting on the ballistic reports to come back. And each time we went to a bond hearing, that's what the main thing was about, waiting on the ballistics report to come back, which they never did come back before the trial --
Q Okay.
A -- or before the hearing.
Q Is there anything else you can add to the discussions you had with Mr. Bartosh?
A The only thing I can add is that the day of the hearing or the trial, whatever you want to call it, he wasn't prepared when he came to Court. He came to Court -- cause I met him right outside this door here, and he say he was coming in to ask the judge for a continuance. And he had a

doctor's appointment. He left and went to the doctor. The next thing I know, he come back and he said they had called him and ordered him to come back cause they was going on with the trial.

Q Okay. Were there witnesses here?

Do you know what witnesses he had planned to call?

A No.

Q Do you, do you know Selena Mills and Mark Ford?

A Yes.

Q Who are they?

A Devon's sister and brother, half sister and brother.

Q All right. Were they present on December 5th?

A No.

Q Please answer any questions that Ms. Parsons has.

THE COURT: I have no---

THE COURT: Ms. Parsons, your witness.

MS. PARSONS: I have no questions, Your Honor.

THE COURT: You may step down, ma'am.

Applicant wish to call any other witnesses?

MR. ALFORD: No, Your Honor.

THE COURT: State may call its witness.

MS. PARSONS: Thank you, Your Honor.

The State would call Clay Allen.

THE COURT: Mr. Allen, come forward to be sworn.

CLAY ALLEN, being first duly sworn,

testified as follows:

THE COURT: Have a seat in the witness stand please. Once seated, I'd ask that you state your name for the record.

WITNESS: Clay T. Allen.

THE COURT: Ms. Parsons, your witness.

MS. PARSONS: Thank you.

DIRECT EXAMINATION

BY MS. PARSONS:

Q Mr. Allen, you weren't the attorney on this case, were you?

A No, ma'am.

Q Was the attorney Mike Bartosh?

A He was, after Chris Brough, yes, ma'am.

Q Has Mr. Bartosh since deceased?

A Yes.

Q Okay. Do you work in the same office?

A Yes.

Q Okay. From Mr. Bartosh's file, were you able to see any evidence of an investigation into this case?

A There's not a great deal of notes. There are some items of discovery, and there's something in there about, it might of been included in the matter that, that you forwarded to me, about an order authorizing expenditures from Indigent Defense for Don Gurnt, a crime scene expert.

I do not know what, if anything, Mr. Gurnt did cause there's no notes or any reports or anything to that effect.

Q Now, do we know if this is the complete file or is it possible that there were other documents that are just not in the file?

A There -- it is possible there are some other documents not in the file. But this is what we have.

Q Did it appear that Mr. Bartosh was preparing for trial?

A I can't answer that cause there aren't that many notes to the file. Mr. Bartosh was well known to keep a lot of things in his head.

Q Okay. Are there any notes indicating, indicating interviews with anyone?

A No, ma'am.

Q Okay. No further questions.

THE COURT: Mr. Alford, your witness.

MR. ALFORD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. ALFORD:

Q The -- I think your office forwarded me a copy of your file.

A Correct.

Q I didn't see any notes in there either of a hearing. Doesn't seem like you have any preparation of any witnesses.

Have you had any opportunity to review the file in

terms of details?

A While we've been here in, in Court.

Q Okay. So, you're really not prepared to discuss the absence of any ballistics match or --?

A I was looking at that when Mr. Ford testified to that effect, and I did flip through every page in the file that I've got, and I did not see any ballistics information or any SLED reports.

Q All right.

A Now, I was also looking through items that were forwarded to me by Ms. Parsons. There is what I call the solicitor's evidence receipt or whatever, and I noticed that there was some items, it looks like ten pages, were given to Mr., were disclosed to us or picked up in February. They were date stamped apparently according to the receipt 12/2/05. I can't read the date that it was picked up. But it appears that that particular item was filed on December 6th of '05.

Q That would of been the day after the plea?

A Right, it was actually filed. But, you know, I mean it could of been picked up prior to the plea. It's ten pages. I've tried looking at the, these date stamps to see if I can see anything date stamped 12/2/05. I do not see that. So, I can't tell you what that was all about. I mean it is possible that could of been the SLED report. It could have

been something else. I can't, I can't tell you. It's not in the file or it's not in our office file.

Q All right. The -- if your office looks at the question such as the angle of the bullet hole, the matching of the ballistics, the residue on a shirt, that would of been done by a crime scene investigator?

A It's normally -- well, it's normally done by, by SLED. I mean obviously by the time we get crime scene investigators involved, if they're not being able to handle the evidence, they can look at things to tell us, and Don Gurnt especially cause I've talked to him in the past in other cases, and he can look at our files and then he helps us go out to the scene and try to help explain---

Q Okay.

A ---things. They may also, because of experience, he can tell us what's missing and what we can be, as far as evidence or as far as documents that should be present, and tell us to, how to go after that or suggest we need to get this, that, or the other thing.

Q Looking at issues such as the angle of projection, the lack of residue, the lack of or say lack of ballistics match, or maybe the absence of a ballistics test, would that be something that your office would routinely have this expert come in to review?

A Oh, well, yeah, sure or just simply to ask, you know,

what the status is of the ballistics. I mean there is a evidence sheet in here. There was a Tech 9 gun recovered. So, I don't know. I mean --.

Q It would -- if there was an order authorizing the expenditures that you just mentioned --

A Yes.

Q -- though, you don't see anywhere that there was any monies expended?

A I don't. But that may not have made it to the file because, after the case is over, the expert will present his voucher for payment, another order will be issued, and the payment will be made. Normally, if we didn't pay him straight out, then it would be made payable straight by, from the Indigent Defense once they receive the order authorizing the final payment. Now, it's my practice to put the order authorizing that final payment into the file, but I can't speak for Mr. Bartosh.

Q Okay.

THE COURT: The Tech 9 you're referring to---

WITNESS: Yes, sir.

THE COURT: ---I assume that's the Tech 9 referred to in the ballistic test?

WITNESS: That would be my assumption, Your Honor.

THE COURT: Or is that the Tech 9 that was recovered from the defendant?

WITNESS: Somehow, from what I understand, the defendant indicated or led them to or told them where to find a Tech 9, and---

THE COURT: I'll get into that later. You're not -- you -- there's nothing in the file that indicated a Tech 9 was recovered from the defendant or are you aware of that?

WITNESS: I'm not aware that it was actually recovered from the defendant.

THE COURT: All right. Go ahead. Just my curiosity.

WITNESS: Yes, sir.

MR. ALFORD: Nothing further, Your Honor.

THE COURT: Yes, ma'am.

Anything in redirect?

MS. PARSONS: Just one question.

REDIRECT EXAMINATION

BY MS. PARSONS:

Q Mr. Allen, was Mr. Bartosh known not to keep everything he had worked on on a case collected in a file?

A Yes, even after his death we were finding papers and I mean---

Q Okay.

A So, yeah.

Q Thank you.

THE COURT: Any other questions, Mr. Alford, of this witness?

MR. ALFORD: No, Your Honor.

THE COURT: You may step down.

State wish to call any other witnesses?

MS. PARSONS: No, Your Honor.

THE COURT: I do want to clear up the source of this Tech 9, and in the record -- I, I've read the record of the plea. I don't see anything that indicates to me where that -- they didn't get into the evidence in the plea. They just talked about facts alleged.

MR. ALFORD: If I understand---

THE COURT: The documentation in front of me just indicates that they tested a Tech 9, and that they fired a test bullet from it and they had bullets that were recovered from the body of the victim, from a driver's door, from -- well, actually two from the driver's door anyway, and they found several cartridges, spent, spent rounds, I guess casings actually is what they were.

Where did the Tech 9 come from?

Is there some record in the case that would indicate where that came from?

Yes, sir, Mr.---

MR. ALLEN: If I may speak?

THE COURT: Yes, sir, I would -- I, I---

MR. ALLEN: I'm not familiar with all these pages, but I think there was something in here, and if -- I, I don't

know how quickly I can flip through and try to find it or the Court indicated---

THE COURT: Let me know if you see something. I'd like to get it on the record before we quit.

MR. ALLEN: Yes, sir.

MR. ALFORD: Your Honor, I can put on the record what I, what I think is in here and I've read somewhere.

THE COURT: Well, let's see if we can put something -- I'd just like to know the source of the gun.

MR. ALFORD: I mean my client will testify to that.

THE COURT: Well, if you want to put him back up on the stand put him back up on the stand.

MR. ALFORD: I call Mr. Ford.

THE COURT: Just for that purpose.

Mr. Ford, just have a seat in the witness stand. You're already under oath for purposes of this hearing. You're still under oath at this point in time.

DEVON FORD, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mr. Ford, I understand that you wanted to explain to the Court the source of the Tech 9 that's referred to in that report.

A Yes, sir, the night of the shoot out, it was me and my

codefendant. The reason it wasn't -- the gun come from -- that was the pistol or the time of the incident, and the reason why I presented my gun to the officer cause the officer was like tell me how this happened, tell me how this happened, tell me how this happened. I said man, look here, I ain't killed nobody, man. I said man, go ahead and get my gun because where they got my gun from is where me and my codefendant went at after the shoot out.

I had stashed my gun there at Flint Rim's house. I put my gun up there at Flint Rim's house. Somehow, some way, besides me, you know what I'm saying, also aware my codefendant was telling them as well that my gun was there at Flint Rim's house, and also like two days after I got arrested I told them, I said, man, y'all go ahead and get my gun, go ahead and get my gun from over there. So, Flint Rim say the police went and raided Flint Rim's house and they got my gun from them.

THE COURT: So, this Tech 9 was recovered from somebody named Flint Rim's house?

WITNESS: Yes, sir, that's who I had put my gun at.

THE COURT: And you had indicated to the police that that's where it was located at?

WITNESS: Yes, sir, and I had -- when I had put my gun up, I had got a .45 from him cause I didn't want to hold my gun to more---

THE COURT: So, you exchanged guns with Mr. Flint Rim?

WITNESS: Yes, sir, cause I didn't want to have my gun anymore cause I knew it was, be related to this crime.

THE COURT: Okay. Any others questions, Mr. Alford, you wish to ask?

MR. ALFORD: No, sir.

THE COURT: Mr. Allen, you been able to -- well, let me ask.

Ms. Parsons, do you wish to ask any questions of him on this point?

MS. PARSONS: No.

THE COURT: You may stand down, sir. Thank you very much.

Have you found anything in the file that indicates the source of the gun that was, that may of been tested?

MR. ALLEN: Yes, Your Honor. This is coming from an investigation report---

THE COURT: And I'll remind you, you're still under oath. So, at -- the Court's asking you the question.

Go ahead.

MR. ALLEN: Yes, sir, from an investigation report, and it indicates that the officer was questioning Mr. Ford, who was talking about the Tech 9 who told to him that the Tech 9, that that was the system, the Tech 9 was the gun he used in the shooting, and that he was telling the truth. I

allowed the detective to call Flint Rim and tell him that the police were coming to pick him up or pick it up. I, I then talked to Flint Rim and told him that I would call before I came. I told him to leave the gun as it is till I got there.

And then further on down in the report, after they took his statement, then they -- let's see, the officer talked about they called Flint Rim's cell phone, asked him to come to the door. He stated he wasn't home, did not know when he would get back. He told me he put the gun in the trash can in the garage. I could get it out of there.

I asked if the gun was loaded or not loaded. So, I consulted Sergeant Neal Urch and then collected the gun at 20, 21:22. That would be 9:22 p.m. I returned to the Sheriff's Office and released the gun to Officer Bogan, and then he described that as a Intra Tech, 9-millimeter model Tech 9, and then writes the serial number down.

THE COURT: All right. Thank you very much.

Mr. Alford, do you wish to offer any argument?

MR. ALFORD: Yes, sir.

Sir, they're two -- there's four issues, but there's sort of two different arguments. One is the, dealing with the, the 37 years. As set out in the brief, essentially the Statute 16-3-20 Subsection A, which is the punishment for murder, a person who is convicted, and then it gets into

must be, and uses the word must, punished by death, by imprisonment for life, and then this is the, the phrase I guess that we're contending, or by a mandatory minimum term of imprisonment for 30 years.

Now, if we look at the statutory construction, the question is if it says a mandatory minimum term for 30 years, then that doesn't suggest that it could be 37. Now, if it had been written a mandatory minimum sentence of at least 30 years or to life or the use may be of another, another phraseology, but we're not suppose to interpret what the Legislature meant especially when it comes to this.

If we look at -- and, and, again, it's pretty much set out in the brief, and I didn't really want to add to it because I think he goes through it quite well. But if we look at that one phrase and make a question, then obviously the Courts, because other cases have, have maybe given more than 30 years, believing that that phraseology allows it to be between 30 years and life. But if we look at the strict reading of it, the argument is that would be a mandatory minimum sentence for 30 years. Not of, of 30 years or at least 30 years.

That is Issue A. That has been brought out. And if that's true, then, you know, what, what we're asking for is that sentence wouldn't be constitutional. It would have to be struck.

That leads to the, sort of the last issue in the PCR about the double sentencing. And without sort or regurgitating what is in the brief, it lays it out. It's a question about being eligible. It cites the Statute 24-21-560. Obviously a sentence for murder for life or 30 years is a sentence that has to be served completely. You don't qualify for any reduced time, and that invokes the 24-21-560 statute.

Now, I did look at the, I call, I call it, the 16-3-20, the, the sentencing statute, was amended after the community service. So, to the extent that the intent of the Legislature, I'd have to represent to the Court the sentencing statute obviously is the latest statute.

However, if we look at that phraseology, what does that mean?

And, and I, I know that I've looked at some other sentence guidelines that I think, if I understand the Courts, they sort of treat that as a 30 years to life. You know, it has to be a minimum. But if we look at the language in the strict construction standpoint, I think that's what the PCR raises and seems to raise the argument very well.

The issue of double sentencing goes, as I understand it and able to articulate it, and I won't regurgitate it, but it seems to be tied into sort of the, the reading of those

two statutes that I cited, and to the constitutionality of it.

The other ones deal, sort of the middle two issues, deal with the ineffective assistance of counsel. We obviously don't have Mr. Bartosh here to, to ask him. But if we look at the record we have a very convoluted crime scene. We, we have the, the shooters. We have submitted in sort of the ballistics, if you will, that don't match up to a Tech 9. There's an angle, as you can see on the diagram submitted, the lack of residue.

The question is what evidence or, or, or what investigation had been done in, in preparing this case for trial cause it certainly was called for trial on the 5th. And, and as Mr. Allen admits, there's nothing in this file that shows anything and I think the Court would have to acknowledge that unfortunately Mr. Bartosh did not have the ballistics match even or the ballistics test results available to him.

So, the question is was he prepared for trial, and then in terms of advising a client if he was unprepared for trial, and then you got the testimony that my client believed he was getting a five year involuntary and ABWIK, five year ABWIK issue, looking at the transcript, the transcript, as my client pointed out going through it, it wasn't just a cut and dried plea. There were some pauses.

There were some stumbles going out. And then the question is if he didn't feel his counsel was prepared for trial, did he feel sort of coerced into accepting the plea thinking it might be the five and five.

Those are the issues, I think they're set out in there, probably with the exception of the factual testimony from Mr. Ford on the stand. What is interesting is it's obviously a, a he said he said situation with one of the individuals deceased. Mrs. Waddell's here to testify that, you know, she spoke with Mr. Bartosh, who indicated to her that he thought he was gonna get the five and five sentence. So, at least there's some corroboration or credibility that that was the belief by the petitioner.

Thank you, Your Honor.

THE COURT: Yes, ma'am.

MS. PARSONS: Your Honor, briefly in regard to the argument on the 30 years, I think the language where it says a mandatory minimum, mandatory minimum term of 30 years is suggestive of other options. It doesn't say or 30 years. It's just mandatory minimum, which, to me, the language, taken on its face alone, reflects a minimum, which would then infer other options.

Okay. Moving aside from that, in regard to the ineffective assistance of counsel, we don't have the opportunity to put Mr. Bartosh on the stand. However, we

have had testimony that it was his general reputation not to keep everything contained in the file. And so, the file is not necessarily reflective to all the information he had available to him.

Furthermore, I would submit that the testimony about the five years just isn't credible. The witnesses have reason to testify to that. So, the corroboration should be taken with a grain of salt. There's nothing indicating that that would of been an option available, and I don't see any way Mr. Bartosh would of suggested that to this client. Furthermore, the judge sets forth the 30 year minimum at the very beginning. And so, he should of known that five years---

THE COURT: Set forth at the end too.

MS. PARSONS: So, he shouldn't -- that shouldn't have been an option. And he was given opportunities by the judge to express exactly what he thought Mr. Bartosh was gonna do for him, and he took that opportunity to talk about the Alford plea. And I think that the transcript reflects that is what he had in mind all along, and this five year thing is a new thing we're just gonna talk about now.

All in all, really we're just gonna have to let the transcript speak for itself in the absence of Mr. Bartosh. But I would say that it was not your typical plea. There was some back and forth. But he was clearly advised of his

rights. And had he gone to trial, it would of been an extremely difficult trial where you would have the codefendant's, the victim giving a dying declaration that he was the shooter, and the surviving victim identifying him as the shooter. And so, I'm not seeing any prejudice where the State had an extremely strong case against him.

THE COURT: Thank you very much.

MR. ALFORD: Very briefly?

Two seconds, Your Honor?

I was listening---

THE COURT: It better be two seconds, yes, sir.

MR. ALFORD: I was listening very carefully to Ms. Parsons when she's talking about the language of the statute.

THE COURT: Yes, sir.

MR. ALFORD: Like everybody else, a mandatory minimum sentence, and she uses of 30 years. That's not what it says. It says for 30 years. Everybody assumes it's of.

Thank you.

THE COURT: Thank you.

MS. PARSONS: Thank you, Your Honor.

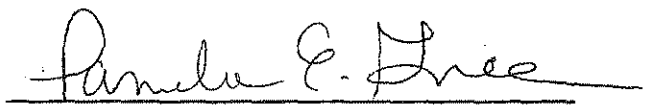
* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

CERTIFICATE

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 18th day of September, 2008.

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

November 8th, 2009



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) 7TH JUDICIAL CIRCUIT

Devon M. Ford, #312731
Applicant

Vs

State of South Carolina
Respondent

CA: 2008-CP-42-0895

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Amended order of dismissal with prejudice in this action dated March 22, 2010 on March 22, 2010

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in and envelope with sufficient postage affixed, addressed as follows:

Suzanne H. White, Esq.
David C. Alford, Esq.
Devon M. Ford, #312731

March 22, 2010 Sharon Winstead, P.C.

(DATE) (SIGNATURE)

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Devon M. Ford, #312731, Applicant, v. State of South Carolina, Respondent.	2008-CP-42-0395 **AMENDED** **ORDER OF DISMISSAL WITH PREJUDICE**

I. PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 24, 2008, with a first amendment on July 30, 2008, and a second amendment on August 22, 2008. An evidentiary hearing into the matter was convened on September 18, 2008, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by David Alford, Esquire. Michelle J. Parsons of the South Carolina Attorney General's Office represented the State. This Court had before it the application, the respondent's return, the guilty plea transcript, the records of the Spartanburg County Clerk of Court, the Applicant's appellate records, and the Applicant's records from the South Carolina Department of Corrections.

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The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted during the August 2005 term of the Spartanburg Grand Jury for Murder (05-GS-42-3376) and Assault and Battery with Intent to Kill (05-GS-42-3377). J. Michael Bartosh, Esquire,

represented the Applicant. On December 5, 2005, the Applicant submitted an Alford plea to the indicted charges. The Honorable Doyet A. Early, III, sentenced him to a confinement for a period of thirty-seven (37) years for Murder and twenty (20) years for ABWIK. The sentences were to be served concurrently.

A timely notice of appeal was filed on the Applicant's and a brief pursuant to Anders v. California, 386 US 738 (1967). The Court of Appeals affirmed the conviction on September 17, 2007 (State v. Ford, 07-UP-365). The remittitur was issued on October 3, 2007.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

At the PCR evidentiary hearing, the Applicant testified his sentence of thirty-seven years was unconstitutional where the statute provided for thirty years or life. The Applicant also claimed the possible imposition of parole resulted in an unconstitutional "double-sentence." The Applicant also alleged his attorney failed to meet with him or do anything on his behalf. The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed he did not know his "pistol did not match the victim's body" and this evidence was withheld from him.

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The Applicant alleged his plea was involuntary. The Applicant stated his attorney mislead him into thinking he would only receive five years for involuntary manslaughter and five years for ABWIK. The Applicant testified he heard the judge mention the mandatory minimum of thirty years, but his attorney told him to just go along with it. The Applicant testified if his attorney had not misled him in regard to his plea, he would have opted for trial.

On cross-examination, the Applicant admitted he was at the scene of the crime and he was carrying a gun. The Applicant also confirmed he was identified as the shooter by both the surviving victim and the victim that died as a result of the shooting. The Applicant also recalled the driver of the Suburban identified him as the shooter.

The Applicant testified he submitted an Alford plea "because my codefendant and the victim that lived was all against me and that my attorney did not present any evidence to prove otherwise..." He further testified he figured the jury would find him guilty because of all the evidence the State had against him.

The Applicant also admitted he heard the guilty plea judge inform him he would receive a mandatory minimum of thirty years. Moreover, the Applicant admitted telling the plea judge he understood that. The Applicant also admitted waiving his right to trial and informing the court no one had promised him anything or threatened him in order to plea. The Applicant noted he told the court he was unsatisfied with his attorney prior to a recess. After the recess, the Applicant indicated he wanted to submit an Alford plea and informed the court he was satisfied with his attorney.

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The Applicant claimed, however, the recess was not for the purpose of discussing an Alford plea. Rather, the Applicant asserts counsel used that time to tell him he would only receive five years.

The Applicant admitted he spoke up to the plea judge about his concerns. The transcript demonstrated the Applicant informed the court about his concerns regarding his child and his desire for an Alford plea. When asked why he did not also raise the issue of his purported five-

year deal, the Applicant testified the judge asked him for factors contributing to leniency and the five-year deal was not relevant to the question.

Avery Waddell, the Applicant's mother, also testified at the PCR hearing. Waddell testified the Applicant told her he was going to try to get an involuntary manslaughter charge with a five-year sentence. Waddell also testified the ballistic report had not come in prior to the plea.

As Mike Bartosh, the Applicant's attorney, is now deceased, Spartanburg Public Defender Clay Allen testified from Bartosh's file. Allen testified the file did not contain a great deal of notes, but there was an order from Indigent Defense authorizing the expenditure of a crime scene expert. Allen testified Bartosh was known for keeping track of things in his head and did not write many things down. Further, Allen testified Bartosh was known for not filing papers in his case such that a file did not reflect all available case materials Bartosh used.

III. APPLICABLE LAW

Ineffective Assistance of Counsel

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SPARTANBURG COUNTY
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In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made

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SPARTANBURG COUNTY
2010 MAR 22 AM 9 27

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds the Applicant was properly sentenced to thirty-seven years and the Applicant failed to demonstrate otherwise. The Applicant failed to demonstrate any ineffectiveness on the part of counsel for failing to object to sentence within the statutory sentencing range. As a result, this allegation is denied and dismissed.

This Court further finds the Applicant failed to demonstrate ineffectiveness of counsel in relation to his double-sentence argument. The Applicant has failed to demonstrate he will be under the restrictions of community supervision when his sentence upon his release. Moreover, community supervision is a collateral consequence of a conviction. State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008). As a result, any failure on the part of counsel to discuss this with the Applicant does not amount to ineffective assistance of counsel.

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SPARTANBURG COUNTY
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The Applicant also claimed his attorney failed to meet with him or do anything on his behalf. This Court finds the Applicant lacks credibility. It is clear from the Applicant's PCR testimony he was well aware of the State's evidence against him at the time of his plea and pled due to the strength of the State's case. This knowledge indicates counsel reviewed discovery with the Applicant, contrary to the Applicant's claims. This Court finds the Applicant failed to prove counsel was ineffective and denies and dismisses these claims.

The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed ballistics revealed his gun did not match the shooter. Counsel's file reveals funds obtained for an expert, though this Court is unable to ascertain what steps were taken in the ballistics investigation. The Applicant failed to show prejudice, however, where he failed to demonstrate further ballistic evidence would have benefited his case. The Applicant failed to meet his burden and this Court denies and dismisses this claim.

The Applicant further alleged his attorney mislead him into thinking he would only receive five years for involuntary manslaughter and five years for ABWIK. This Court again finds the Applicant to lack credibility. The transcript clearly reflects the Applicant informing the plea judge he understood he would be sentenced to a minimum of thirty years. As a result, this Court denies and dismisses this allegation as well.

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SPARTANBURG COUNTY
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While this Court did not have the benefit of counsel's testimony in light of counsel's untimely death, this Court does have the benefit of the plea transcript. This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily

entered. The Applicant showed no reason why he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. This Court finds the Applicant's testimony at the PCR hearing lacked credibility. Therefore, this Court finds that Applicant's Alford plea was freely and voluntarily entered and denies and dismisses any allegations to the contrary.

The Applicant alleged a conflict of interest claim arising from his allegedly poor relationship with his previous public defender Chris Brough and the fact that another public defender, Mike Bartosh, took the case after Chris Brough. This Court finds the Applicant failed to demonstrate an actual conflict of interest existed. This Court denies and dismisses this allegation.

This Court finds that any and all other allegations raised at the hearing or in the application are without merit.

Therefore, this Court finds that the Applicant failed to carry his burden to show counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. The Court finds that the Applicant cannot satisfy either requirement of the Strickland test.

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SPARTANBURG COUNTY
2012 MAR 22 AM 9:27

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that this application for post conviction relief must be denied and dismissed with prejudice. All other allegations or claims that were raised or could have been raised in this application are hereby dismissed with prejudice.

This Court advises 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post conviction relief is denied and dismissed with prejudice.

2. The Applicant is remanded to the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

AND IT IS SO ORDERED this 18th day of March, 2010.

Honorable Roger L. Couch
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

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CLERK OF COURT
SPARTANBURG COUNTY
2010 MAR 22 AM 9:27

A CERTIFIED COPY
M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY: Mary Hunter D.C.
DATED: 3-22-10

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG) H683101
) H683102
)
)
)
STATE OF SOUTH CAROLINA,)
)
)
vs.) TRANSCRIPT OF RECORD
)
DEVON M. FORD,) ORIGINAL
DEFENDANT.)
)

August 17, 2005
Spartanburg, South Carolina

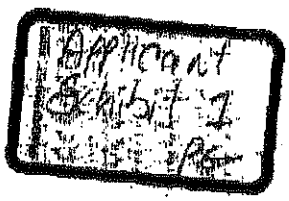
B E F O R E:

THE HONORABLE J. MARK HAYES, II, JUDGE.

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

ROBERT P. COLER, ESQ.
Assistant Solicitor

CHRISTOPHER BROUGH, ESQ.
MICHAEL BARTOSH, ESQ.
Attorneys for the Defendant



HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
	(Defendant's Exhibits)		
D-1	Letter dated 8-12-05	8	8
D-2	Letters	8	8

All Exhibits were retained by the Clerk of Court for Spartanburg County.

THE COURT: This is the matter of Devon Ford.

Are you Mr. Ford?

DEFENDANT FORD: Yes, sir.

THE COURT: Come on around, sir.

Mr. Ford, you had forwarded to me, as the chief administrative judge, a letter concerning the representation of your counsel, Mr. Brough.

Do you recall that?

DEFENDANT FORD: Yes, sir.

THE COURT: All right. And what this hearing does is this hearing gives you an opportunity to be able to let me know of any information that you want me to know so that I can address the issues that you raised in your letter.

DEFENDANT FORD: Yes, sir.

THE COURT: Yes, sir.

I'll be more than happy to hear from you.

DEFENDANT FORD: Okay. Go ahead and start?

THE COURT: Uh-huh.

DEFENDANT FORD: "Dear Chief Administrative Judge: Request for change in counsel, Christopher Brough."

"I met my counsel in December 2004. I did not meet with him again until February '05 before my preliminary hearing."

"From February until July, I have not spoken with my counsel. I wrote numerous letters for contact and

requested my Brady and discovery material, which I did not receive until July 8th '05. And this information was brought to me by another party."

"My second bond hearing was scheduled for March '05. My mother, Avery Waddell, spoke with Mr. Brough. And he informed her to call him any time. My mother tried calling him in May and in June and left messages with no response. The reason she was trying to make contact was because you were giving me another bond hearing 90 days after that."

"My mother was not able to contact Mr. Brough in which she got a private attorney, Mr. John (Jack) Riordan of Leatherwood, Walker, Todd, and Mann to take me back for another bond hearing."

"Your Honor, I know Mr. Brough has a heavy case load, but I have two very serious charges against me and Mr. Brough has not shown me any type of defense."

"On July 20th, '05, Mr. Brough was at my institution visiting another inmate. When I saw him, I got his attention and he acted like he didn't know me. We did talk, but I was unable to discuss my case or defense in detail."

"Judge, I am asking the Court to decide if Mr. Brough is in violation of Rules of South Carolina Professional Conduct, 1.1, 1.2, 1.3, and 1.4, and appoint me legal

counsel that is aware of my case and represented me on my previous bond hearing on July 28th, '05, Mr. Jack Riordan."

"All the letters I have written to Mr. Brough, Chief Administrative Judge, and South Carolina Supreme Court, and South Carolina Supreme Court Disciplinary Board requesting that I discuss my case with my legal counsel was to no avail. I need to properly prepare my case to prove my innocence and plea of not guilty."

"Your Honor, they are trying to have me in court by September 12th. And Mr. Brough has not been to assist me or discuss a trial strategy, a defense, or anything about this criminal matter. And I have all my letters here where I wrote Mr. Brough numerous times and the Chief Administrative Judge telling him about Mr. Brough."

"And I feel like it would be a conflict of interest if you give me another public defender. Plus, I need proper adequate counsel for the charges I am facing."

THE COURT: All right. Did you want me to have that written document that you read from?

DEFENDANT FORD: You can, if you want.

THE COURT: Okay. Thank you, sir.

All right. And I had provided a copy of your letter to me to the Clerk's Office and also to Mr. Brough. And Mr. Brough has brought Mr. Bartosh with him. I believe

Mr. Bartosh is here as his employer.

Is that correct?

MR. BARTOSH: Yes, sir.

THE COURT: Yes, sir, Mr. Bartosh.

MR. BARTOSH: Your Honor, I've discussed this matter with Mr. Brough concerning Mr. Ford's allegations.

Your Honor, it's clear that there's some problems that could come down the road if Mr. Brough continued to represent Mr. Ford. What I would respectfully suggest to the Court is that we will reassign the case within the office and I'll take the case, if Mr. Ford wants us to continue to represent him. If not, then I would suggest, Your Honor, he could either represent himself or he could hire private counsel.

We would -- that's how we would handle it. We would -- I would reassign the case to myself. My understanding is that the Solicitor would have no objection to the case being continued so that I could come up to speed.

MR. COLER: That's correct, Your Honor.

THE COURT: Is he -- and he's correct when he talks about the September 12th potential for the trial date?

MR. COLER: Yes, sir, Your Honor.

We told Judge Cole at a bond hearing two weeks ago that we would be prepared to try it September 12th based

on him making a second motion before Your Honor. I think he, certainly, waived his right to have that tried on the 12th. And, certainly, Mr. Bartosh would require some time to get up to speed on the case. And we'll be glad to set it in October or November of this year, Your Honor. That would all still be within one year of the incident date.

THE COURT: And what's he charged with?

MR. COLER: He's charged with murder. And he's also charged with one count of assault and battery with intent to kill.

THE COURT: All right. Mr. Ford, what they're proposing to the Court is to have the case reassigned to Mr. Bartosh. I'm inclined to accept that recommendation. Mr. Bartosh is imminently qualified in doing this type of work. His reputation is excellent in the legal community. So I'm confident that Mr. Bartosh can provide that representation for you.

If you -- now, that's going to mean that you're not going to go forward on September the 12th. So the case will be delayed a little bit further.

But I will -- that's going to be the Court's order in regards to what you've requested.

DEFENDANT FORD: Yes, sir.

THE COURT: Good luck to you, sir.

DEFENDANT FORD: All right.

MR. COLER: Thank you, Your Honor.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: And we'll make --

Mr. Ford, we'll make a copy of your letter a part of this proceeding.

DEFENDANT FORD: All right. I appreciate it.

THE COURT: Uh-huh.

(WHEREUPON, Defendant's Exhibit Nos. 1 and 2 were marked for identification and admitted into evidence.)

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 17th day of August, 2005.

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

June 20, 2007

Hollie M. Jenkins

Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

February 9, 2007

Copy

Deven M. Ford #312731
Lieber Corr. Inst. / Edisto A-19
Post Office Box 205
Ridgeville, SC 29472

RE: Freedom of Information Act Request

Dear Deven Ford:

In order to adequately search our database, please use the space below to provide our office with additional information:

DATE OF CRIME December 7, 2004
TYPE OF CRIME Murder and Assult and Bullery with intent to kill
COUNTY OF CRIME Spartanburg County
ARRESTING AGENCY Spartanburg county Detective Richard Strawn
FULL NAME OF SUSPECT(S) Devon, Ford AND Kim Lilly
FULL NAME OF VICTIM(S) Ikethan, Davis and Johnathan Martin

Once you have provided the above information, we will search our database and advise you of our findings. Please use this form and refer to FOI#2007-92 when submitting additional information for this request.

Sincerely,

M. C. Perry

Mary C. Perry
FOIA/Subpoena Compliance Coordinator

MCP/FOI#2007-92

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

TRACE EVIDENCE DEPARTMENT

Detective Richard Strawn

Spartanburg County Sheriff's Office
366 North Church Street
Spartanburg, SC 29306

April 06, 2006

SLED No: L05-10889
Your Case No: 2004120412
Incident Date: 12/07/2004
(S) Ford, Devon
(S) Lilly, Kim
(V) Davis, Iketha
(V) Martin, Jonathan

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

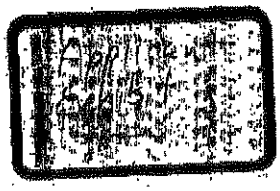
Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 9 Pink T-shirt

RESULTS:

No holes or physical effects indicative of gunpowder residue were found on the pink T-shirt. The garment was analyzed for the presence of lead, however no lead was detected.



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

April 06, 2006
L05-10889

Joseph D. Powell
Lieutenant

P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

FIREARMS DEPARTMENT

Detective Richard Strawn
Spartanburg County Sheriff's Office
366 North Church Street
Spartanburg, SC 29306

November 9, 2005
SLED Lab No: L05-10889
Your Case No: 2004120412
Incident Date: 12/07/04
(S) Ford, Devon
(S) Lilly, Kim
(V) Davis, Iketha

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item 1: One Intratec Model TEC-9, 9mm Luger caliber pistol, serial number 33523, with magazine.

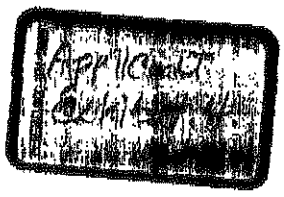
Item 2: One fired bullet removed from body of victim.

Item 3: One fired bullet removed from driver's door.

Item 4: One fired bullet removed from bottom of driver's door.

Item 5: One fired 9mm Luger caliber cartridge case, headstamped "G.F.L. 9mm LUGER", recovered from center console of Nissan Maxima.

Item 6: One unfired 9mm Luger caliber cartridge bearing the headstamp "FC 9MM LUGER". NOTE: Item 6 was incorrectly listed on the Evidence Inventory Sheet as being a "Ruger .9mm FC Live Round".



Item 7: Two fired 9mm Luger caliber cartridge cases, headstamped "G.F.L. 9mm LUGER", recovered under right rear side of driver's seat of Nissan Maxima.

Item 8: One fired 9mm Luger caliber cartridge case, headstamped "G.F.L. 9mm LUGER", recovered from right front seat of Nissan Maxima.

RESULTS:

The Item 1 pistol was examined, test fired, and found to be in working order.

The Item 6 unfired cartridge was the correct caliber for use in the Item 1 pistol or in other 9mm Luger caliber firearms.

The Item 2, 3, and 4 bullets were examined and microscopically compared with each other and with test bullets fired by the Item 1 pistol. Items 2, 3, and 4 were most consistent with bullets loaded into some 9mm Luger caliber cartridges. Matching individual characteristics were found on Items 2, 3, and 4. It was concluded that the Item 2, 3, and 4 bullets were fired by the same gun barrel. Differences noted on test bullets fired by Item 1 were sufficient to conclude that the Item 2, 3, and 4 bullets were not fired by the Item 1 pistol.

Based on their general rifling characteristics, possible makes or origins of 9mm Luger caliber firearms that could have fired Items 2, 3, and 4 include, but are not limited to, the following:

Agram	American Eagle	Arcus	Argentine Industries
Australian	Belgium	Beretta	Bergmann
Browning	Calico	C.Z.	Chinese
Colt	Daewoo	E.A.A.	English/British
Federal Eng.	Feg (KBI, Inc.)	F.M.	FMJ (Cobray)
F.N./Browning	Fox Carbine Co.	German	Heckler & Koch
Hi-Point	Hungary (Kassnar)	I.M.I.	Keltec
Luger	Masterpiece Arms	Mauser	Navy Arms Co.
Norinco	Pletter	Radom	Ruger
Sardius	Springfield Armory	Sten	Sterling
S.W.D/	Tanfoglio (Excam)	Walther	Wilkinson Arms
Witness (E.A.A)	Zastava		

The Item 5, 7, and 8 cartridge cases were examined and microscopically compared with each other and with test cartridge cases fired by the Item 1 pistol. Matching breechface markings were found on Item 5, on both Item 7 cartridge cases, and on Item 8. It was concluded that the Item 5, 7, and 8 cartridge cases were all fired by the same firearm.

SOUTH CAROLINA OFFICE OF INDIGENT DEFENSE
1122 Lady Street, Suite 1110
Post Office Box 11433
Columbia, South Carolina 29211-1433
Telephone (803)734-1343
Facsimile (803)734-1345
E-Mail executives@sciold.state.sc.us

T. Patton Adams, Esq., Executive Director
Lisa Barfield, Administrative Manager

March 7, 2006

Deven Ford #312731
LCI EA
P.O. Box 205
Ridgeville SC 29472

Dear Mr. Ford:

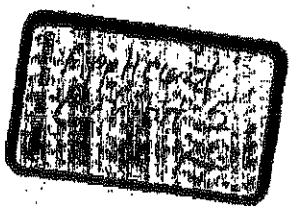
This is in response to your letter received on March 6, 2006.

Your attorney did not submit a time sheet. We only provided funds for the expert witness.

Sincerely,

Lori Shirley

Lori Shirley
Administrative Specialists



156 158

02-24-2005 0097

Name Ikethia Tevvia Davis Autopsy No. _____

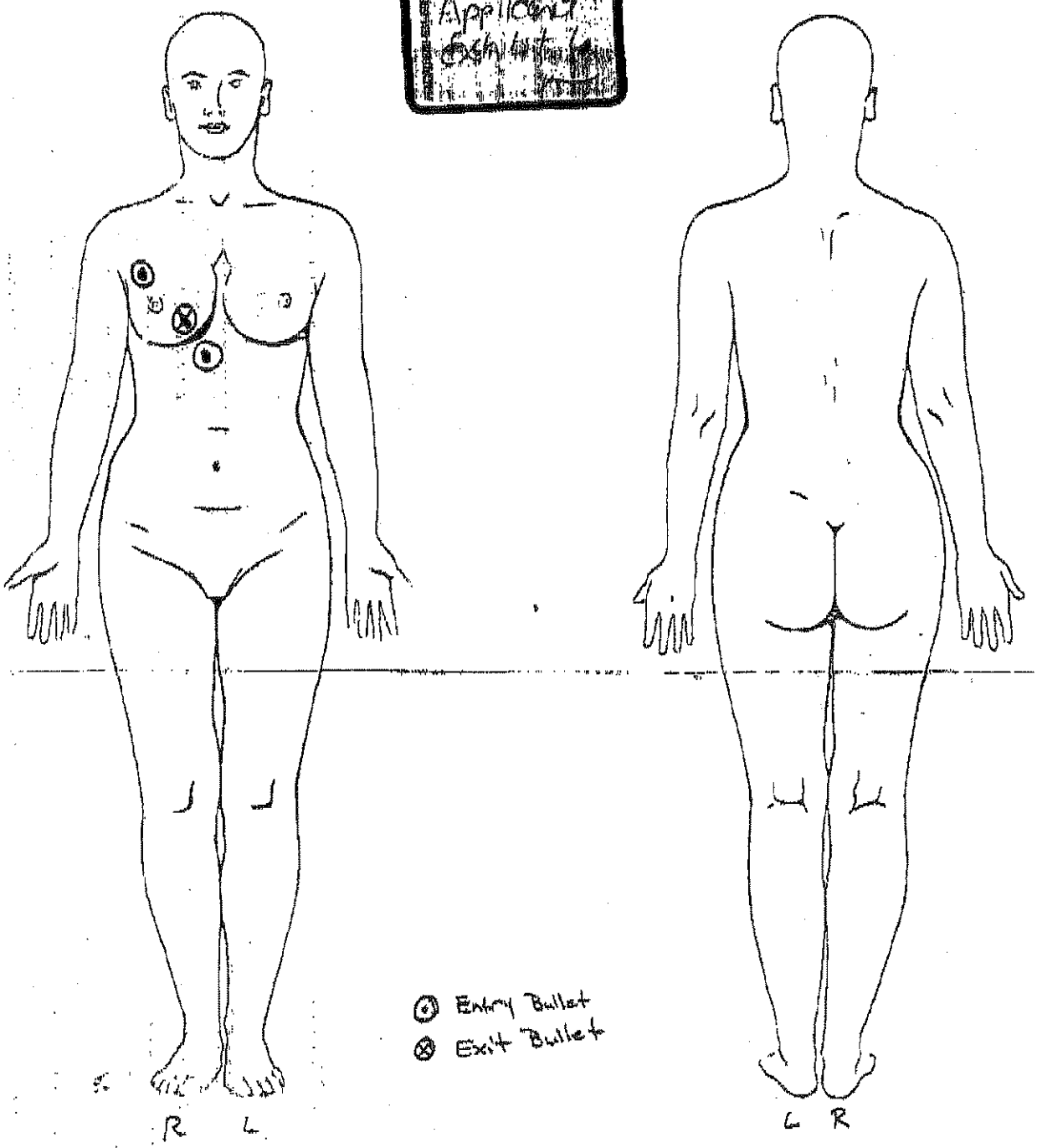
DoB [redacted]82

Hgt: 5'5"

Wgt: 245 lbs

Date 12/08/04 @ 1030hrs

Applicant Exhibit [illegible]



Autopsy performed By DR. David Wren
:D officer S. Dedmon and Detective Taylor
witnessed

For protocol only: _____

159 157

WITNESSES

R. Strawn

Spartanburg County Sheriff's Department

1. SENTENCE MADE
2. Computer
3. CASE PULLED
4. INDICTED
5. CONFLICT ASSIGNED
6. PRESIDING JUDGE
7. ARRAIGNED
8. CLERKS VIOLATIONS COPY

ARREST WARRANT NUMBER

H683101

ACTION OF GRAND JURY

[redacted]

Foreperson of Grand Jury
Date: 8-25-05

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 05-GS-42 3376

The State of South Carolina

County of Spartanburg

TREY GOWDY, *SOLICITOR*

COURT OF GENERAL SESSIONS

AUG 29 2005

TERM

THE STATE
vs.

Devon Michael Ford

Indictment for

MURDER

SC Code 16-03-0010, 0020
CDR Code 116
Class FEL-EXM

FILED
CLERK OF COURTS
2005 AUG 31 PM 3:16
MARC KITCHINGS

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

AUG 25 2005

At a Court of General Sessions, convened on _____, the Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Devon Michael Ford did in Spartanburg County on or about December 7, 2004, feloniously, willfully, and with malice aforethought, kill one Ikethia Davis by shooting her, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *THE South Carolina 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.

ASSISTANT SOLICITOR

16159

WITNESSES

R. Strawn

Spartanburg County Sheriff's Office

1. SENTENCE MADE ☐
2. REPORT FILED ☒
3. CARD PULLED ☒
4. INDEXED ☒
5. CHECKED WARRANTS ☒
6. CHECKED SIGNATURE ☐
7. ASSESSMENT AND FINE CARD MADE ☐
8. TRAFFIC VIOLATIONS COPY ☐

ARREST WARRANT NUMBER

H683102

ACTION OF GRAND JURY

True Bill

[redacted]

Date: 8-25-05

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 05-GS-42-3377

The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

COURT OF GENERAL SESSIONS

AUG 29 2005 TERM

THE STATE
vs.

Devon Michael Ford

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILL

SC Code: 16-3-620
CDR Code: 014
Class FEL-C(V)

FILED
CLERK OF COURT
2005 AUG 31 PM 3:16
MARC RITCHIE

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

AUG 25 2005

At a Court of General Sessions, convened on _____, the Grand Jurors of Spartanburg County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Devon Michael Ford did in Spartanburg County on or about December 7, 2004, commit an unlawful act of violent injury upon the victim, Johnathan Martin, by shooting the victim, and with malice aforethought, all in violation of the laws of the State of South Carolina and Section 16-3-620 of the *Code of Laws of South Carolina*, 1976, as amended.

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

ASSISTANT SOLICITOR

Due August 5 ~~163~~

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

DEVON M. FORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did trial counsel render ineffective assistance of counsel when he did not secure the results of a ballistics test prior to petitioner's plea which would have revealed that the state's version of events was inaccurate?

STATEMENT

Devon Michael Ford was indicted by the Spartanburg county Grand jury for murder and assault and battery with intent to kill. He pleaded guilty before the Honorable Doyet A. Early, III on December 5, 2005. He was represented by Michael Bartosh, Esquire, who is now deceased. He received 37 and 20 years, respectively, to be served concurrently.

He appealed his convictions and sentence and the South Carolina Court of Appeals affirmed. State v. Ford, Op. No. 2007-UP-365 (filed September 17, 2007).

He then filed an application for post-conviction relief on January 24, 2008. An evidentiary hearing was held on September 18, 2008 before the Honorable Roger L. Couch. He was represented by David Alford, Esquire. The order of dismissal was filed March 22, 2010.

This petition for writ of certiorari timely follows.

ARGUMENT

Trial counsel rendered ineffective assistance of counsel when he did not secure the results of a ballistics test prior to petitioner's plea which would have revealed that the state's version of events was inaccurate.

Petitioner pleaded guilty to murder and ABWIK with a recommendation from the state that the charges run concurrently. Petitioner's plea counsel is now deceased. Petitioner pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).

At petitioner's plea hearing, the state recited its version of the facts:

> "[T]he defendant, Devon Ford, got out of the passenger's side of the red Chevy Suburban, came around, and came up to the passenger window of the Maxima, and fired at least four, perhaps as many as seven shots, into the Maxima. Several of those shots hit Jonathan Martin, and – but he survived the gunshot wounds.
>
> One of those shots hit Victim, struck her in the right chest."

App. 17-18.

At the PCR hearing, upon questioning by the judge, he explained where the gun came from:

> "I had stashed my gun there at Flint Rim's house. I put my gun up there at Flint Rim's house. Somehow, some way, besides me, you know what I'm saying, also aware my codefendnant was telling them as well that my gun was there at Flint Rim's house, and also like two days after I got arrested I told them, I said, man, ya'll go ahead and get my gun, go ahead and get my gun from over there. So, Flint Rim say the police went and raided Flint Rim's house and they got my gun from them."

App. 121, ll. 8-17.

At the PCR hearing, petitioner testified that he did not have a copy of the ballistics test until he requested it from SLED pursuant to a FOIA request. The FOIA request and the ballistics test were entered into evidence at the PCR hearing. App. 150, 153-154. As the ballistics test shows, petitioner's gun did not fire the bullets that were found inside the car, or in the victim's body. In

short, the gun that petitioner hid at Flint Rim's house was not the murder weapon. Counsel did not secure this report prior to petitioner's plea, although it was in existence at the time. The date of the SLED report is approximately one month before petitioner's plea date. The ballistics report is not referenced during the guilty plea.

Petitioner testified at the PCR hearing that he requested the ballistics report:

> "Now, the whole time I kept asking Mr. Bartosh can he get my ballistic test for me. He kept telling me they did not have them, they did not have them, they were not ready."

App. 86, ll. 1-4.

Petitioner further testified that he would not have pleaded guilty had he known what the ballistics report would have shown. App. 86-89. Hill v. Lockhart, 474 U.S. 52 (1985).

The order of dismissal is inaccurate when it states:

> The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed ballistics revealed his gun did not match the shooter. Counsel's file reveals funds obtained for an expert, though this Court is unable to ascertain what steps were taken in the ballistics investigation. The Applicant failed to show prejudice, however, where he failed to demonstrate further ballistic evidence would have benefited his case. The Applicant failed to meet his burden and this Court denies and dismisses this claim.

App. 138.

The order is inaccurate for two reasons: first, petitioner is not claiming that additional, or "further" ballistics testing should have been done—his claim is that he was entitled to the evidence that was in existence. Having the ballistics test which was in existence would have benefited his case since it tended to show that he was not the shooter. And secondly, petitioner has shown prejudice because he testified that he would have proceeded to trial but for counsel's substandard performance. Petitioner entered an Alford plea—he denied the factual basis of the plea. Had he

been in possession of a report that supported his claim of innocence, he would not have pleaded guilty. Petitioner was clearly prejudiced by his counsel's failure to secure a report that was in existence, and which benefited him. Petitioner was denied effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). U.S.C.A. 6,14. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

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CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of June, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

DEVON M. FORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire this 21st day of June, 2010.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day of June, 2010.

(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

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PCR App

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 30, 2011

Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Ford, Devon M. v. The State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

November 30, 2011."

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Daniel E. Shearouse

CLERK

DES/jj

cc: Assistant Attorney General Suzanne H. White

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(Rev. 10/07)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: South Carolina
Name (under which you were convicted): Devon Ford	Docket or Case No.:
Place of Confinement: Lee Correctional Institution	Prisoner No.: 312731
Petitioner (include the name under which you were convicted): Devon Ford, #312731 a/k/a Deven Ford	Respondent (authorized person having custody of petitioner): v. Michael McCall, Warden, Lee Correctional Institution
The Attorney General of the State of South Carolina	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Spartanburg County Court of General Sessions; 180 Magnolia Street, Spartanburg, SC 29306

(b) Criminal docket or case number (if you know): 2005-GS-42-3376; 3377

2. (a) Date of the judgment of conviction (if you know): 12/5/2005

(b) Date of sentencing: 12/5/2005

3. Length of sentence: 37 years' imprisonment

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
2005-GS-42-3376: Murder (37 years' imprisonment)
2005-GS-42-3377: Assault and battery with intent to kill (20 years' imprisonment) (concurrent)

6. (a) What was your plea? (Check one)

☐ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☑ (2) Guilty ☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?
The plea was pursuant to North Carolina v. Alford, 400 U.S. 25 (1970)

(c) If you went to trial, what kind of trial did you have? (Check one)

☐ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☑ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: South Carolina Court of Appeals

(b) Docket or case number (if you know):

(c) Result: Dismissed (See Attachment 1)

(d) Date of result (if you know): 9/17/2007

(e) Citation to the case (if you know): State v. Ford, 2007-UP-365

(f) Grounds raised:
Involuntary guilty plea

(g) Did you seek further review by a higher state court? ☐ Yes ☑ No

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

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(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☑ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Spartanburg County Court of Common Pleas

(2) Docket or case number (if you know): 2008-CP-42-395

(3) Date of filing (if you know): 1/24/2008

(4) Nature of the proceeding: Application for Post-Conviction Relief

(5) Grounds raised:
(1) Defense counsel was ineffective for failing to advise the Petitioner of ballistics evidence prior to the plea;
(2) Defense counsel represented the Petitioner under a conflict of interest;
(3) Defense counsel was ineffective for failing to object to the sentence imposed;
(4) Defense counsel was ineffective for failing to advise the Petitioner of the plea agreement.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☑ Yes ☐ No

(7) Result: Denied and dismissed

(8) Date of result (if you know): 3/22/2010

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(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

❒ Yes ❒ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☑ Yes ❒ No

(2) Second petition: ❒ Yes ❒ No

(3) Third petition: ❒ Yes ❒ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

The Petitioner's right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, was violated when defense counsel failed ot advise the Petitioner of the existence of an exculpatory ballistics test prior to the entry of the Petitioner's plea.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The Petitioner was charged with murder and ABWIK in connection with the shooting of Ikethia Davis and Jonathan Martin, respectively. The Petitioner informed the police and his attorneys that he did not shoot Davis and that Martin had shot her. See Attachments 4-6. The Petitioner also informed police where his gun was located so that they could test it against the bullet that was found in Davis. See Attachment 7. Martin stated that he did not fire any shots. See Attachment 8. SLED tested the Petitioner's firearm and discovered that the Petitioner's firearm did not match any of the bullets or shell casings found at hte scene or that were recovered from Davis' body. See Attachment 10. This report was provided to the State on November 22, 2005, approximately two weeks prior to the Petitioner's plea. See Attachment 10. Defense counsel did not adivse the Petitioner of the results of this test prior to the plea. The Petitioner obtained the report directly from SLED while his direct appeal was pending. Had the Petitioner known about the test results, the Petitioner would not have pleaded guilty. Defense counsel was ineffective for failing to advise the Petitioner of the test results.

(b) If you did not exhaust your state remedies on Ground One, explain why:

Although the Petitioner contends that this issue is preserved, certain items attached to this habeas petition, see Attachments 4-10, were not provided to the PCR court. The Petitioner asserts that this Court can review this documentation pursuant to Martinez v. Ryan, 132 S.Ct. 1309 (2012), and 28 U.S.C. Section 2254(e)(2), as the Petitioner's PCR counsel was ineffective for failing to review the State's file or the defense attorney's file prior to the PCR hearing and for failing to present this evidence on the Petitioner's behalf at the PCR hearing.

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(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why:
Collateral review presented the first opportunity for the Petitioner to raise this argument in state court.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for Post-Conviction Relief

Name and location of the court where the motion or petition was filed:
Spartanburg County Court of Common Pleas; 180 Magnolia Street, Spartanburg, SC 29306

Docket or case number (if you know): 2008-CP-42-395

Date of the court's decision: 3/22/2010

Result (attach a copy of the court's opinion or order, if available):
Denied and dismissed

(3) Did you receive a hearing on your motion or petition? ☑ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☑ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:
Supreme Court of South Carolina; 1231 Gervais Street, Columbia, SC 29201

Docket or case number (if you know):

Date of the court's decision: 11/30/2011

Result (attach a copy of the court's opinion or order, if available):
Certiorari denied (See Attachment 2); Remittitur issued 12/19/11 (See Attachment 3).

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO:

The Petitioner's right to the due process of law, as guaranteed by the Fifth and Fourteenth Amendments, was violated by the State's failure to disclose the ballistics report prior to the Petitioner's guilty plea.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The Petitioner incorporates by reference the supporting facts presented in Ground One. The ballistics report was not found in defense counsel's file during the PCR hearing. The Seventh Circuit Solicitor's Office's file in this matter contains no guarantee that the ballistics report was provided to defense counsel prior to the Petitioner's plea. See Attachment 9. Inasmuch as the ballistics report is clearly exculpatory, the State's failure to disclose the ballistics report prior to trial violated the Petitioner's due process rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and rendered his plea involuntary. The Petitioner's current counsel has been engaging in discussions with the assistant solicitor who prosecuted the Petitioner's charges to determine if he can definitively remember providing defense counsel with the report; the Petitioner will provide any subsequent information that he receives to this Court regarding this matter.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

PCR counsel did not present this allegation at the Petitioner's PCR hearing. The Petitioner asserts that this claim can be properly presented pursuant to Martinez v. Ryan, 132 S.Ct. 1309 (2012), due to PCR counsel's clear ineffectiveness in failing to present this claim at the PCR hearing. Since defense counsel was deceased at the time fo the PCR hearing, his file did not contain the ballistics report, and the Solicitor's Office's file did not contain definitive proof that the ballistics report was provided to defense counsel, it was incumbent upon PCR counsel to argue that the Petitioner's due process rights were violated.

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why:

Collateral review would have presented the first opportunity for this claim to be heard in state court.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

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Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:
See answer to Question (b); additionally, PCR appellate counsel could not raise an issue that was not presented at the PCR level.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why?

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ❒ Yes ❒ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

❒ Yes ❒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ❒ Yes ❒ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings**:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

❒ Yes ❒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

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Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

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13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☑ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

Ground Two; the reasons for not presenting the claim in state court are set forth in the answers to Questions (b) and (d)(7) for Ground Two.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

Ground Two; the reasons for nto presenting the claim in state court are set forth in the answers to Questions (b) and (d)(7) for Ground Two.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:
Michael Bartosh, Esquire; deceased.

(c) At trial:

(d) At sentencing:
Michael Bartosh, Esquire; deceased.

(e) On appeal:
Robert M. Dudek, then Deputy Chief Attorney for Capital Appeals; South Carolina Commission on Indigent Defense, Division of Appellate Defense; 1330 Lady Street, Columbia, SC 29201

(f) In any post-conviction proceeding:
David C. Alford, Esquire; David C. Alford, PC; P.O. Box 6326, Spartanburg, SC 29304

(g) On appeal from any ruling against you in a post-conviction proceeding:
Elizabeth A. Franklin-Best, Appellate Defender, South Carolina Commission on Indigent Defense, Division of Appellate Defense; 1330 Lady Street, Columbia, SC 29201

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☑ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*
The Petitioner was convicted and sentenced on December 5, 2005. The Petitioner filed a timely direct appeal from his conviction, which was dismissed on September 17, 2007. The remittitur from the direct appeal was issued on October 3, 2007, at which point the federal habeas clock began to run. The Petitioner filed a timely Application for Post-Conviction Relief on January 24, 2008, stopping the federal habeas clock. At this point, 113 days, at most, had run from the habeas clock. The Petitioner timely appelead the unfavorable decision issued by the PCR court to the Supreme Court of South Carolina, and certiorari was denied on November 30, 2011. The remittitur for the PCR appeal was issued on

December 19, 2011, at which point the habeas clock began to run again. The Petitioner had at least 252 days from this date to file his federal habeas petition. By the Petitioner's count, the habeas petition must be filed on or before August 27, 2012. Therefore, this petition is timely filed.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

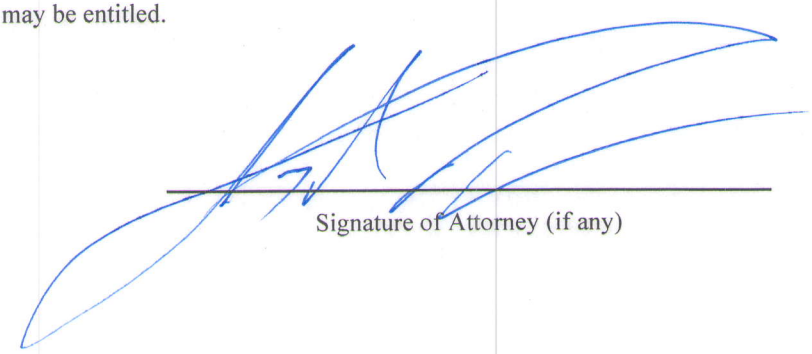
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which petitioner may be entitled.



Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on 8/9/2012 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

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IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF SOUTH CAROLINA

DEVON FORD, #312731,)) Petitioner,)) v.)) MICHAEL MCCALL, WARDEN,) LEE CORRECTIONAL INSTITUTION,)) Respondent.) _____)	**CASE NO.: 8:12-CV-02266-GRA-JDA** RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

This matter is before the Court pursuant to a Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus filed on August 9, 2012. This Memorandum is submitted in Response to the Respondent's Motion for Summary Judgment and Memorandum in Support filed November 8, 2012. The Petitioner now respectfully asserts that summary judgment is inappropriate for the reasons set forth below.

I.
PROCEDURAL HISTORY

The procedural history set forth in the Return and Memorandum of Law in Support of Motion for Summary Judgment ("the Return") is substantially correct. See Return at 1-12. The instant Petition was filed within one year of the finality of the judgment of conviction. Therefore, it is timely filed under 28 U.S.C. §2244.[1]

II.
GROUNDS FOR RELIEF

The Petitioner has asserted that this Petition should be granted in the following respects:

- **Ground One:** The Petitioner's right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, was violated when defense counsel failed to

[1] The Respondent does not appear to contest the timeliness of the Petition.

advise the Petitioner of the existence of an exculpatory ballistics test prior to the entry of the Petitioner's plea.

Supporting Facts: The Petitioner was charged with murder and ABWIK in connection with the shooting of Ikethia Davis and Jonathan Martin, respectively. The Petitioner informed the police and his attorneys that he did not shoot Davis and that Martin had shot her. See ECF Nos. 1-4, 1-5, 1-6. The Petitioner also informed police where his gun was located so that they could test it against the bullet that was found in Davis. See ECF No. 1-7. Martin stated that he did not fire any shots. See ECF No. 1-8. SLED tested the Petitioner's firearm and discovered that the Petitioner's firearm did not match any of the bullets or shell casings found at the scene or that were recovered from Davis' body. See ECF No. 1-10. This report was provided to the State on November 22, 2005, approximately two weeks prior to the Petitioner's plea. See ECF No. 1-10. Defense counsel did not advise the Petitioner of the results of this test prior to the plea. The Petitioner obtained the report directly from SLED while his direct appeal was pending. Had the Petitioner known about the test results, the Petitioner would not have pleaded guilty. Defense counsel was ineffective for failing to advise the Petitioner of the test results.

- **Ground Two:** The Petitioner's right to the due process of law, as guaranteed by the Fifth and Fourteenth Amendments, was violated by the State's failure to disclose the ballistics report prior to the Petitioner's guilty plea.

  Supporting Facts: The Petitioner incorporates by reference the supporting facts presented in Ground One. The ballistics report was not found in defense counsel's file during the PCR hearing. The Seventh Circuit Solicitor's Office's file in this matter

> contains no guarantee that the ballistics report was provided to defense counsel prior to the Petitioner's plea. See ECF No. 1-9. Inasmuch as the ballistics report is clearly exculpatory, the State's failure to disclose the ballistics report prior to trial violated the Petitioner's due process rights pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, and rendered his plea involuntary.

As stated in the habeas petition, see ECF No. 1 at 7, the Petitioner would inform the Court if he received any additional information from the assistant solicitor, Robert Coler, Esquire, who prosecuted the Petitioner in connection with Ground Two. Solicitor Coler's affidavit is attached to the motion to expand the record which is being filed in conjunction with this memorandum. See ECF Nos. 20; 20-1. In light of Solicitor Coler's affidavit, the Petitioner is withdrawing Ground Two and is proceeding solely on Ground One.

III.
STANDARD OF REVIEW

The review of a petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. §2254(d) provides two methods for granting a writ of habeas corpus. First, a petition for a writ of habeas corpus shall not be issued unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. §2254(d)(1). Second, the petition will not be granted unless the state court's ruling resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d)(2). A state court's determination of a factual issue is presumed correct, and a habeas petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1). Subsections (d)(2) and (e)(1) provide "independent requirements" for habeas

review by federal courts. Miller-El v. Cockrell, 537 U.S. 322, 341 (2003). AEDPA's deferential standard of review applies even when the state court fails to identify the prevailing federal standards and principles to address the claim. See Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002).

A federal court may grant habeas relief under §2254(d)(1) "when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" Wiggins v. Smith, 539 U.S. 510, 520 (2003) (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)). The legal principle governing claims of ineffective assistance of counsel is that announced in Strickland v. Washington, 466 U.S. 668 (1984). Wiggins, 539 U.S. at 521. In order to prove a claim of ineffective assistance of counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland. In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court held that "the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. Consequently, in the context of a guilty plea, the relevant inquiry is whether a defendant, but for counsel's errors and omissions, would have exercised his right to trial. Id. at 58-59.

IV.
ARGUMENT

The Petitioner's sole argument for relief is that defense counsel was ineffective for failing to advise him of the existence of an exculpatory ballistics report performed by SLED prior to his guilty plea. There are two variations on this argument: (1) that defense counsel was ineffective for failing to obtain the report prior to the plea; and (2) that defense counsel had the report and

failed to advise the Petitioner about its contents prior to the plea. The Respondent concedes that this argument is preserved for federal habeas review, but argues that some of the additional documentation provided in support of the habeas petition should be excluded. See Return at 23-24 (footnote 2). The Petitioner is filing a motion to expand the record in conjunction with this memorandum. See ECF No. 20. Essentially, the Petitioner argues that this Court should consider the documentation provided in light of the United States Supreme Court's decision in Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309 (2012). The Petitioner will bifurcate his argument into two sections: (1) how the case should be resolved under the record before the state court; and (2) how the case should be resolved pursuant to Martinez.

A. Resolution of the Claim under the State Court Record

1. Factual and Procedural Background

On December 7, 2004, Ikethia Davis was shot and killed in Spartanburg County while she was sitting in a white Maxima. The driver of that vehicle, Jonathan Martin, was also shot multiple times, but he survived. The State charged the Petitioner with the murder of Davis and with assault and battery with intent to kill with regard to Martin, contending that

> While Mr. Martin, in the driver's seat of his car and Mrs. Davis in the passenger side … the defendant, Devon Ford, got out of [his vehicle], came around, and came up to the passenger window of the maxima, and fired at least four, perhaps as many as seven shots, into the Maxima.

PCR App. p. 17, lines 17-23; ECF No. 14-1 at 19, lines 17-23. Following the incident, the Petitioner was arrested, and he informed the police that he had given his gun to an individual he knew as "Flint Rim."[2] PCR App. p. 121, lines 9-15. He instructed the police to obtain the firearm in order to test it. The police then recovered his firearm—an "Intratec Model TEC-9, 9mm Luger Caliber pistol"—from Flint Rim. PCR App. p. 153; ECF No. 14-1 at 155. Four 9

[2] The proper spelling of Flint's last name is "Rhem." See ECF No. 1-7 at 1.

millimeter Luger shell casings and three 9 millimeter bullets, including a bullet taken from the body of the deceased victim, were recovered at the scene and from the autopsy. See PCR App. pp. 153-154; ECF No. 14-1 at 155-156. All of these bullets and shell casings were compared to the Petitioner's gun by the South Carolina Law Enforcement Division, and SLED concluded that the Petitioner's firearm did not fire any of them. PCR App. p. 154; ECF No. 14-1 at 156.

On December 5, 2005, the Petitioner was scheduled to proceed to trial on his charges, but, after some deliberation,[3] he pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). At this proceeding, his attorney, Michael Bartosh, Esquire, explained to the trial court that he felt that the case came down to witness credibility and that "with Mrs. Davis' dying declaration … I think there's a, an excellent chance Mr. Ford would be convicted." PCR App. p. 20, lines 5-13; ECF No. 14-1 at 22, lines 5-13. The trial court then sentenced the Petitioner to thirty-seven years imprisonment.

While the Petitioner's direct appeal was pending, he requested, and received, SLED's ballistics report that concluded that his firearm did not fire the shots into the Maxima. See PCR App. p. 150; pp. 153-154; ECF No. 14-1 at 152; pp. 155-156. He then filed for Post-Conviction Relief in state court and argued that defense counsel was ineffective for failing to advise the Petitioner of the existence of the SLED report prior to his plea. See PCR App. p. 85, line 15-p. 86, line 6; ECF No. 14-1 at 87, line 15-p. 88, line 6. Defense counsel did not testify at the PCR hearing, as he was deceased at the time of the hearing. The report was not found in defense counsel's file. See PCR App. p. 115, lines 3-8; ECF No. 14-1 at 117, lines 3-8. Petitioner's counsel argued to the PCR court that defense counsel "did not have the ballistics match even or

[3] The plea was aborted when the Petitioner told the trial court that he was not satisfied with his attorney's representation. See PCR App. p. 13, lines 8-20; ECF No. 14-1 at 15, lines 8-20.

the ballistics test results available to him." PCR App. p. 126, lines 16-18; ECF No. 14-1 at 128, lines 16-18. The PCR court denied relief on this claim:

> The Applicant also claimed his attorney neglected to properly investigate ballistics evidence. The Applicant claimed ballistics revealed his gun did not match the shooter. Counsel's file reveals funds obtained for an expert, though this Court is unable to ascertain what steps were taken in the ballistics investigation. The Applicant failed to show prejudice, however, where he failed to demonstrate further ballistic evidence would have benefited his case. The Applicant failed to meet his burden and this Court denies and dismisses this claim.

PCR App. p. 138; ECF No. 14-1 at 140. The Petitioner appealed the denial of this claim to the Supreme Court of South Carolina. See ECF No. 14-13. The Supreme Court denied certiorari. See ECF No. 14-15.

2. Discussion

In order for the Petitioner to demonstrate that he should receive a new trial based on defense counsel's ineffectiveness, the Petitioner must show that: (1) defense counsel's performance was deficient; and (2) "but for counsel's errors, [the Petitioner] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, *supra*, 474 U.S. at 59. The Supreme Court has held that the prejudice inquiry in cases "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence" turns "on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." Id. The Petitioner contends that both prongs of Strickland and Hill are clearly met in this case.

a. Defense Counsel's Performance Was Deficient

The Petitioner contends that defense counsel's performance was deficient pursuant to Strickland and Hill in failing to investigate the ballistics evidence. The Respondent concedes

that the trial court did not address the deficient conduct prong of Strickland and Hill in its analysis of this issue, see ECF No. 14 at 23 ("The PCR Court did not make a finding regarding whether counsel was deficient"), and does not even appear to contest the issue. Since the PCR court did not address the deficient conduct prong, this Court does not have to evaluate Strickland's deficiency prong under the "doubly deferential" standard of review set out in AEDPA. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). Instead, this Court should review the deficiency prong *de novo*. See Foster v. Wolfenbarger, 687 F.3d 702, 709 (6th Cir. 2012) ("[W]here the state court ruled on one prong of the Strickland test, but not the other, we apply a de novo standard of review to the prong that the state court did not consider"); see also Wiggins v. Smith, *supra*, 539 U.S. at 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis").

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, *supra*, 446 U.S. at 691. Here, defense counsel failed to conclude a reasonable investigation into the ballistics evidence. The record reflects that the ballistics report was not in defense counsel's file prior to the plea. See PCR App. pp. 113-118; ECF No. 14-1 at 115-120. However, the report had been provided to the State before the date of the plea. See PCR App. p. 153; ECF No. 14-1 at 155. Defense counsel knew that ballistics testing would be forthcoming, and, indeed, told the Petitioner that testing was being conducted. See PCR App. p. 86, lines 1-3; ECF No. 14-1 at 88, lines 1-3. It would have only taken a simple phone call to the prosecutor to obtain the test results. Clearly, he should have done so inasmuch as the trial was to start the day that the Petitioner entered the plea. See PCR App. p. 4, lines 3-7; ECF No. 14-1 at 6, lines 3-7. Additionally, the Petitioner's

defense was hindered by the dying declaration of the victim, so he needed an avenue to challenge the validity of her assertion that the Petitioner shot her. In light of the impending trial, the importance of the ballistics report, the evidence against the Petitioner, and the ease in which the report could have been obtained, defense counsel's failure to secure the ballistics report prior to the Petitioner's plea constituted deficient conduct. See Hooper v. Garraghty, 845 F.2d 471, 474 (4th Cir. 1988) (finding deficient performance after the habeas petitioner's attorneys failed to investigate an insanity defense when they "knew … that, realistically, he had no other defense").

b. Defense Counsel's Deficient Performance Prejudiced the Petitioner

As an initial matter, the Petitioner believes that the PCR court misapplied Hill's prejudice prong in this case. The PCR court's one-clause reasoning for denying relief was that the Petitioner "failed to demonstrate further ballistic evidence would have benefited his case." PCR App. p. 138; ECF No. 14-1 at 140. While Hill's prejudice prong does include an inquiry as to how helpful the evidence would have been, Hill's prejudice prong is focused more closely on the decision-making process between defense counsel and the client and whether or not the client would have proceeded to trial had defense counsel undertaken the proper investigation. See generally Miller v. Champion, 262 F.3d 1066, 1068-1069 (11th Cir. 2001) (holding that while the "strength of the government's case against the defendant should be considered" in analyzing Hill's prejudice prong, "the test for prejudice is whether he can show that he would not have pled guilty had his attorney performed in a constitutionally adequate manner"). The PCR court did not engage in any substantive analysis whatsoever as to whether or not the Petitioner would have proceeded to trial had he known about the exculpatory ballistics test. Since the PCR court only looked to the "benefit[]" of the evidence and did not critically examine Hill's prejudice inquiry regarding the Petitioner's decision to plead guilty or go to trial, the PCR court's decision is

contrary to clearly established federal law. This Court should analyze the prejudice prong *de novo*. See Moody v. Polk, 408 F.3d 141, 147 (4th Cir. 2005) ("Because the state court applied the wrong standard to evaluate prejudice, we do not defer to its analysis of that prong but instead review it *de novo*").[4]

Assuming, *arguendo*, that the PCR court's ruling is entitled to AEDPA's deferential protections, the Petitioner contends that he is still entitled to federal habeas relief on this claim. The PCR court's entire basis for denying relief was that the Petitioner could not demonstrate that the ballistics evidence would have helped him at trial. However, the ballistics report was exculpatory in nature, as it showed that the gun the Petitioner provided to the police—which was the same caliber gun as the bullets and shell casings found in the vehicle—did not fire the fatal shot. With such results in hand, the Petitioner could clearly show the jury that he was not guilty of murder. See generally United States ex rel. Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985) (holding that a ballistics report that showed that the firearm alleged to have been fired was inoperable "was clearly exculpatory evidence").

The Respondent contends that the PCR court's finding that the Petitioner was not credible defeats this claim. See ECF No. 14 at 23. The Respondent's argument appears to follow this line of logic: since the Petitioner was found not credible at the PCR hearing, the PCR court further found that *all* of the Petitioner's information that he provided to police about the

[4] The Petitioner would point out that the Respondent argues that "as noted by the PCR Court, Petitioner did fail to establish by a preponderance of the evidence that he was prejudiced by any error of plea counsel." ECF No. 14 at 23. If this statement was correct, the PCR court's decision would also be contrary to federal law because a preponderance of the evidence standard is not the correct standard of review; instead, a reasonable probability standard is the correct standard of review. See Rose v. Lee, 252 F.3d 676, 689 (4th Cir. 2001). However, while the Respondent argues that the PCR court correctly applied the incorrect standard, the Petitioner cannot find any reference to a preponderance of the evidence standard in the PCR court's decision.

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shooting and his gun was also not credible. The PCR court's ruling does not extend that far.[5] However, even if the Respondent's analysis of the PCR court's ruling is correct, facts independent of the Petitioner's testimony support the Petitioner's argument that the ballistics report would have been important at trial. First, the State made it clear at the plea proceeding that the Petitioner was the sole shooter at the scene, see PCR App. pp. 17-18; ECF No. 14-1 at 19-20, so there was no need to test a firearm unless it was connected to the Petitioner. Second, as the Respondent points out, an investigative report in the file shows that the Petitioner told the police how to get to the gun, see PCR App. pp. 122-123; ECF No. 14-1 at 124-125, confirming the Petitioner's testimony on this point. Third, defense counsel requested funds for a ballistics expert, see PCR App. p. 155; ECF No. 14-1 at 157, so it is clear that the ballistics report was an important factor in the defense. Therefore, both attorneys, the police, and the Petitioner all felt the ballistics testing was important. The significance of the ballistics report to everyone involved shows that all parties to the case treated the report's results with far more respect than the Respondent.

Turning to the Petitioner's decision to plead guilty, the Supreme Court has held that "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him." Brady v. United States, 397 U.S. 742, 756 (1970). The appraisal of the strength of the State's case is critical to determining whether the plea was a "voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, *supra*, 400 U.S. at 31. It is unquestioned, even by the Respondent, that the Petitioner did not know about the existence of the ballistics report prior to his plea. The Petitioner pleaded guilty because he, and his attorney, believed that the case came down to "who the jury believed,"

[5] In fact, the PCR court doesn't even address the Petitioner's credibility in its discussion on this claim, so it's difficult to see how the PCR court could have found that all of the information the Petitioner had ever provided to the police was not credible.

and that the "dying declaration" by the victim gave the State "an excellent chance" to convict the Petitioner. PCR App. p. 20, lines 9-12; ECF No. 14-1 at 22, lines 9-12. However, if the Petitioner had known that the dying declaration would be rendered a nullity by the fact that his gun did not fire the shot that killed the victim, there can be no doubt that the "voluntary and intelligent choice among the alternative courses of action open to" him would have been to proceed to trial. Id. Therefore, the Petitioner was prejudiced by defense counsel's failure to secure the ballistics report prior to the plea.

The Petitioner also believes that the fact that he pleaded guilty pursuant to Alford is relevant. This is not a case where the Petitioner pleaded guilty because he was admitting that he shot the victim. Cf. McMann v. Richardson, 397 U.S. 759, 773 (1976) (holding that a defendant who pleads guilty is "convicted on his counseled admission in open court that he committed the crime charged against him"). Contrarily, the Petitioner pleaded guilty because of the perceived strength of the State's case. Had he known that the ballistics report confirmed his statements to the police that his firearm did not shoot the victim, he would not have pleaded guilty.

Furthermore, the Respondent's simple analysis of the issue—the Petitioner was not credible—ignores Hill's prejudice prong regarding whether or not the Petitioner would have proceeded to trial had he known about the testing. It is not enough to assume that the Petitioner would not have been found credible had he testified at trial—a finding that was never made by the PCR court—because the decision to proceed to trial remained with the Petitioner. It was his decision to present his defense to the jury, and it would have been the jury's determination to make as to whether or not he was telling the truth. Defense counsel's deficient performance forever prevented the Petitioner from exercising his constitutional right to a jury trial. The appropriate relief is to afford the Petitioner that lost opportunity.

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On a similar note, to the extent that the Petitioner's subjective intent to go to trial is relevant,[6] the Petitioner was scheduled to proceed to trial the day he pleaded guilty. Additionally, the Petitioner's plea was stopped due to the Petitioner's dissatisfaction with his attorney's representation. See PCR App. p. 13, lines 8-18; ECF No. 14-1 at 15, lines 8-18. The Petitioner's plea was also almost stopped again when he asked about an appeal and when he refused to say he was sorry to the victim's family.[7] See PCR App. pp. 22-25; ECF No. 14-1 at 24-27. If the Petitioner, who clearly had numerous issues with the way the plea proceeding was handled and with his decision to plead guilty, had known about the ballistics report, he would not have pleaded guilty.

Finally, the Petitioner contends that no rational defendant, standing in his shoes, would have made the decision to plead guilty with the ballistics report in hand, given the complete lack of benefit to the plea. See Cloud v. Beckstrom, 555 F.Supp.2d 777, 800 (E.D.Ky. 2008) (finding that an objective analysis of the decision to plead guilty includes the consideration of "'any

[6] Hill's prejudice prong is, ostensibly, an objective analysis. As the Fourth Circuit has noted, however:

> Objective analysis of the prejudice prong is probably the only workable means of applying Hill, but … not all of the rationale underlying the Strickland test comfortably fits its Hill cousin. In a Strickland case, we can logically apply objective analysis to the prejudice prong because we can assume that the trier of fact acted rationally and in accordance with the law, and we can assume that a hypothetical trier of fact at a trial untainted by incompetent assistance would do the same. In the guilty plea context, the entity in control of the result—the defendant—has unchecked subjective authority to insist on going to trial. In other words, he has the *right* to act *unreasonably*. Thus, if incompetent assistance has actually caused him to forgo this fundamental personal right, one might think that the Sixth Amendment has been violated, notwithstanding that many, most, or even all "reasonable" defendants would have pled guilty anyway.

Ostrander v. Green, 46 F.3d 347, 355 (4th Cir. 1995) (footnote 12) (emphasis in original), overruled on other grounds by O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996).

[7] The Petitioner would note that both of these actions by the trial court were improper. First, the trial court essentially threatened the Petitioner into not pursuing the plea if he was going to pursue an appeal, which had a statutory right to pursue. Second, the trial court disapproved of the Petitioner's decision not to apologize to the victim's family even though the proceeding was pursuant to Alford entirely so that the Petitioner would not have to admit guilt.

sentencing benefit received through the plea bargain versus the possible penalties to which the defendant would have been subjected if convicted after trial'") (quoting Frost v. United States, 2007 WL 1960605 (W.D.Va. 2007)). Since the Petitioner pleaded to murder, the minimum sentence the Petitioner faced at his plea was thirty years imprisonment with no possibility of early release, and the maximum penalty was life without parole. S.C. Code Ann. §16-3-20(A). There were no recommendations or promises with regard to the sentence imposed other than the State's recommendation that the sentences run concurrently. See PCR App. p. 3, lines 14-18; ECF No. 14-1 at 5, lines 14-18. Since that "concurrent" sentence could also include a life sentence, the Petitioner received virtually no sentencing benefit to his plea, other than the hope that he would be treated with more leniency because he was not proceeding to trial. Even with that leniency, a thirty-seven year sentence was still imposed, and the Petitioner will not be released from prison until 2041 when he is fifty-seven years old. While that is not a life sentence, service of thirty-seven years in prison will likely take an incalculable toll on the Petitioner before he is released. Consequently, the Petitioner received little to no benefit from his plea, and anyone who had been in his position would not have pleaded guilty had they known about the existence of the ballistics report.

Given all of the above, it was manifestly unreasonable for the PCR court to find that the Petitioner would not have benefited from an exculpatory ballistics test and that he would not have proceeded to trial had he known about the test results. The PCR court's decision was, therefore, a gross misapplication of Strickland and Hill. See Williams v. Taylor, 529 U.S. 362, 407 (2000) ("[A] state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case"). Under the facts of

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this case, the Petitioner is entitled to relief pursuant to 28 U.S.C. §§2254(a) and 2254(d)(1), and this Court should not grant summary judgment to the Respondent.

B. Resolution of the Claim Pursuant to Martinez

As set forth in detail above, the Petitioner believes that he is entitled to relief based on the record presented at the PCR hearing. However, the Petitioner contends that if this Court finds that summary judgment is appropriate based on the record, then this Court should consider his arguments, pursuant to Martinez, that collateral counsel was ineffective for failing to present additional evidence to the PCR court in support of the Petitioner's arguments, and grant habeas relief. The Petitioner believes that there is no doubt that he is entitled to relief pursuant to Strickland and Hill once the new evidence is considered. The Petitioner will first address the new evidence he seeks for this Court to consider before turning to the application of Martinez and how this Court can consider that evidence. Finally, the Petitioner will analyze his ineffective assistance of counsel argument in light of the new evidence.

1. Additional Evidence Presented to this Court

On December 8, 2004, the day after the shooting incident, the Petitioner was interviewed by detectives with the Spartanburg County Sheriff's Department regarding the incident. The Petitioner admitted to the police that he was present at the scene and was trying to give money to Martin when Martin pulled a gun on him and started shooting at him. ECF No. 1-4 at 3. The Petitioner hid momentarily and then reapproached Martin's vehicle, shooting multiple times and hitting Martin. ECF No. 1-4 at 3-6. He admitted to firing a 9 millimeter gun and he was fairly confident that Martin had a 9 millimeter gun as well. ECF No. 1-4 at 8; see also ECF No. 1-6 at 2. He told the police that "they just need to check these[] bullets, check them bullets and see whose finger they was on [sic]." ECF No. 1-5 at 12. He also told the police on multiple

occasions that he was innocent of shooting Davis and that the "courtroom" would have a chance "to understand my story." See ECF No. 1-5 at 12; ECF No. 1-6 at 3. He told the police that "I know it will be a trial Dog, it needs to be, you know what I'm saying. Because I'm not going down with no shit that I didn't damn do Dog." ECF No. 1-6 at 7.

In his initial statement, he told the police that he had thrown his gun into a river near Greer, South Carolina. ECF No. 1-5 at 4. Two days later, on December 10, 2004, he was reinterviewed by police and told them that he had traded guns with Flint Rhem, who was his employer, after the incident instead of throwing the gun in the river. ECF No. 1-7 at 1-3. He further told the police that they needed to retrieve Martin's firearm so that it could be tested:

> That's the only thang [sic] I need to sit up there and say, because I was what you told me about um, my pistol, only way you gonna know the evidence is between my pistol and his pistol you understand what I'm sayin? So I'm givin up my pistol so he need to go ahead and give up his pistol, that's the only thang [sic] ya'll to know the evidence, that the evidence come back to my pistol shot her, then ya'll know then understand that my pistol shot her, but ya'll won't know the evidence until ya'll have both of the pistols.

ECF No. 1-7 at 4. He told the police again that he knew that he did not shoot Davis. ECF No. 1-7 at 5.

On December 9, 2004, the police interviewed Martin. Martin told the police that he did not have a gun the night of the incident. ECF No. 1-8 at 8. He also told the police that he knew the Petitioner to have a 9 millimeter gun and that he did not know the Petitioner to have any other firearms. ECF No. 1-8 at 9.[8]

[8] In its Return, the Respondent argues that Martin identified the Petitioner as the shooter. See ECF No. 14 at 24 ("The solicitor indicated that Petitioner was identified as the shooter by the ABWIK victim"). This is incorrect based on Martin's statement. Martin told the police that he did not know who the shooter was. See ECF No. 1-8 at 5-6.

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Robert Coler, the prosecutor in the Petitioner's case, has concluded that he provided the SLED report to defense counsel prior to the Petitioner's guilty plea. See ECF No. 20-1 at 2-4. Furthermore, based on the SLED report, he was going to have to argue at trial that the Petitioner did not use the gun that he provided to the police. See ECF No. 20-1 at 3-4. His testimony was not presented at the PCR hearing, though he would have been readily available to testify.

2. Procedural Bar and Application of Martinez

In Martinez, the Supreme Court held that "a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 132 S.Ct. at 1313. Martinez, however, was silent as to whether or not collateral counsel's ineffectiveness could serve as a basis for expanding the record where, as here, an issue was presented in state court insufficiently. Specifically, the Petitioner contends that his case would have been much stronger had collateral counsel pursued an argument that defense counsel had the ballistics report in his possession instead of pursuing a failure-to-investigate argument. The Petitioner submits that Martinez should be expanded to cover these types of cases, as the Supreme Court's reasoning was based in the need for an effective attorney at a collateral relief proceeding to properly develop and present claims. See 132 S.Ct. at 1317 ("To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney"). The Supreme Court also noted that it is very difficult for a "prisoner … to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record" that is not readily accessible to him while in prison. Id. Finally, the Supreme Court, when describing what should suffice as "cause" to excuse a procedural default, noted that habeas courts should look to whether or not collateral counsel was ineffective under

the standards of Strickland v. Washington, 466 U.S. 668 (1984), which is a standard that permits courts to find ineffective assistance of counsel for failing to completely present an argument at trial *and* for failing to properly present an argument at trial. Id. at 1318. Therefore, while the explicit holding of Martinez applies only to habeas issues that are procedurally defaulted, the reasoning of Martinez should apply in full force to habeas issues that were not presented sufficiently in state court due to collateral counsel's ineffectiveness. The Petitioner does not believe that the Supreme Court would permit habeas petitioners whose collateral attorneys failed to completely present a claim to be entitled to habeas relief but not allow habeas petitioners whose collateral attorneys failed to properly present a claim to not receive habeas relief.

Additionally, the argument that the Petitioner presents here—that defense counsel failed to advise the Petitioner of the existence of the ballistics report—could be found by this Court to not be preserved for federal habeas review. Robert Coler's affidavit essentially confirms that plea counsel had the report prior to the plea. See ECF No. 20-1 at 3-4. However, Petitioner's PCR counsel argued to the PCR court that "I think the Court would have to acknowledge that unfortunately Mr. Bartosh did not have the ballistics match even or the ballistics test results available to him." PCR App. p. 126, lines 15-18; ECF No. 14-1 at 128, lines 15-18. PCR appellate counsel further presented this argument to the Supreme Court by arguing that "[c]ounsel did not secure this [ballistics] report prior to petitioner's plea, although it was in existence at the time." ECF No. 14-13 at 6. The argument presented at the PCR and on the appeal is different from the argument presented in this habeas petition, which makes this habeas claim procedurally barred. See, e.g., Singleton v. Eagleton, 425 Fed.Appx. 228 (4th Cir. 2011) (concluding that failure to consult claim was procedurally barred because a failure-to-follow-instructions claim was presented to the state courts instead). Although the Respondent has not

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pursued a procedural bar to this argument, this Court could conclude that it is procedurally barred *sua sponte*. See Roach v. Angelone, 176 F.3d 210, 215 (4th Cir. 1999) (footnote 3) ("[T]his court has the discretionary power to address a petitioner's procedural default *sua sponte*").

If Martinez does not extend to claims which have been insufficiently presented to the state courts, then the Petitioner will be placed in the position of arguing that his claim is procedurally barred in order to obtain the protections of Martinez while the Respondent will argue that the claim is preserved for federal habeas review so that Martinez does not apply. This is an absurd result, and one that likely was not intended by the Supreme Court. The Petitioner believes that a simpler reading of Martinez would be to extend it to cases where a claim was presented insufficiently by collateral counsel. However, if this Court is disinclined to extend Martinez to that type of claim, then the Petitioner requests that this Court find this portion of his federal habeas claim procedurally barred and apply Martinez.

The Petitioner contends that this Court has the power to expand the record pursuant to Martinez under two independent bases. First, the Petitioner contends that 28 U.S.C. §2254(e)(2) is inapplicable to Martinez claims. Since Martinez operates to lift a procedural bar, the Petitioner believes that analysis under Martinez should be similar to providing evidence of actual innocence to lift a procedural bar, which should not be subject to §2254(e)(2)'s requirements. See Teleguz v. Pearson, 689 F.3d 322, 331 (4th Cir. 2012) (footnote 6) ("Our sister circuits considering whether the limitation on evidentiary hearings in §2254(e)(2) applies to Schlup[v. Delo, 513 U.S. 298 (1995)] claims have overwhelmingly found that it does not") (citing Cristin v. Brennan, 281 F.3d 404 (3rd Cir. 2002): McSwain v. Davis, 287 Fed.Appx. 450 (6th Cir. 2008); Vineyard v. Dretke, 125 Fed.Appx. 551 (5th Cir. 2005)). Martinez permits a court to

examine collateral counsel's ineffectiveness, but it will be almost impossible to determine whether or not collateral counsel was ineffective for failing to present a claim of ineffective assistance of defense counsel without also holding a hearing on defense counsel's ineffectiveness. It would lead to an another absurd result to allow a court to examine collateral counsel's effectiveness without regard to §2254(e)(2) but to be prohibited from examining the underlying claim unless §2254(e)(2)'s exceptions applied. Therefore, under Martinez's holding, an evidentiary hearing as to collateral counsel's effectiveness and defense counsel's effectiveness is required.

Second, given the Supreme Court's reasoning in Martinez, the Petitioner submits that §2254(e)(2)'s prohibition against holding evidentiary hearings where habeas petitioners "failed to develop the factual basis of a claim in state court" should not be applied where collateral counsel was the reason for that failure. The Petitioner recognizes that a similar argument was presented to the Supreme Court in Holland v. Jackson, 542 U.S. 649 (2004), and that it was rejected. See 542 U.S. at 653 (finding collateral counsel's "negligence … is chargeable to the client and precludes relief unless the conditions of §2254(e)(2) are satisfied"); see also Williams v. Taylor, 529 U.S. 420, 432 (2000) ("Under the opening clause of §2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). The Petitioner believes that Martinez has abrogated Holland and Williams. If the reading of §2254(e)(2) given by Holland survives Martinez, then Martinez crafts a right without a remedy. After all, even if a claim is not presented by collateral counsel, it is still subject to §2254(e)(2)'s stringent requirements before an evidentiary hearing would be granted. However, if no evidence can be heard for a claim that *has never been presented*, then it will be almost impossible for a habeas petitioner to ever utilize

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Martinez to obtain federal habeas relief. This cannot have been the Supreme Court's intent in Martinez. The most reasonable way to reconcile Martinez and §2254(e)(2) is to extend Martinez to cases where collateral counsel is at fault in presenting a claim—either partially or *in toto*—in state court. Accordingly, the Petitioner believes that this Court can extend Martinez to §2254(e)(2) and hold an evidentiary hearing if collateral counsel was ineffective in failing to properly present evidence in support of the Petitioner's habeas claim at his Post-Conviction Relief hearing.

3. Discussion

The Petitioner contends that the additional evidence he seeks to admit pursuant to Martinez affects both Strickland's and Hill's deficient conduct and prejudice prongs. As an initial matter, the Petitioner would note that all of the additional evidence was readily available to collateral counsel. The statements of the Petitioner and Martin were provided in the discovery materials given to defense counsel by the State, and collateral counsel had a complete copy of defense counsel's file forwarded to him. See PCR App. p. 114, lines 20-22; ECF No. 14-1 at 116, lines 20-22. Additionally, collateral counsel could have easily secured the contents of Solicitor Coler's affidavit by subpoenaing him to testify at the PCR hearing. The Petitioner submits that collateral counsel's ineffectiveness will be shown by how important the information contained in these documents was to the PCR allegations.

a. Defense Counsel's Performance Was Deficient

Solicitor Coler's affidavit conclusively shows that defense counsel had the ballistics report prior to the plea proceeding. See ECF No. 20-1 at 2-4. However, he did not advise the Petitioner of the findings prior to the plea. This fact can be inferred from a number of sources. First, defense counsel's presentation at the plea proceeding did not mention the ballistics report

in his description of why he felt the evidence was overwhelming, so it is clear that he either did not read the ballistics report or did not understand the report's findings. See PCR App. p. 20, lines 5-13; ECF No. 14-1 at 22, lines 5-13. Second, the Petitioner personally requested the SLED report while incarcerated following his plea, and then alleged ineffective assistance of counsel for failing to advise him of the report, which are actions completely inconsistent with someone who had been apprised of the report prior to the plea. Third, as has been shown, no rational defendant would have pleaded guilty had they been provided the report prior to the guilty plea.

Since defense counsel had the ballistics report prior to the plea, his performance fell further below an objective standard of reasonableness than if he simply failed to request the results from the prosecution prior to the plea. All defense counsel had to do was read the document to know its relevancy and importance. Defense counsel's failure to even read the report "puts at risk … the reliability of the adversarial testing process." Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). See also Williams v. Washington, 59 F.3d 673, 680 (7th Cir. 1995) ("We cannot imagine a plausible excuse for a decision not to read discovery materials provided by the State").

The Respondent appears to believe that defense counsel's presentation of facts at the plea shows that defense counsel had a complete understanding of the facts, including the results of the testing, against the Petitioner. See ECF No. 14 at 24 ("Plea counsel indicated that the primary concern in going to trial was the dying declaration of the murder victim, not some matter relating to the ballistics evidence that could have been presented at trial"). However, "[t]here is much truth to the logic of Occam's Razor that, all things being equal, the simpler explanation is probably true." L.W. Matteson, Inc. v. United States, 61 Fed.Cl. 296, 310 (Fed.Cl. 2004). The

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simple explanation is that defense counsel didn't mention the ballistics report because he hadn't read it. As has been shown, this simple explanation is consistent with all of the facts of the case. Accordingly, defense counsel's failure to advise the Petitioner of the existence of the ballistics report that he had in his possession is undeniably deficient conduct. Relief should be granted. See 28 U.S.C. §2254(a).

b. Defense Counsel's Deficient Performance Prejudiced the Petitioner

The Petitioner would incorporate by reference all of his arguments presented above as to why he was prejudiced by defense counsel's deficient conduct. The Petitioner submits that the additional evidence submitted to this Court is relevant to the prejudice analysis because the evidence sheds significant light on the defense that would have been presented at trial. The Petitioner was steadfast in all of his statements to the police that he did not shoot the victim. See ECF Nos. 1-4 through 1-7. Additionally, the Petitioner told the police where his gun was located, who was in possession of it, and how to retrieve it. See ECF No. 1-7. The Petitioner also told the police that Martin fired at him with a nine millimeter firearm, which was the same caliber pistol as the bullets and shell casings found at the scene. See ECF Nos. 1-4 through 1-6. The Petitioner further told the police that they needed to convince Martin to give up his firearm so that it could be conclusively established who shot the deceased victim. See ECF No. 1-7 at 4-5. Finally, the Petitioner told the police on multiple occasions that he was going to go to trial because he did not shoot the victim. See ECF No. 1-5 at 12; ECF No. 1-6 at 3; ECF No. 1-6 at 7. All of this evidence demonstrates that the Petitioner intended, from the very beginning of the case, to show at trial that he did not kill the victim.

While the Respondent questions the validity of the Petitioner's defense, since the gun provided to the police came from the Petitioner, the Petitioner submits that the circumstances

surrounding the Petitioner's actions and statements to the police lend credence to his defense. An objective review of the statements shows that the Petitioner was not trying to minimize his involvement in the crime. The Petitioner readily admitted to shooting Martin on multiple occasions with a nine millimeter firearm. He was given the opportunity to blame his co-defendant for the shooting, and he consistently denied that his co-defendant had anything to do with the shooting. ECF No. 1-4 at 9-11. He also stated, though quite crassly, the reasons why he would not have wanted to kill the victim. ECF No. 1-4 at 11-13; ECF No. 1-5 at 12-13.

In order for the Respondent's argument that the Petitioner's defense was so incredible that this Court should find that he would not have proceeded to trial, this Court would have to believe that the Petitioner was a criminal mastermind who was smart enough to place himself at the scene, inculpate himself with regard to shooting Martin, provide a false gun that was the same caliber as the gun used in the crime to Flint Rhem, convince the police to retrieve his gun at Rhem's house, and get the police to test it in order to provide himself with a solid defense. However, again, "the simpler explanation is probably true." L.W. Matteson, Inc., *supra*, 61 Fed.Cl. at 310. The simple explanation is that the Petitioner was telling the truth to the police. Certainly, his story is not so incredible that it would never have been believed by a jury.

Finally, if the Petitioner planted a false gun, as the State was going to have argue at trial[9] and the Respondent appears to contend occurred, the Petitioner would never have pleaded guilty because he would have absolutely known that the tests would come back as exculpatory. The fact that the Petitioner pleaded guilty shows that he was concerned that the ballistics report would come back positive. Cf. ECF No. 1-7 at 5 (in response to a question that he shot the victim, the Petitioner stated that "I, I don't think, I know it ain't no possibility"). The test did not come back positive because he did not shoot the deceased victim. The Petitioner respectfully

[9] See ECF No. 20-1 at 3-4.

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submits that this Court should grant relief so that he may present his defense to a jury because he was unconstitutionally prevented from doing so. See 28 U.S.C. §2254(a).[10]

[10] In addition to his earlier argument that the PCR court misapplied the prejudice prong of Hill, the Petitioner submits that since new evidence is being presented which affects the prejudice prong of Hill, the PCR court's decision evaluating prejudice is no longer entitled to deference. See generally Monroe v. Angelone, 323 F.3d 286, 297-298 (4th Cir. 2003) (evaluating a Brady claim that was partially presented in state court *de novo* because the state court did not have the opportunity to review the evidence properly presented in habeas proceedings in conjunction with the evidence introduced in the state proceedings). If this Court finds that §2254(d)(1) applies despite the misapplication of Hill and the new evidence introduced, the Petitioner believes that he has met that more stringent standard as well in this case.

V.
CONCLUSION

Defense counsel failed to perform one of the most basic and fundamental duties a criminal defense attorney must do: advise his client about potentially exculpatory evidence that is favorable to the defense. The Petitioner respectfully requests that this Court grant him the opportunity to present that favorable evidence to a jury and let the jury conclude if he is guilty or innocent. Under the facts of this case, that is the appropriate remedy. See Strickland, *supra*, Hill, *supra*, 28 U.S.C. §§2254(a); (d)(1).

Given all of the above, the Petitioner submits that the Respondent's motion for summary judgment should be denied, and that his petition for a writ of habeas corpus should be granted.

Respectfully submitted,



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This 1st day of February, 2013.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/ GREENWOOD DIVISION

Devon Ford, a/k/a Deven Ford or Devin Ford, Petitioner, v. Michael McCall, Warden, Lee Correctional Institution, Respondent.	C/A No.: 8:12-cv-02266-GRA **ORDER** (Written Opinion)

This matter comes before the Court for a review of United States Magistrate Judge Jacquelyn D. Austin's Report and Recommendation made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) for the District of South Carolina, and filed on April 23, 2013. Pursuant to 28 U.S.C. § 2254, Petitioner Devon Ford ("Petitioner"), who is currently proceeding with the assistance of counsel, filed a Petition for Writ of Habeas Corpus. ECF No. 1. On November 8, 2012, Respondent Michael McCall ("Respondent") filed a Motion for Summary Judgment and a Return and Memorandum of Law in Support of Motion for Summary Judgment. ECF Nos. 14 & 15. Petitioner filed a Motion to Expand the Record and a Response in Opposition to Respondent's Motion for Summary Judgment on February 1, 2013. ECF Nos. 20 & 21. On February 11, 2013, Respondent filed a Reply to Petitioner's Response, and on February 19, 2013, Respondent filed a Response in Opposition to Petitioner's Motion to Expand the Record. ECF Nos. 25 & 26. Petitioner filed a Reply to Respondent's Response to

Petitioner's Motion to Expand the Record on March 1, 2013. ECF No. 28. Petitioner also filed timely objections to the Report and Recommendation. ECF No. 30. For the reasons set forth herein, this Court adopts the Report and Recommendation to the extent that it is consistent with this Order.

Background and Procedural History

The Magistrate Judge's Report and Recommendation sets forth in detail the relevant facts and standards of law on this matter, and the Court incorporates and summarizes them below in relevant part. Petitioner is presently confined at the Lee Correctional Institution of the South Carolina Department of Corrections ("SCDC"). He was indicted on August 25, 2005 for murder and assault and battery with intent to kill ("ABWIK"). ECF No. 14-1, at 157–60. Michael Bartosh ("Plea Counsel"), a public defender, represented Petitioner on the charges. ECF No. 14-1, at 1. On December 5, 2005, Petitioner pled guilty to the charges before the Honorable Doyet A. Early, III.[1] ECF No. 14-1, at 1. After accepting Petitioner's plea of guilty, Judge Early sentenced Petitioner to a term of thirty-seven (37) years imprisonment for the murder charge and twenty (20) years imprisonment for the ABWIK charge, and ordered that the sentences run concurrently. ECF No. 14-1, at 25.

Petitioner filed a notice of appeal on December 9, 2005. ECF No. 14-2. On appeal, Petitioner was represented by Robert Dudek ("Appellate Counsel"), whom

[1] Petitioner entered the plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970). ECF No. 14-1, at 5. "An *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest." *United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (citing *Alford*, 400 U.S. at 37).

filed a brief on Petitioner's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967) and a petition to be relieved as counsel. ECF No. 14-3. Petitioner also filed a *pro se* brief in support of his appeal. ECF No. 14-6. In an unpublished opinion, the South Carolina Court of Appeals dismissed the appeal and granted Appellate Counsel's petition to be relieved. *State v. Ford*, 2007-UP-365 (S.C. Ct. App. Sept. 17, 2007); ECF No. 14-1, at 27–28.

On January 24, 2008, proceeding *pro se*, Petitioner filed a Post-Conviction Relief ("PCR") Application. ECF No. 14-1, at 29. David C. Alford ("PCR Counsel") was subsequently appointed to represent Petitioner, and on July 30, 2008, Petitioner filed an amended PCR Application. ECF No. 14-8. In the amended PCR Application, Petitioner alleged the following grounds for relief: (1) trial counsel was "ineffective for failing to object to the sentence that was handed down by the court that was contrary to legislative intent"; (2) trial counsel was "ineffective for failing to explain to Petitioner the consequences of his plea, thus violating the mandates of Boykin-v-Alabama"; (3) trial counsel was "ineffective for failing to object when the plea court failed to advise Petitioner of the full consequences of his plea"; and (4) Petitioner was "denied his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process of law when counsel and the plea court failed to apprise Petitioner of the mandates of S.C. Code Ann. § 24-21-560(D), which results in **double sentencing** and thus rendering Petitioner's plea and sentence unconstitutional." ECF No. 14-8, at 2, 7 (emphasis in original). Petitioner filed a second amended PCR Application on August 22, 2008 which raised the

same grounds for relief as the first amended Application. ECF No. 14-1, at 42, 45–57.

PCR Counsel represented Petitioner at a PCR hearing on September 18, 2008. ECF No. 14-9, at 1. On December 14, 2009, the PCR court denied Petitioner's PCR Application and dismissed the claims with prejudice. ECF No. 14-9, at 9. Petitioner filed a Motion to Alter or Amend Judgment pursuant to South Carolina Rules of Civil Procedure 59(e) and 52(b). ECF No. 14-10. Subsequently, the PCR Court denied Petitioner's PCR Application in an Amended Order of Dismissal with Prejudice. ECF No. 14-1, at 132–40. Relevant to the instant Petition, the PCR Court denied Petitioner's claim that Plea Counsel was ineffective for failing to properly investigate ballistic evidence, because Petitioner "failed to show prejudice . . . [because] he failed to demonstrate further ballistic evidence would have benefited his case." ECF No. 14-1, at 138.

Petitioner also filed a notice of appeal. ECF No. 14-12. Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense filed a Petition for Writ of Certiorari on Petitioner's behalf in the South Carolina Supreme Court on June 21, 2010. ECF No. 14-13. In the Petition for Writ of Certiorari, Petitioner raised one issue: "Did trial counsel render ineffective assistance of counsel when he did not secure the results of a ballistics test prior to petitioner's plea which would have revealed that the state's version of events was inaccurate?" ECF No. 14-13, at 2. On November 30, 2011, the South Carolina Supreme Court denied

the Petition for Writ of Certiorari and on December 19, 2011, issued the Remittitur. ECF Nos. 14-15 & 14-16.

Petitioner filed the instant Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254 on August 9, 2012. ECF No. 1. In the Petition, Petitioner asserts two grounds for relief, listed verbatim as follows:

> **Ground One:** The Petitioner's right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, was violated when defense counsel failed [to] advise the Petitioner of the existence of an exculpatory ballistics test prior to the entry of the Petitioner's plea.
>
> Supporting Facts: The Petitioner was charged with murder and ABWIK in connection with the shooting of Ikethia Davis and Jonathan Martin, respectively. The Petitioner informed the police and his attorneys that he did not shoot Davis and that Martin had shot her. The Petitioner also informed police where his gun was located so that they could test it against the bullet that was found in Davis. Martin stated that he did not fire any shots. SLED tested the Petitioner's firearm and discovered that the Petitioner's firearm did not match any of the bullets or shell casings found at [the] scene or that were recovered from Davis' body. This report was provided to the State on November 22, 2005, approximately two weeks prior to the Petitioner's plea. Defense counsel did not [advise] the Petitioner of the results of this test prior to the plea. The Petitioner obtained the report directly from SLED while his direct appeal was pending. Had the Petitioner known about the test results, the Petitioner would not have pleaded guilty. Defense counsel was ineffective for failing to advise the Petitioner of the test results.
>
> **Ground Two:** The Petitioner's right to the due process of law, as guaranteed by the Fifth and Fourteenth Amendments, was violated by the State's failure to disclose the ballistics report prior to the Petitioner's guilty plea.
>
> Supporting Facts: The Petitioner incorporates by reference the supporting facts presented in Ground One. The ballistics report was not found in defense counsel's file during the PCR hearing. The Seventh Circuit Solicitor's Office's file in this matter contains no

> guarantee that the ballistics report was provided to defense counsel prior to the Petitioner's plea. Inasmuch as the ballistics report is clearly exculpatory, the State's failure to disclose the ballistics report prior to trial violated the Petitioner's due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and rendered his plea involuntary. The Petitioner's current counsel has been engaging in discussions with the assistant solicitor who prosecuted the Petitioner's charges to determine if he can definitively remember providing defense counsel with the report; the Petitioner will provide any subsequent information that he receives to this Court regarding this matter.

Pet. for Writ of Habeas Corpus, ECF No. 1 (internal citations omitted). Respondent moved for summary judgment on November 8, 2012, and Petitioner filed a Response in Opposition on February 1, 2013. ECF Nos. 15 & 21. In the Response, Petitioner withdrew Ground Two, and stated that "[t]here are two variations" on the argument set forth in Ground One: "(1) that defense counsel was ineffective for failing to obtain the report prior to the plea; and (2) that defense counsel had the report and failed to advise Petitioner about its contents prior to the plea." Pet'r's Resp. in Opp'n to Resp't's Mot. Summ. J. 3–5, ECF No. 21. On the same date, Petitioner also filed a Motion to Expand the Record. ECF No. 20.

On April 23, 2013, the Magistrate Judge issued a Report and Recommendation and recommended that Respondent's Motion for Summary Judgment be granted and that Petitioner's Petition and Motion to Expand the Record be denied. Report and Recommendation 31, ECF No. 29. Petitioner filed timely objections to the Report and Recommendation. ECF No. 30.

Standard of Review

A. The Magistrate Judge's Report and Recommendation

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The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a *de novo* determination of any portions of the Report and Recommendation to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

B. Legal Standard for Summary Judgment

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing that is sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir. 1990).

C. Section 2254 Petitions

Petitioner's Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA provides that a federal court cannot grant habeas relief to a person in state custody, unless the petitioner "has exhausted the remedies available in the courts of the State"; or "there is an absence of available State corrective process"; or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1).

Under the AEDPA, a state court's decision must be sustained unless it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Furthermore, "a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Supreme Court has held that the "contrary to" and "unreasonable application" clauses contained in 28 U.S.C. § 2254(d) have independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Moreover, a state court's decision may be "contrary to," Supreme Court precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law"; or (2) "if the state court confronts facts that are materially

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indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." *Id.* at 405.

The "unreasonable application" clause is implicated when a "state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam). The federal habeas court should not grant relief to a petitioner "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. ___, ___ 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Relief cannot be granted if the state court's decision is only incorrect or erroneous; rather, the state court's application of Supreme Court precedent must be "objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003) (internal quotation marks omitted).

Discussion

Petitioner has withdrawn Ground Two of his Petition, but has advanced two different theories for relief under Ground One. In the Report and Recommendation, the Magistrate Judge construes these arguments as asserting separate grounds for relief: "'(1) that defense counsel was ineffective for failing to obtain the [ballistics] report prior to the plea; and (2) that defense counsel had the report and failed to

advise the Petitioner about its contents prior to the plea.'" Report & Recommendation 16, ECF No. 29 (quoting Pet'r's Resp. in Opp'n to Mot. Summ. J. 4–5, ECF No. 21). The Magistrate Judge refers to Petitioner's grounds for relief as Ground One (1) and Ground One (2) respectively. Report & Recommendation 16, ECF No. 29. The Court will also refer to Petitioner's arguments as Ground One (1) and Ground (2).

I. Ground One (1) of Petitioner's Petition

In Ground One (1) of his Petition, Petitioner contends that Plea Counsel was ineffective for failing to obtain a ballistics report prior to Petitioner's guilty plea. PCR Counsel raised the failure to investigate claim at the PCR hearing, and the PCR Court addressed this argument in its Amended Order of Dismissal. ECF No. 14-1, at 138–39. The Magistrate Judge concluded that Respondent's Motion for Summary Judgment as to Ground One (1) should be granted, because the PCR Court's denial of this claim did not involve an unreasonable determination of facts in light of the evidence, nor was it contrary to, or did it involve an unreasonable application of, clearly established federal law. Report & Recommendation 21, ECF No. 29. The Magistrate Judge further found that the record supports the PCR Court's decision. *Id.* Petitioner raises several objections to the Magistrate Judge's conclusions.

A. Objection One: The Magistrate Judge erred by failing to address the deficient conduct prong of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

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Petitioner argues that because the Report and Recommendation did not examine the deficient conduct prong of *Strickland v. Washington*, 466 U.S. 668 (1984), the Court should "address the deficient conduct prong *de novo*." Pet'r's Objection 3–4, ECF No. 30. Furthermore, Petitioner argues that the Court should determine whether Plea Counsel's performance was deficient, without giving any deference to the state court, because the PCR Court also failed to address this issue. *Id.* Petitioner's objection is without merit. In *Strickland v. Washington*, the Supreme Court concluded that:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697; *see also Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012) (quoting *Strickland*, 466 U.S. at 697) ("[A] reviewing court is not required to address the issue whether 'counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.'"). Therefore, it was not improper for the Magistrate Judge or the PCR Court to make a determination that Plea Counsel's performance did not prejudice Petitioner without making a determination about the deficiency, or lack thereof, of his conduct.

B. Objection Two: The Magistrate Judge erred by misapplying the prejudice prong of the test articulated in *Strickland*.

In the Report and Recommendation, the Magistrate Judge concluded that the record supports the PCR Court's decision to deny Petitioner's claim that Plea Counsel was ineffective for failing to obtain the ballistics report. Report & Recommendation 21–22, ECF No. 29. Relying on *Hill v. Lockhart*, 474 U.S. 52, 59–60 (1985), Petitioner argues that the Magistrate Judge based her conclusion solely on the PCR Court's finding that Petitioner is not credible; thus, she erred because she engaged in a subjective rather than an objective inquiry into whether Petitioner would have proceeded to trial if Plea Counsel had investigated the ballistics evidence. Pet'r's Objection 4–5, ECF No. 30.

The Court finds that this objection is without merit. The Magistrate Judge stated several reasons in support of her conclusion that the record supports the PCR Court's decision, not just the fact that the PCR Court found Petitioner to not be credible.[2] Report and Recommendation 21–22, ECF No. 29.

C. Objection Three: The Magistrate Judge erred in concluding that the PCR Court's decision was entitled to deference under 28 U.S.C. § 2254(d)(1).

[2] The Magistrate Judge concluded that the following supports the decision of the PCR Court: (1) "Petitioner indicated several times that he believed the State could prove his guilt beyond a reasonable doubt"; (2) "in summarizing the facts of the case, the prosecution never mentioned that ballistics evidence would be an issue in the case; the prosecution stated that everyone at the scene of the crime aside from Petitioner had identified Petitioner as the shooter"; (3) "[Plea Counsel] indicated Petitioner could not overcome the dying declaration of the murder victim that Petitioner was the shooter"; (4) "*Finally*, although Petitioner testified at the PCR hearing that he would have proceeded to trial if [Plea Counsel] had advised him of the ballistics report, the PCR Court determined Petitioner was not credible." Report & Recommendation 21–22, ECF No. 29 (emphasis added) (citations omitted).

Petitioner objects to the Magistrate Judge's conclusion that the PCR Court's application of the *Strickland* and *Hill* standards to his ineffective-assistance-of-counsel claim was reasonable. Pet'r's Objection 5, ECF No. 30. Petitioner argues that the PCR Court "looked solely to the benefit of the evidence" and "did not evaluate *Hill*'s determination of 'the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.'" *Id.*

As stated, this Court may not grant federal habeas relief to Petitioner unless the PCR Court's adjudication of the claim "'was contrary to' federal law then clearly established in the holdings of [the Supreme Court], § 2254(d)(1); or that it 'involved an unreasonable application of' such law, § 2254(d)(1); or that it 'was based on an unreasonable determination of the facts' in light of the record before the [PCR] court, § 2254(d)(2)." *Harrington v. Richter*, 562 U.S. ___, ___,131 S. Ct. 770, 785 (2011). Furthermore, Petitioner "can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the [PCR Court's] decision." *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1402 (2011) (quoting *Richter*, 562 U.S. at ___, 131 S. Ct. at 784). "'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Richter*, 562 U.S. at ___, 131 S. Ct. at 785 (emphasis in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). Moreover, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 786.

The Supreme Court has established that in the context of an ineffective assistance of counsel claim, "the rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (internal quotation marks omitted). In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the Supreme Court held that to prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) that, but for his counsel's deficiencies, the result of the proceeding would have been different. With respect to reasonableness, the court must determine the reasonableness of the challenged conduct on the facts of the particular case at the time of the attorney's conduct. *Id.* at 690. The attorney's conduct must be "'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689 (directing that "[j]udicial scrutiny of counsel's performance must be highly deferential"). To establish prejudice in the context of a guilty plea, the habeas petitioner must show "'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

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The PCR Court held an evidentiary hearing on Petitioner's ineffective assistance of counsel claims. *See* ECF No. 14-1 at 69–130. After the hearing, the PCR Court issued an Amended Order of Dismissal with Prejudice. ECF No. 14-1, at 132–40. The PCR Court properly identified that the clearly established Federal law as determined by the Supreme Court are the standards set forth in *Strickland v. Washington,* 466 U.S. 668 (1984) and *Hill v. Lockhart*, 474 U.S. 52 (1985). ECF No. 14-1, at 136. The PCR Court held that Petitioner failed to show that he was prejudiced by Plea Counsel's conduct because he "failed to demonstrate further ballistic evidence would have benefitted his case." ECF No. 14-1, at 138.

In *Hill v. Lockhart*, the Supreme Court concluded that: "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that the discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59 (1985). However, the Supreme Court also concluded that "[t]his assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. . . . As we explained in *Strickland v. Washington, supra*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59–60 (quoting *Strickland*, 466 U.S. at 695).

Here, the Court agrees with the Magistrate Judge that Petitioner has not demonstrated that the PCR Court's adjudication of this issue resulted in a decision contrary to, or involving an unreasonable application of clearly established federal law, or resulted in a decision based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see also Premo v. Moore*, ___ U.S. ___, 131 S. Ct. 733, 743 (2011) ("Deference to the state court's prejudice determination is all the more significant in light of the uncertainty inherent in plea negotiations . . . .").

The Court also concludes that the record supports the PCR Court's decision. Petitioner was indicted on charges of murder and ABWIK. ECF No. 14-1, at 3. On the murder charge, Petitioner was facing a minimum sentence of thirty years imprisonment and a maximum sentence of life imprisonment. *Id.* On the ABWIK charge, Petitioner was facing a sentence of up to twenty years. *Id.* In exchange for Petitioner's plea of guilty, the State agreed to recommend that Petitioner's sentences run concurrently rather than consecutively. *Id.* Furthermore, as the Magistrate Judge articulated in the Report and Recommendation, at the guilty plea hearing the State did not indicate that ballistics evidence would be used at trial. ECF No. 14-1, at 17–19. The crux of the State's case was a dying declaration identifying the shooter as Petitioner, not ballistics evidence:

> The police quickly developed Devon Ford as a suspect . . . . [The murder victim] gave a dying declaration of who the shooter was. [The ABWIK victim] identified the shooter for the police. The testimony at trial would [have] also come from Ken Lilly, the driver of the Suburban, that Devon Ford was the shooter in this case.

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ECF No. 14-1, at 18. Plea Counsel also stated at the guilty plea hearing that he believed that based on the dying declaration, "there's a, an excellent chance [Petitioner] would be convicted." ECF No. 14-1, at 20. In addition, Petitioner and Plea Counsel affirmed at various times that they believed that the State could prove Petitioner's guilt beyond a reasonable doubt based on what was presented by the prosecution at the plea hearing. ECF No. 14-1, at 5, 8, 16 & 23. Finally, at the PCR hearing, Petitioner testified that the firearm analyzed in the ballistics report was recovered by law enforcement only after he told police to retrieve the firearm and that it was the gun that he used in the shooting. This statement was given to law enforcement two days after he was arrested. ECF No. 14-1, at 120–22. The firearm was not discovered on Petitioner or recovered from the crime scene. ECF No. 14-1, at 119–23. Accordingly, summary judgment for Respondent as to Ground One (1) is appropriate.

D. Objection Four: The Magistrate Judge erred by failing to evaluate the relevancy of the ballistics report.

The Petitioner also objects to the Magistrate Judge's failure to "address[] the value of the ballistics report or how it may have changed the Petitioner's calculus in assessing the plea versus taking the case to trial." Pet'r's Objection 6, ECF No. 30. Petitioner's objection is without merit. As stated, a federal habeas court must determine whether the state court's adjudication of the habeas claim was contrary to, or an unreasonable application of, clearly established federal law, or whether the decision of the state court was based on an "unreasonable determination of the

facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Petitioner is entitled to a *de novo* consideration of his underlying constitutional claim for relief only after the federal habeas court determines that the state court's adjudication of the claim was unreasonable. *Pope v. Crews*, ___ F. Supp. 2d ___, No. 91-06717-CIV, 2013 WL 1289257 (S.D. Fla. March 26, 2013) (emphasis added) ("Pursuant to the AEDPA, courts confronted with a section 2254 petition raising claims that have been adjudicated on the merits by the state court must answer two questions prior to providing habeas relief: (1) whether the state court's adjudication of the claim was unreasonable under section 2254(d); and (2) *if so*, whether the petitioner is being held in custody in violation of the Constitution or laws and treaties of the United States."). The Court has determined that the PCR Court's adjudication of Petitioner's ineffective-assistance-of-counsel claim was reasonable; therefore, the PCR Court's decision is entitled to deference under § 2254(d).

E. Objection Five: The Magistrate Judge erred in overvaluing the dying declaration and failing to examine the dying declaration in light of the exculpatory ballistics test.

Petitioner alleges that he "is clearly entitled to relief" and that there is "overwhelming evidence of innocence." Pet'r's Objection 6–7, ECF No. 30. "Petitioner, therefore, objects to the Report's overvaluation of the dying declaration, and its failure to examine the dying declaration in light of the exculpatory ballistics test." *Id.* at 7. Petitioner again asks this Court to review his ineffective-assistance-of-counsel claim *de novo*. For the reasons stated above, the

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Court concludes that the PCR Court's adjudication of Petitioner's claim was not contrary to, or an unreasonable application of, clearly established federal law. Nor was it based on an unreasonable determination of the facts in light of the evidence presented at the PCR hearing. Accordingly, the Court concludes that Petitioner's objection is without merit.

II. Ground One (2) of Petitioner's Petition

In Ground One (2) of Petitioner's Petition, Petitioner contends that Plea Counsel was ineffective for failing to disclose a ballistics report prior to the guilty plea hearing. Pet'r's Resp. in Opp'n to Mot. Summ. J. 4–5, ECF No. 21. PCR Counsel did not raise this issue before the PCR Court; therefore, Respondent argues that the claim is procedurally defaulted and cannot be considered by this Court. Resp't's Reply to Resp. in Opp'n to Mot. Summ. J. 1–3, ECF No. 25. Petitioner contends that the Court may consider it under the Supreme Court's holding in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012). Pet'r's Resp. in Opp'n to Mot. Summ. J. 17–19, ECF No. 21.

The Magistrate Judge concluded that this Court cannot excuse the procedural default and consider Petitioner's claim, because he did not demonstrate that his PCR Counsel's representation fell below an objective standard of reasonableness. Report & Recommendation 25, ECF No. 29. Petitioner objects to the Magistrate Judge's "conclusion that Petitioner did not argue that collateral counsel's performance was deficient pursuant to *Strickland*." Pet'r's Objection to Report & Recommendation 8, ECF No. 30.

In *Martinez v. Ryan*, ___ U.S. ___, ___ 132 S. Ct. 1309, 1313 (2012), the United States Supreme Court considered "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in the state court due to an attorney's errors in an initial-review collateral proceeding." Prior to *Martinez*, the Supreme Court set forth a general rule that defendants do not have a constitutional right to counsel in collateral proceedings; thus, the ineffective assistance of counsel in such proceedings does not establish cause for a prisoner's procedural default of an ineffective-assistance-of-trial-counsel claim. *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Martinez*, the Supreme Court created a "narrow exception" to its statement in *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings *may* establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1315 (emphasis added). The exception to *Coleman* "allow[s] a federal habeas court to find 'cause,' thereby excusing a defendant's procedural default, where:

> (1) the claim of 'ineffective assistance of trial counsel' was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective-assistance-of-trial-counsel claim'; and (4) state law *requires* that an 'ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.'

Trevino v. Thaler, ___ U.S. ___, ___, 133 S. Ct. 1911, 1918 (2013) (quoting *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1318–19, 1320–21). With regard to the

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requirement that the ineffective-assistance-of-trial-counsel claim be a "substantial" one, "the prisoner must demonstrate that the claim has some merit." *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1318 (citation omitted).

Finally, if Petitioner establishes "cause" for the procedural default, he must also establish prejudice. *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1316 ("A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.").

To establish that PCR Counsel provided ineffective assistance of counsel, Petitioner must show that: (1) his counsel's performance "fell below an objective standard of reasonableness"; and (2) he was prejudiced by his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To establish prejudice, Petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Thus, "the Court must conclude that the ineffective-assistance-of-trial-counsel claim would have won Petitioner a new trial at the state court level." *Martinez v. Schriro*, No. CV 08-785-PHX-JAT, 2012 WL 5936566, at *2 (D. Ariz. Nov. 27, 2012); *see also Preyor v. Stephens*, ___ F. App'x ___, No. 12-70024, 2013 WL 3830160, at *8 (July 25, 2013 5th Cir.) ("To establish ineffective assistance of his initial state habeas counsel, [Petitioner] must show both that habeas counsel's performance . . . was deficient and that he was prejudiced by the deficient

performance—that is, there is a reasonable probability that he would have been granted state habeas relief had the claims been presented in the first state habeas application."); *Foley v. White*, No. 6:00-CV-552-DCR-REW, 2012 WL 6965070, at *9 (E.D. Ky. Nov. 15, 2012) (quoting *Leavitt v. Arave*, No. 1:93-cv-0024-BLW, 2012 WL 1995091, at *10 (D. Idaho June 1, 2012)) ("In the context of *Martinez*, a demonstration of prejudice would require [Petitioner] to show that, but for post-conviction counsel's errors, there is a reasonable probability he 'would have received relief on a claim of ineffective assistance of trial counsel in state court.'"), *adopted by* 2013 WL 375185 (E.D. Ky. Jan. 30, 2013); *Horonzy v. Smith*, No. 1:11-cv-00235-EJL, 2013 WL 3776372, at *6 (D. Idaho Sept. 12, 2012) ("The application of the *Strickland* test in this instance means that Petitioner is required to show that counsel's representation during the post-conviction proceeding was objectively unreasonable, and that, but for his errors, there is a reasonable probability that Petitioner would have received relief on a claim of ineffective assistance of trial counsel in the state post-conviction matter. This standard is a high one.").

Petitioner contends that PCR Counsel's conduct was deficient because he failed to investigate whether or not Plea Counsel obtained a copy of the ballistics report prior to Petitioner's guilty plea hearing and because, at the PCR hearing, he failed to "adequately support the Petitioner's allegations that he would have proceeded to trial . . . ." Pet'r's Objection 10, ECF No. 30. Petitioner further asserts that he was prejudiced by PCR Counsel's conduct. Pet'r's Resp. in Opp'n

to Mot. Summ. J. 21–25, ECF No. 21. Petitioner also filed a Motion to Expand the Record and seeks to introduce evidence that was not before the state court in order to establish that PCR Counsel was ineffective and to support his claim for federal habeas relief. Petitioner requests that this Court consider: (1) an affidavit from Robert Coler, the solicitor that prosecuted Petitioner's case; (2) two statements that were given by Petitioner to law enforcement; and (3) the ABWIK victim's statement to law enforcement. Pet'r's Mot. Expand Record 2, ECF No. 20.

Coler's affidavit specifically relates to PCR Counsel's ineffectiveness; thus, the Court will consider it for the purpose of evaluating cause and prejudice for the default of Ground One (2).[3] The Court discusses the admissibility of Petitioner's statements and the ABWIK victim's statement below.

[3] Under Rule 7 of the Rules Governing Section 2254 Cases, a federal habeas court may expand the record to include additional, relevant material that was not presented to the State court. However, the ability of the court to examine additional evidence is constrained by 28 U.S.C. § 2254(e)(2) which provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2); *see Fielder v. Stevenson*, C/A No. 2:12-cv-00412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) (citing *Runningeagle v. Schriro*, No. CV-98-1903-PHX-PGR, 2007 WL 4200743 (D. Ariz. Nov. 27, 2007)) ("Section 2254(e)(2) limits a petitioner's ability to present new evidence through a Rule 7 motion to expand the record to the same extent that it limits the availability of an evidentiary hearing."). Conversely, § 2254(e)(2) does not apply to the court's ability to expand the record in order to determine whether cause and prejudice exists in order to excuse the procedural default of a claim for habeas relief. *Fielder*, 2013 WL 593657 at *3. In *Martinez v. Ryan*, ___ U.S. ___, ___, 132 S. Ct. 1309, 1315 (2012) the Supreme Court held that the ineffective assistance of collateral counsel may establish cause for a petitioner's procedural default of an ineffective-assistance-of-counsel claim. Thus, "the usual bars to hearing evidence not

In the affidavit, Coler states that he "is of the opinion that defense counsel was made aware of the existence of the SLED ballistics report" although he has "no independent recollection of providing defense counsel . . . with a copy of the SLED ballistics report prior to the Petitioner's guilty plea" and "there is no documentation in the Solicitor's Office's file that shows that anyone with the Solicitor's Office provided defense counsel with the ballistics report prior to the Petitioner's guilty plea." Coler Aff. Par. 6, ECF No. 20-1.[4]

At the PCR hearing, PCR Counsel argued that Plea Counsel was ineffective for failing to investigate ballistics evidence prior to the guilty plea hearing. ECF No. 14-1, at 126. Clay Allen, an attorney from Plea Counsel's office, testified that Plea Counsel "was well known to keep a lot of things in his head" and that the file contained an order authorizing expenditure for a crime scene expert. ECF No. 14-1, at 113–14. Allen also stated that "it is possible there are some other documents not in the file." *Id.* at 114. Allen further testified that the prosecutor's office forwarded him an evidence receipt that indicated that Plea Counsel had received a copy of the State's evidence prior to the plea and that it may have contained the ballistics report. ECF No. 14-1, at 115. The PCR Court asked Allen

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presented in state court may not be applicable insofar as the claims relate *specifically* to the PCR attorney's ineffectiveness." *Id.* at *4 (emphasis added).

[4] Coler states that he concludes that he provided Plea Counsel with a copy of the ballistics report because his "handwritten opening statement notes maintained in the file since December 5, 2005" referred to the fact that the firearm Petitioner turned over to law enforcement did not match the projectile or shell casings located at the crime scene. Coler further states in the affidavit that Petitioner produced the firearm subsequent to his arrest and after he "initially claimed he threw his gun in a pond," and that the State's theory was to be that the firearm produced by Petitioner was not the same firearm that was used by him in the shooting. Coler concludes that it was clearly his intent to deal with the ballistics report during trial; therefore, he must have disclosed it to Plea Counsel prior to the guilty plea hearing. Coler Aff. Par. 6, ECF No. 20-1.

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whether Plea Counsel's file indicated that the firearm analyzed in the ballistics report was recovered from Petitioner. ECF No. 14-1, at 118. Allen responded that he was "not aware that it was actually recovered" from Petitioner to which the PCR Court responded "[j]ust my curiosity." *Id.* After Allen's testimony, the PCR Court stated that it wanted to "clear up the source" of the firearm tested in the ballistics report. ECF No. 14-1, at 119. Subsequently, Petitioner testified that he told police two days after he was arrested that he had "stashed" his firearm at "Flint Rhem's house."[5] ECF No. 14-1, at 121. Allen also testified that the firearm was obtained from Rhem's house after Petitioner told police during an interview to retrieve the gun from the house. ECF No. 14-1, at 122–23.

In response to Petitioner's ineffective-assistance-of-counsel claim, the State argued that it was Plea Counsel's "general reputation not to keep everything contained in the file, . . . so the file is not necessarily reflective [of] all the information he had available to him." The State also argued that Petitioner was not prejudiced by Plea Counsel's conduct, because several witnesses were prepared to identify him as the shooter, and the "State had an extremely strong case against him." ECF No. 14-1, at 127–29.

The PCR Court dismissed Petitioner's ineffective-assistance-of-counsel claim because "he failed to demonstrate further ballistic evidence would have benefited his case." ECF No. 14-1, at 138. Thus, this Court concludes that PCR Counsel's

[5] In the PCR hearing transcript, the name is spelled "Flint Rim"; however, Petitioner states that the correct spelling of the name is "Flint Rhem." Pet'r's Resp. in Opp'n to Mot. Summ. J. 5 n.2, ECF No. 21.

conduct did not prejudice Petitioner. The PCR Court was concerned about the source of the firearm, not whether Plea Counsel had failed to apprise Petitioner of the contents of the ballistics report prior to the guilty plea hearing, due to Plea Counsel's failure to either investigate the report or to disclose it. Even if PCR Counsel had set forth a failure-to-disclose argument instead of a failure-to-investigate argument, there is not a reasonable probability that the outcome of the proceeding would have been different. *See Harrington v. Richter*, 562 U.S. ___, ___, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 693–94 (1984)) ("With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'") Therefore, Petitioner has not established that, under *Martinez*, the procedural default of Ground One (2) should be excused. The Court concludes that summary judgment for Respondent as to Ground One (2) is appropriate.

III. Motion to Expand the Record

As stated above, Petitioner has moved the Court to expand the record in this case pursuant to Rules 7 and 8 of the Rules Governing Section 2254 Cases. Mot. to Expand Record 1, ECF No. 20. "Petitioner seeks to introduce evidence that was not before the state courts for [two] purposes: (1) to establish his PCR counsel was ineffective and overcome the procedural bar to Ground One (2) and (2) to establish

the factual predicate of his claim for federal habeas relief—ineffective assistance of defense counsel." Report & Recommendation 29–30, ECF No. 29. Above, the Court considered Robert Coler's affidavit in order to evaluate Petitioner's claim that PCR Counsel provided ineffective assistance. The Magistrate Judge recommends that this Court deny Petitioner's Motion to Expand the Record for the purpose of supporting his claim for federal habeas relief, because he "has failed to meet the requirements of § 2254(e)(2)." *Id.* Petitioner argues that 28 U.S.C. § 2254(e)(2) does not bar consideration of the additional evidence, because § 2254(e)(2) is subject to "equitable modification in light of *Martinez*." Pet'r's Objection 11, ECF No. 30.

The statements given to law enforcement by Petitioner and the ABWIK victim are intended to support his claim for federal habeas relief. Petitioner argues that "the additional evidence submitted to this Court is relevant to the prejudice analysis because the evidence sheds significant light on the defense that would have been presented at trial." Pet'r's Res. in Opp. Resp't's Mot. Summ. J. 23, ECF No. 21. Relying on *Martinez*, Petitioner contends that because PCR Counsel was ineffective for failing to introduce this evidence at the PCR hearing, 28 U.S.C. § 2254(e)(2) does not apply. *Id.* at 21; Pet'r's Objection 11–12, ECF No. 30.

Under Section 2254(e)(2), a petitioner may present new evidence in a federal habeas court only if the claim relies on: "(1) a new rule of constitutional law, made retroactive to cases on collateral review . . . that was previously unavailable; or (2) a factual predicate that could not have been previously discovered through the

exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A). Furthermore, Petitioner must demonstrate that "the facts underlying [his] claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [Petitioner] guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

"*Martinez* does not directly provide the authority for a petitioner to expand the record in order to further develop facts that could have been presented in the state court proceeding." *Fielder*, 2013 WL 593657, at *4 (citing *Foster v. Oregon*, 2012 WL 3763543 (D. Or. Aug. 29, 2012); *Halvorsen v. Parker*, 2012 WL 5866595 (E.D. Ky. Nov. 19, 2012); *Williams v. Mitchell*, 2012 WL 4505181 (N.D. Ohio Sept. 28, 2012)). Thus, the Court agrees with the Magistrate Judge that Section 2254(e)(2) applies, and that Petitioner has failed to meet the requirements of Section 2254(e)(2). Accordingly, the evidence is not admissible for the purpose of supporting his claim for federal habeas relief. Report & Recommendation 30, ECF No. 29. Petitioner has failed to demonstrate, by clear and convincing evidence, that no reasonable factfinder would have found Petitioner guilty of the underlying offense if he had proceeded to trial. Rather, he seeks to have the evidence admitted for the purpose of supporting his contention that if he had known about the ballistics report prior to the guilty plea hearing, he would not have entered a plea of guilty and would have insisted on going to trial. *See* Pet'r's Resp. in Opp'n to Mot. Summ J. 23, ECF No. 21 ("All of this evidence demonstrates that the Petitioner intended, from the very beginning of his case, to show at trial that he

did not kill the victim."). Therefore, Petitioner's Motion to Expand the Record for the purpose of supporting his claim for federal habeas relief is DENIED; however the Court GRANTS the Motion as to the affidavit of Robert Coler (ECF No. 20-1) for the limited purpose of evaluating cause and prejudice for the procedural default of Ground One (2).

Conclusion

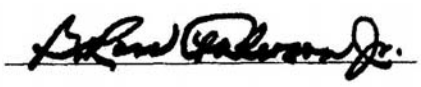
The Court has reviewed the Magistrate Judge's Report and Recommendation, Petitioner's objections, and the record, and has conducted a *de novo* review of the issues raised in this case. The Court concludes that the Magistrate Judge correctly determined that Petitioner has no claim for relief under 28 U.S.C. §2254. Based on the foregoing, the Court adopts the Report and Recommendation to the extent that it is consistent with this Order.

IT IS THEREFORE ORDERED that the Report and Recommendation is ADOPTED to the extent that it is consistent with this Order, Petitioner's Petition is DISMISSED with prejudice, and Respondent's Motion for Summary Judgment is GRANTED. The Court declines to issue a certificate of appealability in this matter.[6]

IT IS FURTHER ORDERED that Petitioner's Motion to Expand the Record is DENIED as to ECF Nos. 1-4 through 1-8 and GRANTED as to ECF No. 20-1.

[6] When a district court issues a final ruling on a habeas petition, the court must issue or deny a certificate of appealability. *See* Rule 11(a) of the Rules governing 28 U.S.C. § 2254 & 2255. The Court has reviewed its order and, pursuant to Rule 11(a), declines to issue a certificate of appealability as Petitioner has not made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that, to satisfy § 2253(c), "a petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

IT IS SO ORDERED.



G. Ross Anderson, Jr.
Senior United States District Judge

August 14, 2013
Anderson, South Carolina

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AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Devon Ford aka Deven Ford aka Devin Ford
Petitioner
v.
Michael McCall, Warden Lee Correctional Institution
Respondent

Civil Action No. 8-12-2266-GRA

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

❒ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars ($__), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

❒ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

■ other: summary judgment is granted for Respondent and the petition is dismissed.

This action was *(check one)*:

❒ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

❒ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

■ decided by the Honorable G Ross Anderson, Jr on the record.

Date: August 14, 2013

CLERK OF COURT

BY: s/ M. Allister
Deputy Clerk

Signature of Clerk or Deputy Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-7471

DEVON FORD, a/k/a Deven Ford, a/k/a Devin Ford,

Petitioner - Appellant,

v.

MICHAEL MCCALL, Warden, Lee Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Anderson. G. Ross Anderson, Jr., Senior District Judge. (8:12-cv-02266-GRA)

Submitted: February 26, 2014 Decided: March 10, 2014

Before NIEMEYER, MOTZ, and THACKER, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jeremy A. Thompson, LAW OFFICE OF JEREMY A. THOMPSON, LLC, Columbia, South Carolina, for Appellant. Alphonso Simon, Jr., Assistant Attorney General, Donald John Zelenka, Senior Assistant Attorney General, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Devon Ford seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Ford has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
DEVEN FORD a/k/a DEVON FORD, **#00312731**)
Plaintiff(s))
)
vs.)
)
State of South Carolina)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2020 - CP -

APPLICATION FOR POST-CONVICTION RELIEF PURSUANT TO S.C. CODE SECTIONS 17-27-20(A)(4) and 45(C)

Submitted By: Dayne C. Phillips, Esq.
Address: 1614 Taylor Street, Ste. D.,
Columbia, SC 29201

SC Bar #: 77712
Telephone #: (803) 807-0234
Fax #: (803) 380-8035
Other: 803-272-4503
E-mail: dayne@pricebenowitz.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

If Action is Judgment/Settlement do not complete

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

NATURE OF ACTION (*Check One Box Below*)

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

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

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

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

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

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

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

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

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

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

Submitting Party Signature: Dayne Phillips **Date:** April 3, 2020

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF **SPARTANBURG**	)	**SEVENTH** JUDICIAL CIRCUIT
	)	
DEVEN MICHAEL FORD, a/k/a Devon Ford, a/k/a Devin Ford, SCDC No. 00312731	)	Case No. **2020-CP-**
Applicant,	)	
v.	)	**APPLICATION FOR POST-CONVICTION RELIEF BASED ON NEWLY DISCOVERED EVIDENCE PURSUANT TO S.C. CODE SECTIONS 17-27-20(A)(4) and 45(C)**
State of South Carolina,	)	
Defendant.	)	

As required by Rule 71.1(b), SCRCP, this application is in conformity with Form 5 of the SCRCP Appendix of Forms.

1. **Place of Detention:** Applicant is currently detained in the South Carolina Department of Corrections at the Ridgeland Correctional Institution.

2. **Name and location of Court which imposed sentence:** Spartanburg County Court of General Sessions, 180 Magnolia St, Spartanburg, SC 29306.

3. **Name(s) of co-defendant(s) (if any):** Kim Terrance Lilly.

4. **The indictment number(s) upon which and the offenses for which sentence was imposed:**

   (a) 2005-GS-42-3376 (Murder).

   (b) 2005-GS-42-3377 (Assault and Battery With the Intent to Kill ("ABWIK")).

5. **The date upon which the sentence was imposed and the terms of the sentence:**

   (a) December 5, 2005 (*Alford* Plea before the Honorable Doyet A. Early).

   (b) Thirty-seven (37) year sentence for the Murder conviction.

   (c) Twenty (20) year sentence for the ABWIK conviction.

   (d) Judge Early imposed concurrent sentences.

6. A finding of guilty was made after:

(a) A plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) before the Honorable Doyet A. Early on December 5, 2005. *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

7. Did you appeal from the judgment of conviction or the imposition of the sentence?

(a) Yes. Notice of Appeal filed on December 9, 2005.

8. If you answered "yes" to number (7), list:

(a) The name of each Court to which you appealed:

i. South Carolina Court of Appeals.

(b) The result in each Court to which you appealed:

i. Affirmed convictions and sentences of direct appeal (S.C. Court of Appeals).

(c) The date of each result:

i. September 17, 2007 (Unpublished Opinion 2007-UP-365).

(d) If known, citations of any written opinions or ordered entered pursuant to such results:

i. *State v. Devon Ford*, Op. No. 2007-UP-365 (S.C. Ct. App. filed Sept. 17, 2019).

9. If you answered "no" to number (7), state your reasons for not appealing:

(a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.

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

(a) The notarized affidavit from the victim, Jonathan Roshun Martin, signed on January 17, 2020, constitutes evidence of material facts not previously presented or heard that,

in the interest of justice, requires to vacate Applicant's convictions and sentences resulting from his guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See* (Attachment A: Affidavit of Jonathan Roshun Martin) and (Attachment B: Letter from Jonathan Roshun Martin).

i. *See generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (holding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and "a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

i. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there *exists evidence of material facts, not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) (emphasis added).

ii. *See* S.C. Code § 17-27-45(c) (providing "[i]f the applicant contends that there is *evidence of material facts not previously presented and heard* that requires vacation of the conviction or sentence, the application *must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.") (emphasis added).

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

(a) Applicant became aware of the letter and notarized affidavit from the alleged victim, Jonathan Roshun Martin, after the entry of his guilty plea under *North Carolina v. Alford*, and in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea. Specifically, as the only living victim and eyewitness in the case, Mr. Martin previously provided a statement to law enforcement that is inconsistent with his letter and notarized affidavit signed on January 17, 2020, exculpating Applicant of murder and ABWIK. In other words, Mr. Martin's recent disclosure exonerates Applicant of the crimes for which he was convicted and sentenced. *See* (Attachment A: Affidavit of Jonathan Roshun Martin) and (Attachment B: Letter from Jonathan Roshun Martin).

(b) The letter and notarized affidavit from the only living victim and eyewitness, Jonathan Martin, is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires to vacate Applicant's convictions and sentences.

(c) Based on the facts and circumstances of this case and the newly discovered evidence, Applicant submits the following additional evidence in support of the "interests of justice" to vacate Applicant's convictions and sentences.

(d) ***Excerpts from Jonathan Martin's Affidavit*: *See* (Attachment A)**

i. "It has been fifteen (15) years since the conviction of Mr. Ford [Applicant] and I realized it is not right that Mr. Ford is serving time. Because Mr. Ford did not do anything wrong, I feel bad that my actions contributed to him being incarcerated.

Therefore, I wanted to come forward and tell the truth about this matter."

ii. On the day of the shooting, Ms. Davis [the deceased victim] and I made plans to meet with Mr. Ford [Applicant] and Mr. Lilly [Applicant's co-defendant]. I was the driving one vehicle (sic) and Ms. Davis was the passenger in my vehicle. There was a second vehicle involved that Mr. Lilly was the driver and Mr. Ford was the passenger. We met Lilly and Ford and stopped our vehicles. Mr. Lilly pulled his vehicle beside ours. At this time, Mr. Lilly was face to face and beside Ms. Davis, who was the passenger in my vehicle.

iii. "I was threatened by the police to implicate Mr. Ford in this crime. I gave a statement to the police that Mr. Ford was the shooter in this incident. I did this in an attempt to protect myself."

iv. "I do not know who is responsible for this shooting, although I do know, that it was not Mr. Ford. At no time did I see Lilly [Applicant's co-defendant] or Mr. Ford get out of the vehicle that they were in."

v. "To the best of my knowledge, I am unaware of Ms. Davis [the deceased victim] disclosing to the responding police officers that Mr. Ford [Applicant] was the shooter involved in this case."

vi. "I had pending charges from an unrelated incident at the time of this incident. The police threatened to put me back into prison if I did not cooperate with them."

(e) *Excerpts from Jonathan Martin's Letter*: *See* (Attachment B)

i. "It's been 15 years" and "[i]t's not right I got this man back here knowing he didn't do it."

ii. "I didn't see deven [Applicant] jump out no car (sic) nor Did T [the deceased

victim, Ikethia Davis]."

iii. "And when me [and] T [the deceased victim] was at the gas station, t [the deceased victim] did not say he [Applicant] did anything" because "[s]he was in too much pain to talk."

iv. "I know she [the deceased victim] didn't make no (sic) statement [because] . . . She went straight to ICU."

v. "Plus I was there when the police lied and co-Hearsed all of this about what to say. They was telling me I was going to jail, saying I did this to her [the deceased victim] so I can coopurate (sic) with them. Then told me if I help they will make sure I didn't go to prison for the charges I had at the time."

vi. "That man didn't do it[,] you got the wrong man locked up."

vii. "Deven [Applicant] is innocent."

(f) ***Jonathan Martin's Prior Statements to Police*****: *See* (Attachment C)**

i. Police interrogation dated December 9, 2004.

(g) ***Excerpts from Dominic Ramon Hunting's Affidavit*****: *See* (Attachment D)**

i. On February 25, 2020, Private Investigator William Stephen Russell interviewed Dominic Ramon Hunting. Below are excerpts from the notarized affidavit signed by Mr. Hunting dated March 5, 2020.

ii. "On or about December 8, 2004, I . . . met up with Mr. Ford [Applicant] at McDonalds. We later went back to Mr. Ford's house . . . Mr. Ford cut off his ankle monitor and said he needed to stash his gun. I recall Mr. Ford had a gun in his possession. The gun was black, had holes in the barrell, and looked like a Tec-9-semi automatic handgun."

iii. "On the way to Asheville, NC, Mr. Ford asked me to stop at a friend's house. I do not recall the exact address; however, I remember the house was big and maybe white in color. Mr. Ford exited the vehicle and entered the residence with his gun. A few minutes later, Mr. Ford exited the house without his gun."

iv. "I tried many times to get in touch with Mr. Ford's attorney after he was arrested. I was not asked by police to give my account prior to Mr. Ford's trial."

(h) *Background*: *See* (Attachments E – I)

i. On December 7, 2004, Ikethia Davis was shot and killed while she was sitting in the passenger side of a white Maxima. The driver of that vehicle, Jonathan Martin, was also shot multiple times but survived. Following the shooting, the police arrested Applicant and his co-defendant, Kim Lilly, based on Ms. Davis's alleged dying declaration and Mr. Martin's statements to police implicating Applicant as the shooter.

ii. On December 8 and 10, 2004, the Spartanburg County Sheriff's Department interrogated Applicant, and he denied shooting Ms. Davis. *See* (Attachment E: Ford's Statement to Police dated December 8, 2004) and (Attachment F: Ford's Statement to Police dated December 10, 2004). Applicant also told the police that Mr. Martin had shot Ms. Davis and that he gave his gun to an individual he knew as "Flint Rim."[1] *See* (Attachment F, pages 1-3) and (Attachment H: PCR Hearing Transcript, pages 53, line 1 – 54, line 3).

iii. Applicant also informed the police where his gun was located so that they could do a ballistics comparison against the bullet that was found in Davis. *See*

[1] The proper spelling of Flint's last name is "Rhem." *See* (Attachment F).

(Attachment F) and (Attachment H).

iv. The police subsequently recovered Applicant's firearm—an "Intratec Model TEC-9, 9mm Luger Caliber pistol"—from Flint Rhem. *See* (Attachment H: PCR Hearing Transcript; page 55, lines 6-17) and (Attachment I: SLED Laboratory Report, Ballistics Comparison).

v. The police also obtained the following relevant evidence from the crime scene and autopsy of Ms. Davis: Four 9 millimeter Luger shell casings and three 9 millimeter bullets, including a bullet taken from the body of the deceased victim. *See* (Attachment I: SLED Laboratory Report, Ballistics Comparison).

vi. On December 9, 2004, the Spartanburg County Sheriff's Department also interrogated Jonathan Martin, and he told the police that he did not have a gun the night of the incident and did not fire any shots. *See* (Attachment C, page 8). Mr. Martin also told the police that he knew Applicant to have a 9-millimeter gun and that he did not know Applicant to have any other firearms. *See* (Attachment C, page 9).

vii. On November 9, 2005, the South Carolina Law Enforcement Division ("SLED") compared the bullets and shell casings recovered by the police to Applicant's gun and concluded Applicant's firearm did not fire any of the bullets or shell casings. *See* (Attachment I: SLED Laboratory Report, Ballistics Comparison). In other words, the ballistics evidence excluded Applicant as the shooter.

viii. Notably, this report was provided to the Solicitor's Office on November 22, 2005, approximately two weeks prior to the Applicant's plea. *See* (Attachment H: PCR Hearing Exhibit numbers 3-4).

ix. Applicant ultimately obtained the ballistics report directly from SLED while his direct appeal was pending, and argued during his original PCR action, that Defense Counsel did not advise him of the results of this test prior to the plea hearing. *See* Attachment H: PCR Hearing Exhibit number 2).

(i) *Alford Plea (Maintained Innocence)*: *See* (Attachment G: Guilty Plea Transcript)

i. On December 5, 2005, Applicant proceeded to trial but ultimately appeared before Honorable Doyet A. Early for a plea hearing.

ii. The plea was initially aborted when Applicant told the Plea Court that he was not satisfied with his attorney's representation. *See* (Attachment G: Guilty Plea Transcript, page 13, lines 8-20).

iii. Applicant ultimately pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

(j) *Excerpts from the Plea Hearing*: *See* (Attachment G: Guilty Plea Transcript)

i. Mr. Martin was present during the plea hearing but did not address the Plea Court or provide a victim impact statement. *See* (Attachment G: Guilty Plea Transcript, page 4, lines 3-7; page 17, lines 4-7; page 19, lines 12-13).

ii. When asked by the Plea Court, "[H]ow are you this morning?", Applicant replied, "I guess you could say I'm all right . . . cause some things I don't understand." *See* (Attachment G: Guilty Plea Transcript, page 6, lines 12-17). The Plea Court then asked him what he did not understand, and Applicant responded, "About some more evidence that we ain't able to bring up." *See* (Attachment G: Guilty

Plea Transcript, page 6, lines 18-22).

iii. After asking whether he wanted to plead guilty under *North Carolina v. Alford* or proceed to trial "at 2:15" that afternoon, Applicant inquired, The "only question I'd like to ask you, Your Honor, is about the, by me plea[d]ing [guilty], is the appeal, and then I'll plea about the appeal." Defense Counsel interjected, "Applicant "feels he also gives up his right to an appeal, and I've explained to him that he does not. He can still appeal the, the sentence of the Court." *See* (Attachment G: Guilty Plea Transcript, page 12, lines 2-13).

iv. When the Plea Court asked whether he was satisfied with his lawyer, Applicant stated simply, "No.". *See* (Attachment G: Guilty Plea Transcript, page 13, lines 8-12). The Plea Court then stated, "All right. We'll stand aside and we'll start at 2:15 drawing the jury." *See* (Attachment G: Guilty Plea Transcript, page 13, lines 15-16).

v. After a lunch break, the Plea Court asked Applicant again whether he was satisfied with his attorney, and he responded, "Yes, Sir.". *See* (Attachment G: Guilty Plea Transcript, page 14, lines 2-6).

vi. During the recitation of the facts, Assistant Solicitor Robert Coler maintained that Ms. Davis "gave a dying declaration of who the shooter was [referring to Applicant]" and "Mr. Martin identified [Applicant as] the shooter for the police." *See* (Attachment G: Guilty Plea Transcript, page 18, lines 17-18).

vii. In mitigation, his attorney, Michael Bartosh, who has since died, explained to the Plea Court, "in discussing the evidence with Mr. Ford [Applicant], this would be a triable case, but for the dying declaration by, by Ms. Davis. I don't think that -

- the witnesses that the State would call all have contradictory statements, and, and it would be - - it would just be a question of who the jury believed." *See* (Attachment G: Guilty Plea Transcript, page 20, lines 5-13).

viii. Applicant then reiterated to the Trial Court that he was pleading guilty under *North Carolina v. Alford* because "[h]e's not admitting to, to doing this. However, he feels that it's in his best interest to enter this plea because, knowing the evidence, that he believes there's a good likelihood he'd be convicted." *See* (Attachment G: Guilty Plea Transcript, page 22, lines 1-8).

ix. Applicant also asked again about having ten days to file an appeal, and the Plea Court noted, "There ain't no sense in pleading if you're gonna appeal. Why are you - - you don't have to do this. I'll back out of it right now. We'll let a jury decide if you're guilty or not guilty." In response, Applicant stated, "We'll go ahead with it, Your Honor." *See* (Attachment G: Guilty Plea Transcript, page 22, lines 12-25).

(k) *Direct Appeal*:

i. Applicant appealed his convictions and sentences, arguing his guilty plea was involuntarily pled guilty. While Applicant's direct appeal was pending, he requested and received, SLED's ballistics report that concluded that his firearm did not fire the shots into the Maxima. *See* (Attachment H: PCR Hearing Exhibit numbers 2 and 3).

(l) *Post-Conviction Relief Hearing*: *See* Attachments H –

i. Applicant filed an application for Post-Conviction Relief, arguing Defense Counsel was ineffective for failing to advise him of the existence of the SLED

Ballistics Lab Report prior to his *Alford* plea. *See* (Attachment H: PCR Hearing Transcript, page 85, line 15 – 86, line 11).

ii. On September 18, 2008, Applicant appeared before the Honorable Roger L. Couch for an evidentiary hearing. David Alford, Esq., represented Applicant at the hearing. *See* (Attachment H: PCR Hearing Transcript).

iii. At the beginning of the hearing, PCR Counsel stated, "As a preliminary matter, I'd like to file a motion for a continuance. As I understand the situation, this case was scheduled previously this week. Due to my trial - - it was suppose to go Monday. We, we first continued all these and then we rest them for today . . . As I understand, talking to my client, that he was told I think yesterday to be prepared to come up. Normally they are given adequate time and notice that they're gonna be coming up for PCR. Because of that, there's, you know, various stuff he wanted to be able to bring. Possibly two additional witnesses to get word for me, which I understand were in a message to my office from yesterday, which I haven't been in my office about five minutes since yesterday afternoon. . . . But because of the nature of the rescheduling and the adequate time to make sure that he had all his stuff with him, he feels he's prejudiced cause he has some notes he wanted to make sure that he was able to submit to the Court." *See* (Attachment H: PCR Hearing Transcript, page 72, line 17 – 73, line 11).

iv. Applicant also requested a continuance, "No, sir, I would like the continuance so I can be better prepared for this because they came and got me on short notice . . . Your Honor, that's the reason why he didn't have no witnesses on the stand." *See* (Attachment H: PCR Hearing Transcript, page 78, lines 1-11).

v. Despite requests from both PCR Counsel and Applicant, the PCR Court denied the motion for continuance. *See* (Attachment H: PCR Hearing Transcript, page 79, line 22).

vi. Defense Counsel did not testify at the PCR hearing because he was deceased at the time of the hearing.

vii. Notably, the SLED Ballistics Laboratory Report was not found in Defense Counsel's file. *See* (Attachment H: PCR Hearing Transcript, page 115, lines 3-8).

viii. Applicant testified at the hearing that he told his attorney to obtain the ballistics report prior to trial and that he only discovered the favorable results until after he personally wrote SLED and received the ballistics report. *See* (Attachment H: PCR Hearing Transcript, page 84, line 18 – 87, line 1). Specifically, Applicant stated, "Now, SLED wrote me back February 26th, 2007…stating that my pistol is not a match to the victim's body…the whole time I kept asking Mr. Bartosh [Plea Counsel] can he get my ballistics test for me. He kept telling me they did not have them, they did not them, they were not ready." *See* (Attachment H: PCR Hearing Transcript, page 85, line 19 – 86, line 3).

ix. Applicant also testified, "on April the 6th, 2006, while I was in SCDC, some more evidence came up where the victim did not have no gunshot residue on her shirt cause (sic) the prosecution is stating that I ran to the car and shot the person in point blank range[.]" *See* (Attachment H: PCR Hearing Transcript, page 86, lines 6-10).

x. The record established at the PCR hearing proves Defense Counsel knew the State was processing the ballistics evidence, and SLED would eventually issue a report

to him. *See* (Attachment H: PCR Hearing Transcript, page 86, lines 1-3).

xi. The SLED ballistics report was not in Defense Counsel's file. *See* (Attachment H: PCR Hearing Transcript, pages 113 – 118).

xii. Applicant did not have a copy of the report prior to the plea, as he had to request a copy of the report directly from SLED following the Alford plea. *See* (Attachment H: PCR Hearing Transcript, page 85, line 19 – 87, line 3). However, the State had received the ballistics report prior to the plea, as it was issued November 9, 2005, almost a full month prior to the Applicant's plea—which occurred on the eve of trial. *See* (Attachment H: PCR Hearing Exhibit number 4).

xiii. The ballistics report was not found in Defense Counsel's file during the PCR hearing. The Seventh Circuit Solicitor's Office's file in this matter contains no guarantee that the ballistics report was provided to defense counsel prior to the Applicant's plea. *See* (Attachment K: Solicitor's Office Discovery File).

xiv. Assistant Solicitor Robert Coler, the prosecutor in Applicant's case, maintained that he provided the SLED report to Defense Counsel prior to Applicant's Alford plea. *See* (Attachment L: Affidavit of Assistant Solicitor Robert Coler, pages 2-4). Notably, based on the SLED report, the Prosecutor would have argued at trial that Applicant did not use the gun that he provided to the police. *See* (Attachment L: Affidavit of Assistant Solicitor Robert Coler, pages 3-4).

(m) ***Discussion*:**

i. The newly discovered evidence, Jonathan Martin's letter and notarized affidavit, discredits Ms. Davis's alleged dying declaration identifying Applicant as the shooter and alleges misconduct by the police investigators in this case.

ii. Applicant would not have pleaded guilty pursuant to *North Carolina v. Alford* had Jonathan Martin originally provided the newly discovered evidence to police; and particularly, had he known the exculpatory value of the ballistics report prior to the plea hearing. *See Brady v. United States*, 397 U.S. 742, 756 (1970) (finding "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him.").

iii. Applicant is innocent of murder and ABWIK, and the newly discovered evidence (letter and notarized affidavit from the only living victim and eyewitness, Jonathan Martin), is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires to vacate Applicant's convictions and sentences.

12. Prior to this application, have you filed with respect to this conviction:

(a) Any petition in a State Court under South Carolina Law? Yes.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief? Yes.

i. On January 24, 2008, Applicant filed a *pro se* application for post-conviction relief (2008-CP-42-00395).

ii. On August 9, 2012, Applicant filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for South Carolina (Case No. 8:12-cv-02266-GRA).

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (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 number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof:

i. Post-Conviction Relief (2008-CP-42-00395).

ii. Petition for Writ of Certiorari in the S.C. Supreme Court.

iii. Petition for Writ of Habeas Corpus (Case No. 8:12-cv-02266-GRA).

(b) The name and location of the Court in which each was filed:

i. Spartanburg County Court of Common Pleas, 180 Magnolia St, Spartanburg, SC 29306.

ii. Supreme Court of South Carolina, 1231 Gervais Street, Columbia, SC 29201.

iii. United States District Court.

(c) The disposition thereof:

i. Denied PCR (2008-CP-42-00395).

ii. Certiorari Denied.

iii. Petition Denied (Case No. 8:12-cv-02266-GRA).

(d) The date of each such disposition:

i. March 22, 2010 (2008-CP-42-00395).

ii. November 20, 2011 (Remittitur issued on December 19, 2011).

iii. August 14, 2013 (Case No. 8:12-cv-02266-GRA).

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

i. 2008-CP-42-00395

ii. 8:12-cv-02266-GRA

14. Has any ground set forth in number (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 number (14), identify:

(a) The grounds which have been presented:

i. Not applicable.

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

i. Not applicable.

16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy based on newly discovered evidence. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there *exists evidence of material facts, not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) (emphasis added); S.C. Code § 17-27-45(c) (providing "[i]f the applicant contends that there is *evidence of material facts not previously presented and heard* that requires vacation of the conviction or sentence, the application *must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.") (emphasis added); *See generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

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

(a) Your plea hearing? Yes.

(b) Your trial? Not Applicable.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence?

Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

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

(a) The name and address of each attorney who represented you:

(i) Michael Bartosh (deceased).

(ii) Robert Dudek, 1330 Lady Street, Columbia, Sc 29201.

(iii) Elizabeth Franklin-Best, 2725 Devine Street, Columbia, SC 29205.

(iv) Jeremy Thompson, 1901 Assembly Street, #200, Columbia, SC 29201.

(v) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Michael Bartosh represented Applicant at his guilty plea hearing.

(ii) Robert Dudek represented Applicant on direct appeal.

(iii) Elizabeth Franklin-Best represented Applicant on his Petition for Writ of Certiorari.

(iv) Jeremy Thompson represented Applicant on his Petition for Writ of Habeas Corpus.

(v) Dayne C. Phillips is currently representing Applicant on this application for Post-

Conviction Relief based on Newly Discovered Evidence.

19. **State clearly the relief you seek in filing this application:** Applicant seeks Post-Conviction Relief to vacate his convictions and sentences and to remand the indictments for a new trial based on newly discovered evidence. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) and S.C. Code § 17-27-45(C) (providing "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."); *see generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (holding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and "[i]n other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

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

No. Applicant is not under sentence from any other court.

[Verification Page to Follow]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF **SPARTANBURG**	)	**SEVENTH** JUDICIAL CIRCUIT
	)	
DEVEN MICHAEL FORD, a/k/a Devon Ford, a/k/a Devin Ford, SCDC No. 00312731	)	Case No. **2020-CP-**
Applicant,	)	**VERIFICATION**
v.	)	
State of South Carolina,	)	
Defendant.	)	

I, Dayne C. Phillips, Esq., on behalf of my client, Deven Ford, 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 attached in this application; and that the matters and allegations therein set forth are true.

Dayne C. Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

SWORN to and subscribed before me this 3rd day of April, 2020.

Courtney Powers (L.S.)
Notary Public

My Commission Expires: May 2, 2027

ATTACHMENTS

Attachment A: Affidavit of Jonathan Roshun Martin

Attachment B: Letter from Jonathan Roshun Martin

Attachment C: Jonathan Martin's Prior Statements to Police

Attachment D: Affidavit of Dominic Ramon Hunting

Attachment E: Statement to Police by Ford dated December 8, 2004

Attachment F: Statement to Police by Ford dated December 10, 2004

Attachment G: Guilty Plea Hearing Transcript

Attachment H: PCR Hearing Transcript and Exhibits

Attachment I: SLED Laboratory Report, Ballistics Comparison

Attachment J: PCR Order of Dismissal

Attachment K: Solicitor's Office Discovery File

Attachment L: Affidavit of Assistant Solicitor Robert Coler

Attachment M: Petition for Writ of Certiorari to the South Carolina Supreme Court

Attachment O: Indictments

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing Application for Post-Conviction Relief based on Newly Discovered Evidence by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Alan Wilson, S.C. Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
PO Box 3483
Spartanburg, SC 29304-3483

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

April 3, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
DEVEN FORD a/k/a DEVON FORD, #**00312731**)
Plaintiff(s))
)
vs.)
)
State of South Carolina)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2020 - CP -

AMENDED
APPLICATION FOR POST-CONVICTION RELIEF PURSUANT TO S.C. CODE SECTIONS 17-27-20(A)(4) and 45(C)

Submitted By: Dayne C. Phillips, Esq.
Address: 1614 Taylor Street, Ste. D.,
Columbia, SC 29201

SC Bar #: 77712
Telephone #: (803) 807-0234
Fax #: (803) 380-8035
Other: 803-272-4503
E-mail: dayne@pricebenowitz.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

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

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

NATURE OF ACTION (*Check One Box Below*)

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

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

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

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

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

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

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

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

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

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

Submitting Party Signature: _____ **Date:** April 6, 2020

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF **SPARTANBURG**	)	**SEVENTH** JUDICIAL CIRCUIT
	)	
DEVEN MICHAEL FORD, a/k/a Devon Ford, a/k/a Devin Ford, SCDC No. 00312731	)	Case No. **2020-CP-**
Applicant,	)	**AMENDED**
v.	)	**APPLICATION FOR POST-CONVICTION RELIEF BASED ON NEWLY DISCOVERED EVIDENCE PURSUANT TO S.C. CODE SECTIONS 17-27-20(A)(4) and 45(C)**
State of South Carolina,	)	
Defendant.	)	

As required by Rule 71.1(b), SCRCP, this application is in conformity with Form 5 of the SCRCP Appendix of Forms.

1. **Place of Detention:** Applicant is currently detained in the South Carolina Department of Corrections at the Ridgeland Correctional Institution.

2. **Name and location of Court which imposed sentence:** Spartanburg County Court of General Sessions, 180 Magnolia St, Spartanburg, SC 29306.

3. **Name(s) of co-defendant(s) (if any):** Kim Terrance Lilly.

4. **The indictment number(s) upon which and the offenses for which sentence was imposed:**

   (a) 2005-GS-42-3376 (Murder).

   (b) 2005-GS-42-3377 (Assault and Battery With the Intent to Kill ("ABWIK")).

5. **The date upon which the sentence was imposed and the terms of the sentence:**

   (a) December 5, 2005 (*Alford* Plea before the Honorable Doyet A. Early).

   (b) Thirty-seven (37) year sentence for the Murder conviction.

   (c) Twenty (20) year sentence for the ABWIK conviction.

   (d) Judge Early imposed concurrent sentences.

6. A finding of guilty was made after:

(a) A plea of guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) before the Honorable Doyet A. Early on December 5, 2005. *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

7. Did you appeal from the judgment of conviction or the imposition of the sentence?

(a) Yes. Notice of Appeal filed on December 9, 2005.

8. If you answered "yes" to number (7), list:

(a) The name of each Court to which you appealed:

i. South Carolina Court of Appeals.

(b) The result in each Court to which you appealed:

i. Affirmed convictions and sentences (S.C. Court of Appeals).

(c) The date of each result:

i. September 17, 2007 (Unpublished Opinion 2007-UP-365).

(d) If known, citations of any written opinions or ordered entered pursuant to such results:

i. *State v. Devon Ford*, Op. No. 2007-UP-365 (S.C. Ct. App. filed Sept. 17, 2007).

9. If you answered "no" to number (7), state your reasons for not appealing:

(a) Not applicable. Applicant filed a Direct Appeal of his convictions and sentences.

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

(a) The notarized affidavit from the only living victim and eyewitness, Jonathan Roshun Martin, signed on January 17, 2020, exculpating Applicant of murder and ABWIK,

constitutes evidence of material facts not previously presented or heard that, in the interest of justice, requires to vacate Applicant's convictions and sentences resulting from his guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See* (Attachment A: Affidavit of Jonathan Roshun Martin) and (Attachment B: Letter from Jonathan Roshun Martin).

i. *See generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (finding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and holding "a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

i. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there *exists evidence of material facts, not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) (emphasis added).

ii. *See* S.C. Code § 17-27-45(c) (providing "[i]f the applicant contends that there is *evidence of material facts not previously presented and heard* that requires vacation of the conviction or sentence, the application *must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.") (emphasis added).

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

(a) Applicant became aware of the letter and notarized affidavit from the victim, Jonathan Roshun Martin, after the entry of his *Alford* plea, and in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea.

(b) Applicant is filing this application for Post-Conviction Relief within one year of Applicant's actual discovery of the newly discovered evidence.

(c) The letter and notarized affidavit from the victim, Jonathan Martin, is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires to vacate Applicant's convictions and sentences. Specifically, as the only living victim and eyewitness in this case, Mr. Martin previously provided a statement to law enforcement that is self-serving and inconsistent with his recent letter and notarized affidavit signed on January 17, 2020, exculpating Applicant of murder and ABWIK. Mr. Martin's recent disclosure also corroborates the SLED ballistics report that Applicant had no knowledge of prior to his *Alford* plea and was not in Defense Counsel's file. Mr. Martin also alleged misconduct by the police in fabricating evidence against Applicant. Therefore, this evidence further exonerates Applicant as the shooter in this case. *See* (Attachment A: Affidavit of Jonathan Roshun Martin); (Attachment B: Letter from Jonathan Roshun Martin); and (Attachment I: SLED Laboratory Report, Ballistics Comparison).

(d) Based on the facts and circumstances of this case and the newly discovered evidence, Applicant submits the following evidence in support of the "interests of justice" to vacate Applicant's convictions and sentences.

(e) ***Excerpts from Jonathan Martin's Affidavit*: *See* (Attachment A)**

i. "It has been fifteen (15) years since the conviction of Mr. Ford [Applicant] and I realized it is not right that Mr. Ford is serving time. Because *Mr. Ford did not do anything wrong, I feel bad that my actions contributed to him being incarcerated. Therefore, I wanted to come forward and tell the truth about this matter.*"

ii. "On the day of the shooting, Ms. Davis [the deceased victim] and I made plans to meet with Mr. Ford [Applicant] and Mr. Lilly [Applicant's co-defendant]. I was the driving [*sic*] one vehicle and Ms. Davis was the passenger in my vehicle. There was a second vehicle involved that Mr. Lilly was the driver and Mr. Ford was the passenger. We met Lilly and Ford and stopped our vehicles. Mr. Lilly pulled his vehicle beside ours. At this time, Mr. Lilly was face to face and beside Ms. Davis, who was the passenger in my vehicle."

iii. "*I was threatened by the police to implicate Mr. Ford in this crime.* I gave a statement to the police that Mr. Ford was the shooter in this incident. *I did this in an attempt to protect myself.*"

iv. "*I do not know who is responsible for this shooting, although I do know, that it was not Mr. Ford.* At no time did I see Lilly [Applicant's co-defendant] or Mr. Ford get out of the vehicle that they were in."

v. "To the best of my knowledge, *I am unaware of Ms. Davis* [the deceased victim] *disclosing to the responding police officers that Mr. Ford* [Applicant] *was the shooter involved in this case.*"

vi. "*I had pending charges from an unrelated incident at the time of this incident. The police threatened to put me back into prison if I did not cooperate with them.*"

(emphasis added).

(f) ***Excerpts from Jonathan Martin's Letter*****: *See* (Attachment B)**

i. "It's been 15 years" and "[i]t's not right I got this man back here *knowing he didn't do it.*"

ii. "*I didn't see deven* [Applicant] *jump out no car* [*sic*] *nor Did T* [the deceased victim, Ikethia Davis]."

iii. "And when me [and] T [the deceased victim] was at the gas station, t [the deceased victim] did not say he [Applicant] did anything" because "*[s]he was in too much pain to talk.*"

iv. "I know she [the deceased victim] didn't make no [*sic*] statement [because] . . . She went straight to ICU."

v. "*Plus I was there when the police lied and co-Hearsed [sic] all of this about what to say.* They was telling me I was going to jail, saying I did this to her [the deceased victim] so I can coopurate [*sic*] with them. Then told me if I help they will make sure I didn't go to prison for the charges I had at the time."

vi. "*That man didn't do it[,] you got the wrong man locked up.*"

vii. "*Deven [Applicant] is innocent.*"

(emphasis added).

(g) ***Jonathan Martin's Prior Statements to Police*****: *See* (Attachment C)**

i. Police interrogation dated December 9, 2004.

(h) ***Excerpts from Dominic Ramon Hunting's Affidavit*****: *See* (Attachment D)**

i. On February 25, 2020, Private Investigator William Stephen Russell interviewed Dominic Ramon Hunting. Below are excerpts from the notarized affidavit signed

by Mr. Hunting dated March 5, 2020.

ii. "On or about December 8, 2004, I . . . met up with Mr. Ford [Applicant] at McDonalds. We later went back to Mr. Ford's house . . . Mr. Ford cut off his ankle monitor and said he needed to stash his gun. I recall Mr. Ford had a gun in his possession. The gun was black, had holes in the barrell, and looked like a Tec-9-semi automatic handgun."

iii. "On the way to Asheville, NC, Mr. Ford asked me to stop at a friend's house. I do not recall the exact address; however, I remember the house was big and maybe white in color. Mr. Ford exited the vehicle and entered the residence with his gun. A few minutes later, Mr. Ford exited the house without his gun."

iv. "I tried many times to get in touch with Mr. Ford's attorney after he was arrested. I was not asked by police to give my account prior to Mr. Ford's trial."

(i) *Background*: *See* (Attachments E – I)

i. On December 7, 2004, Ikethia Davis was shot and killed sitting in the passenger side of a white Maxima. The driver of that vehicle, Jonathan Martin, was also shot multiple times but survived. Following the shooting, the police arrested Applicant and his co-defendant, Kim Lilly, based on Ms. Davis's alleged dying declaration and Mr. Martin's statements to police implicating Applicant as the shooter.

ii. On December 8 and 10, 2004, the Spartanburg County Sheriff's Department interrogated Applicant, and he denied shooting Ms. Davis. *See* (Attachment E: Ford's Statement to Police dated December 8, 2004) and (Attachment F: Ford's Statement to Police dated December 10, 2004). Applicant also told the police Mr. Martin had shot Ms. Davis, and he gave his gun to an individual he knew as "Flint

Rim."[1] *See* (Attachment F, pages 1-3) and (Attachment H: PCR Hearing Transcript, pages 53, line 1 – 54, line 3).

iii. Applicant also told the police the location of his gun, so they could test it (i.e., do a ballistics comparison against the shell casings and bullets found at the crime scene and during the autopsy). *See* (Attachment F) and (Attachment H).

iv. The police subsequently recovered Applicant's firearm—an "Intratec Model TEC-9, 9mm Luger Caliber pistol"—from Flint Rhem. *See* (Attachment H: PCR Hearing Transcript; page 55, lines 6-17) and (Attachment I: SLED Laboratory Report, Ballistics Comparison).

v. The police also obtained the following relevant evidence from the crime scene and autopsy: Four 9 millimeter Luger shell casings and three 9 millimeter bullets, including a bullet taken from the body of Ms. Davis. *See* (Attachment I: SLED Laboratory Report, Ballistics Comparison).

vi. On December 9, 2004, the Spartanburg County Sheriff's Department also interrogated Jonathan Martin, and he told the police that he did not have a gun the night of the incident nor did he fire any shots. *See* (Attachment C, page 8). Mr. Martin also told the police that he knew Applicant to have a 9-millimeter gun, and that he did not know Applicant to have any other firearms. *See* (Attachment C, page 9).

vii. On November 9, 2005, the South Carolina Law Enforcement Division ("SLED") compared the bullets and shell casings recovered by the police to Applicant's gun and concluded Applicant's firearm did not fire any of the bullets or shell casings.

[1] The proper spelling of Flint's last name is "Rhem." *See* (Attachment F).

See (Attachment I: SLED Laboratory Report, Ballistics Comparison). In other words, the ballistics evidence excluded Applicant as the shooter.

viii. Notably, SLED provided this report to the Solicitor's Office approximately two weeks prior to Applicant's plea on November 22, 2005, yet Plea Counsel failed to mention it during the plea hearing when discussing the State's evidence against Applicant. *See* (Attachment G: Guilty Plea Transcript) and (Attachment H: PCR Hearing Exhibit numbers 3-4).

ix. After his *Alford* plea, Applicant conducted his own investigation and obtained the ballistics report directly from SLED while his direct appeal was pending.

x. During his original PCR action, Applicant alleged Defense Counsel did not advise him of SLED's ballistics report prior to the plea hearing and argued he would have proceeded to trial had he known of the results. *See* Attachment H: PCR Hearing Transcript and Exhibit numbers 2–4).

(j) *Alford Plea (Maintained Innocence)*: *See* (Attachment G: Guilty Plea Transcript)

i. On December 5, 2005, Applicant proceeded to trial but ultimately appeared before Honorable Doyet A. Early for a plea hearing.

ii. The Plea Court initially aborted the plea hearing when Applicant responded that he was not satisfied with his attorney's representation. *See* (Attachment G: Guilty Plea Transcript, page 13, lines 8-20).

iii. Applicant pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). *See United States v. Taylor*, 659 F.3d 339, 347 (4th Cir. 2011) (noting "[a]n *Alford* plea is an arrangement in which a defendant maintains his innocence but pleads guilty for reasons of self-interest.").

(k) *Excerpts from the Plea Hearing*: *See* (Attachment G: Guilty Plea Transcript)

i. Mr. Martin was present during the plea hearing but did *not* address the Plea Court or provide a victim impact statement. *See* (Attachment G: Guilty Plea Transcript, Page 4, lines 3-7; Page 17, lines 4-7; Page 19, lines 12-13) (emphasis added).

ii. When asked by the Plea Court, "[H]ow are you this morning?", Applicant replied, "I guess you could say I'm all right . . . cause some things I don't understand." *See* (Attachment G: Guilty Plea Transcript, page 6, lines 12-17).

iii. The Plea Court then asked him what he did not understand, and Applicant responded, "About some more evidence that we ain't (*sic*) able to bring up." *See* (Attachment G: Guilty Plea Transcript, page 6, lines 18-22).

iv. After asking whether he wanted to plead guilty under *North Carolina v. Alford* or proceed to trial "at 2:15" that afternoon, Applicant inquired, The "only question I'd like to ask you, Your Honor, is about the, by me plea[d]ing [guilty], is the appeal, and then I'll plea [*sic*] about the appeal."

v. Defense Counsel interjected, Applicant "feels he also gives up his right to an appeal, and I've explained to him that he does not. He can still appeal the, the sentence of the Court." *See* (Attachment G: Guilty Plea Transcript, page 12, lines 2-13).

vi. When asked whether he was satisfied with his lawyer, Applicant stated simply, "No." *See* (Attachment G: Guilty Plea Transcript, page 13, lines 8-12).

vii. In response, the Plea Court aborted the plea, "All right. We'll stand aside and we'll start at 2:15 drawing the jury." *See* (Attachment G: Guilty Plea Transcript, page 13, lines 15-16).

viii. After the lunch break, the Plea Court asked Applicant again whether he was satisfied with his attorney, and he responded, "Yes, Sir." *See* (Attachment G: Guilty Plea Transcript, page 14, lines 2-6).

ix. During the recitation of the facts, Assistant Solicitor Robert Coler maintained that Ms. Davis "gave a dying declaration of who the shooter was [referring to Applicant]" and "Mr. Martin identified the shooter for the police [also referring to Applicant]." *See* (Attachment G: Guilty Plea Transcript, page 18, lines 17-18).

x. In mitigation, his attorney, Michael Bartosh, who has since died, explained to the Plea Court, "in discussing the evidence with Mr. Ford [Applicant], *this would be a triable case, but for the dying declaration by, by Ms. Davis.* I don't think that - - the witnesses that the State would call all have contradictory statements, and, and it would be - - *it would just be a question of who the jury believed.*" *See* (Attachment G: Guilty Plea Transcript, page 20, lines 5-13) (emphasis added).

xi. Plea Counsel also reiterated to the Plea Court that Applicant was pleading guilty pursuant to *North Carolina v. Alford* because "[h]e's not admitting to, to doing this. However, he feels that it's in his best interest to enter this plea because, knowing the evidence, that he believes there's a good likelihood he'd be convicted." *See* (Attachment G: Guilty Plea Transcript, page 22, lines 1-8).

xii. Applicant also asked the Plea Court again about having ten days to file an appeal, and the Plea Court noted, "There ain't no sense in pleading if you're gonna appeal. Why are you - - you don't have to do this. I'll back out of it right now. We'll let a jury decide if you're guilty or not guilty." *See* (Attachment G: Guilty Plea Transcript, page 22, lines 12-25).

xiii. In response, Applicant stated, "We'll go ahead with it, Your Honor." *See* (Attachment G: Guilty Plea Transcript, page 22, lines 12-25).

(l) ***Direct Appeal*:**

i. Applicant appealed his convictions and sentences, arguing that he did not knowing, intelligently, and voluntarily plead guilty.

ii. While his direct appeal was pending, Applicant requested and received SLED's ballistics report that concluded his firearm did not match the shell casings and bullets used in the murder of Ms. Davis and the ABWIK of Mr. Martin. *See* (Attachment H: PCR Hearing Exhibit numbers 2 and 3) and (Attachment I: SLED Laboratory Report, Ballistics Comparison).

(m) ***Post-Conviction Relief Hearing*: *See* (Attachments H – M).**

i. Applicant filed an application for Post-Conviction Relief, arguing Defense Counsel provided ineffective assistance of counsel for failing to advise him of the existence of the SLED Ballistics Lab Report prior to his *Alford* plea. *See* (Attachment H: PCR Hearing Transcript, page 85, line 15 – 86, line 11).

ii. On September 18, 2008, Applicant appeared before the Honorable Roger L. Couch for an evidentiary hearing. David Alford, Esq., represented Applicant at the hearing. *See* (Attachment H: PCR Hearing Transcript).

iii. At the beginning of the hearing, PCR Counsel stated, "As a preliminary matter, I'd like to file a motion for a continuance. As I understand the situation, this case was scheduled previously this week. Due to my trial - - it was suppose to go Monday. We, we first continued all these and then we rest them for today . . . As I understand, talking to my client, that he was told I think yesterday to be prepared

to come up. *Normally they are given adequate time and notice that they're gonna be coming up for PCR.* Because of that, there's, you know, various stuff he wanted to be able to bring. *Possibly two additional witnesses* to get word for me, which I understand were in a message to my office from yesterday, which I haven't been in my office about five minutes since yesterday afternoon. . . . But because of the nature of the rescheduling and the adequate time to make sure that he had all his stuff with him, *he feels he's prejudiced cause he has some notes he wanted to make sure that he was able to submit to the Court.*" *See* (Attachment H: PCR Hearing Transcript, page 72, line 17 – 73, line 11) (emphasis added).

iv. Applicant also requested a continuance, "No, sir, I would like the continuance so I can be better prepared for this because they came and got me on short notice . . . *Your Honor, that's the reason why he didn't have no witnesses on the stand.*" *See* (Attachment H: PCR Hearing Transcript, page 78, lines 1-11) (emphasis added).

v. Despite requests from both PCR Counsel and Applicant, the PCR Court denied the motion for continuance. *See* (Attachment H: PCR Hearing Transcript, page 79, line 22).

vi. Defense Counsel did not testify at the PCR hearing because he had since died.

vii. Notably, Defense Counsel's file did not contain the SLED Ballistics Laboratory Report. *See* (Attachment H: PCR Hearing Transcript, page 115, lines 3-8).

viii. At the hearing, Applicant testified he specifically requested that his attorney obtain the ballistics report, and he only discovered the favorable results until after he personally wrote SLED and received the report after his *Alford* plea. *See* (Attachment H: PCR Hearing Transcript, page 84, line 18 – 87, line 1).

ix. Specifically, Applicant stated, "Now, SLED wrote me back [on] February 26th, 2007…stating that my pistol is not a match to the victim's body…the whole time I kept asking Mr. Bartosh [Plea Counsel] can he get my ballistics test for me. He kept telling me they [the Prosecutor] did not have them, they did not them, they [the test results of the ballistics evidence] were not ready." *See* (Attachment H: PCR Hearing Transcript, page 85, line 19 – 86, line 3).

x. Applicant also testified, "on April the 6th, 2006, while I was in SCDC, some more evidence came up where the [deceased] victim [Ms. Davis] did not have no gunshot residue on her shirt cause [*sic*] the prosecution is stating that I ran to the car and shot the person in [*sic*] point blank range[.]" *See* (Attachment H: PCR Hearing Transcript, page 86, lines 6-10).

xi. The record established at the PCR hearing proves Defense Counsel knew the State was processing the ballistics evidence and SLED would eventually issue a report with the results. *See* (Attachment H: PCR Hearing Transcript, page 86, lines 1-3).

xii. Despite the critical nature of this favorable evidence, the SLED ballistics report was not in Defense Counsel's file based on the testimony presented at the PCR hearing. *See* (Attachment H: PCR Hearing Transcript, pages 113 – 118).

xiii. Applicant also testified that he did not know about the ballistics report prior to the plea hearing, as evidenced by his request to obtain a copy of the report directly from SLED while on direct appeal. *See* (Attachment H: PCR Hearing Transcript, page 85, line 19 – 87, line 3).

xiv. Notably, SLED issued the ballistics report on November 9, 2005, almost a month prior to Applicant's *Alford* plea, but it was not in Defense Counsel's file. *See*

(Attachment H: PCR Hearing Exhibit number 4).

xv. Notably, the Seventh Circuit Solicitor's Office's file also contains no guarantee that the ballistics report was provided to Defense Counsel prior to Applicant's plea hearing. *See* (Attachment K: Solicitor's Office Discovery File).

xvi. However, the prosecutor in Applicant's case, Assistant Solicitor Robert Coler, maintained that he provided the SLED ballistics report to Defense Counsel prior to Applicant's *Alford* plea. *See* (Attachment L: Affidavit of Assistant Solicitor Robert Coler, pages 2-4).

xvii. Based on the results of the SLED ballistics report, the Prosecutor would have been forced to argue at trial that Applicant did not use the gun he provided to the police despite the evidence linking Applicant to that gun. *See* (Attachment L: Affidavit of Assistant Solicitor Robert Coler, pages 3-4).

(n) ***Discussion*:**

i. The newly discovered evidence from the only living victim and eyewitness, Jonathan Martin, discredits the deceased victim's alleged dying declaration and his prior statements to the police implicating Applicant as the shooter.

ii. The newly discovered evidence is also compelling because it corroborates the SLED ballistics report, especially with the allegation of police misconduct by the alleged victim, Mr. Martin (e.g., coercing him to fabricate evidence against Applicant).

iii. Applicant would not have pled guilty pursuant to *North Carolina v. Alford* had Jonathan Martin originally provided this newly discovered evidence to police; and particularly, had he also known the exculpatory value of the ballistics report prior

to the plea hearing. *See Brady v. United States*, 397 U.S. 742, 756 (1970) (finding "the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him.").

iv. Applicant is innocent of murder and ABWIK, and the newly discovered evidence (letter and notarized affidavit from the only living victim and eyewitness, Jonathan Martin), is of such a weight and quality that, under the facts and circumstances of this case, the "interests of justice" requires to vacate Applicant's convictions and sentences.

12. Prior to this application, have you filed with respect to this conviction:

(a) Any petition in a State Court under South Carolina Law? Yes.

(b) Any petition in State or Federal Courts for Federal Habeas Corpus or Post-Conviction Relief? Yes.

i. On January 24, 2008, Applicant filed a *pro se* application for post-conviction relief (2008-CP-42-00395).

ii. On August 9, 2012, Applicant filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court for South Carolina (Case No. 8:12-cv-02266-GRA).

(c) Any petition in the Supreme Court of the United States for certiorari other than petitions, if any, already specified in number (8)? No.

(d) Any other petitions motions or applications in this or any other Court? No.

[Remainder of Page Intentionally Left Blank]

13. If you answered "yes" to any part of number (12), list with respect to each petition, motion, or application:

(a) The specific nature thereof:

i. Post-Conviction Relief (2008-CP-42-00395).

ii. Petition for Writ of Certiorari in the S.C. Supreme Court.

iii. Petition for Writ of Habeas Corpus (Case No. 8:12-cv-02266-GRA).

(b) The name and location of the Court in which each was filed:

i. Spartanburg County Court of Common Pleas, 180 Magnolia St, Spartanburg, SC 29306.

ii. Supreme Court of South Carolina, 1231 Gervais Street, Columbia, SC 29201.

iii. United States District Court.

(c) The disposition thereof:

i. Denied PCR (2008-CP-42-00395).

ii. Certiorari Denied.

iii. Petition Denied (Case No. 8:12-cv-02266-GRA).

(d) The date of each such disposition:

i. March 22, 2010 (2008-CP-42-00395).

ii. November 20, 2011 (Remittitur issued on December 19, 2011).

iii. August 14, 2013 (Case No. 8:12-cv-02266-GRA).

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

i. 2008-CP-42-00395

ii. 8:12-cv-02266-GRA

14. Has any ground set forth in number (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 number (14), identify:

(a) The grounds which have been presented:

i. Not applicable.

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

i. Not applicable.

16. If any ground set forth in number (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) Post-Conviction Relief is the proper forum and remedy based on newly discovered evidence. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there *exists evidence of material facts, not previously presented and heard*, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) (emphasis added); S.C. Code § 17-27-45(c) (providing "[i]f the applicant contends that there is *evidence of material facts not previously presented and heard* that requires vacation of the conviction or sentence, the application *must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant* or after the date when the facts could have been ascertained by the exercise of reasonable diligence.") (emphasis added); *See generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

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

(a) Your plea hearing? Yes.

(b) Your trial? Not Applicable.

(c) Your sentencing? Yes.

(d) Your appeal, if any, from the judgment of conviction and/or imposition of the sentence?

Yes.

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes.

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

(a) The name and address of each attorney who represented you:

(i) Michael Bartosh (deceased).

(ii) Robert Dudek, 1330 Lady Street, Columbia, Sc 29201.

(iii) Elizabeth Franklin-Best, 2725 Devine Street, Columbia, SC 29205.

(iv) Jeremy Thompson, 1901 Assembly Street, #200, Columbia, SC 29201.

(v) Dayne C. Phillips, 1614 Taylor Street, Ste D., Columbia, SC 29201.

(b) The proceedings at which each attorney represented you:

(i) Michael Bartosh represented Applicant at his guilty plea hearing.

(ii) Robert Dudek represented Applicant on direct appeal.

(iii) Elizabeth Franklin-Best represented Applicant on his Petition for Writ of Certiorari.

(iv) Jeremy Thompson represented Applicant on his Petition for Writ of Habeas Corpus.

(v) Dayne C. Phillips is currently representing Applicant on this application for Post-

Conviction Relief based on Newly Discovered Evidence.

19. **State clearly the relief you seek in filing this application:** Applicant seeks Post-Conviction Relief to vacate his convictions and sentences and to remand the indictments for a new trial based on newly discovered evidence. *See* S.C. Code § 17-27-20(A)(4) (providing "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) and S.C. Code § 17-27-45(C) (providing "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."); *see generally Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014) (holding "we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases", and "[i]n other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.") (emphasis in original).

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

No. Applicant is not under sentence from any other court.

[Verification Page to Follow]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF **SPARTANBURG**	)	**SEVENTH** JUDICIAL CIRCUIT
	)	
DEVEN MICHAEL FORD, a/k/a Devon Ford, a/k/a Devin Ford, SCDC No. 00312731	)	Case No. **2020-CP-**
Applicant,	)	**VERIFICATION**
v.	)	
State of South Carolina,	)	
Defendant.	)	

I, Dayne C. Phillips, Esq., on behalf of my client, Deven Ford, 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 attached in this application; and that the matters and allegations therein set forth are true.

Dayne C. Phillips
PRICE BENOWITZ LLP
1614 Taylor Street, Suite D.
Columbia, SC 29201
O: 803-272-4503
C: 803-807-0234
F: 803-380-8035
dayne@pricebenowitz.com

SWORN to and subscribed before me this 6th day of April, 2020.

Courtney Powers (L.S.)
Notary Public

My Commission Expires: May 2, 2027

ATTACHMENTS

Attachment A: Affidavit of Jonathan Roshun Martin

Attachment B: Letter from Jonathan Roshun Martin

Attachment C: Jonathan Martin's Prior Statements to Police

Attachment D: Affidavit of Dominic Ramon Hunting

Attachment E: Statement to Police by Ford dated December 8, 2004

Attachment F: Statement to Police by Ford dated December 10, 2004

Attachment G: Guilty Plea Hearing Transcript

Attachment H: PCR Hearing Transcript and Exhibits

Attachment I: SLED Laboratory Report, Ballistics Comparison

Attachment J: PCR Order of Dismissal

Attachment K: Solicitor's Office Discovery File

Attachment L: Affidavit of Assistant Solicitor Robert Coler

Attachment M: Petition for Writ of Certiorari to the South Carolina Supreme Court

Attachment N: Indictments and Sentencing Sheets

[NOTE: "Attachment N: Indictments and Sentencing Sheets" is the only attachment enclosed in this Amended Application for Post-Conviction Relief Based on Newly Discovered Evidence because it was inadvertently listed as "Attachment O" and omitted the sentencing sheets from the first application. All the above attachments filed with the first application based on newly discovered evidence are incorporated by reference for purposes of judicial economy.]

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing **Amended** Application for Post-Conviction Relief based on Newly Discovered Evidence by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

Alan Wilson, S.C. Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
PO Box 3483
Spartanburg, SC 29304-3483

By: Courtney Powers
Courtney Powers
Paralegal for Dayne C. Phillips, Esq.

1614 Taylor Street, Suite D.
Columbia, SC 29201
C: (803) 216-5561
F: (803) 380-8035
courtney@pricebenowitz.com

April 6, 2020

ATTACHMENT A

AFFIDIAVIT OF JONATHAN ROSHUN MARTIN

That the Affiant being duly sworn would duly state as follows:

1. My name is Jonathan Roshun Martin. I am currently incarcerated at Tyger River Correctional Institution. On January 9, 2020, I was interviewed by William Stephen Russell from Russell Investigations, LLC regarding the case involving Devon Ford. Devon and I are third cousins. That all the statements made in this Affidavit are true to the best of my knowledge.
2. I was involved in an incident involving Devon Ford, which resulted in Mr. Ford entering into an Alford Plea in 2005 for Murder and Assault and Battery with Intent to Kill. This case involved four (4) individuals: Myself, Terrance King, Kim Lilly and Ikethia T. Davis and Devon Ford.
3. It has been fifteen (15) years since the conviction of Mr. Ford and I realized that it is not right that Mr. Ford is serving time. Because Mr. Ford did not do anything wrong, I feel bad that my actions contributed to him being incarcerated. Therefore, I wanted to come forward and tell the truth about this matter.
4. On the day of the shooting, Ms. Davis and I made plans to meet with Mr. Ford and Mr. Lilly. I was the driving one vehicle and Ms. Davis was the passenger in my vehicle. There was a second vehicle involved that Mr. Lilly was the driver and Mr. Ford was the passenger. We met Lilly and Ford and stopped our vehicles. Mr. Lilly pulled his vehicle beside ours. At this time, Mr. Lilly was face to face and beside Ms. Davis, who was the passenger in my vehicle.
5. I remember that shots were fired into my vehicle and Ms. Davis was struck and later passed away.

6. I was threatened by the police to implicate Mr. Ford in this crime. I gave a statement to the police that Mr. Ford was the shooter in this incident. I did this in an attempt to protect myself. I do not know who is responsible for this shooting, although I do know, that it was not Mr. Ford. At no time did I see Lilly or Mr. Ford get out of the vehicle that they were in.
7. After the shooting, I learned that Ms. Davis had identified Mr. Ford as the shooter to the police in a dying declaration. To the best of my knowledge, I am unaware of Ms. Davis disclosing to the responding police officers that Mr. Ford was the shooter involved in this case.
8. I had pending charges from an unrelated incident at the time of this incident. The police threatened to put me back into prison if I did not cooperate with them.

FURTHER AFFIANT SAYETH NOT.

Jonathan Roshun Martin

Sworn to before me this 17th day of January, 2020.

Notary Public for the State of South Carolina
My commission expires:

WILLIAM S. RUSSELL
My Commission Expires
NOTARY PUBLIC
02-01-2022
STATE OF SOUTH CAROLINA

ATTACHMENT B

Kim Lilly

It's Been 15 years and Being Back Here I Have realized It's not Right I got this man Back Here Knowing He Didn't Do it. on the night it Happened. I Didn't See deven Jump out no Car nor Did I. the Police made that up saying She said that Because deven was on the Passenger Side the whole time shots got Fired while I was talking to the Driver who Y'all Set Free to testify on Devin as well. And when me & T was at the gas Station, I did not say He Did Anything She was in to much Pain to talk. I kept talking to Her telling Her everything is going to Be ok. I know She DiDn't make no statement How could She Or she went

Strait to I Cu. So you telling me they
Just gone stope in the middle of surgery
why trying to take a Bullet out Her
Chest In get Her to Say dason did it?
That Dosen't make no since. Plus I was
Here when the police Lied and co-Hearsed
all of this on what to Say. They was telling
me I was going to Jail, Saying I Did this
to Her So I Can Coorporate with them,
Then told me if I Help them they will
make Sure I Didn't go to Prison For the
Charges I Had at the time. In the End I
still went to Prison, all they wanted was a
Conviction. That man didn't Do it You got
the wrong man locked up, Dason is Innocent.
I Called my family And told them to
get At His Dad And I got my lawyer to get
this Statment. So I Can make this right, And
I'm willing to testify this Statement In court
as well.

ATTACHMENT C

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 1 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		02-25-2005 0001
PHONE #	DOB:	SSN:

TIME: 1:55 p.m.

This is a Voluntary Statement given to Investigator Richie Strawn of the Spartanburg County Sheriff's Office by Jonathan R. Martin referencing case #2004120412; (Murder of Ikethia Davis) Mr. Martin was the second victim for which Devon Ford has not been charged with Murder/ABWIK against Mr. Martin. This interview took place at the Spartanburg Regional Medical Center on the 7th floor tower in Mr. Martin's room.

Identities: S = Investigator Richie Strawn of the Spartanburg County Sheriff's Office

M = Jonathan Martin (victim #2)

S: Mr. Martin, if you would tell me your full name and date of birth for me please sir.

M: Jonathan Martin,)

S: And again you and I had talked at length a couple of times about what's happened and you've told me several times about the incident and we just need to get it real quick on a statement okay, and you understand this will be your statement. Let's just start off with some background information. Ikethia or the person you call "T" that was in the car, how long have you known T?

M: I know'd T since about , we was young.

S: Okay, since ya'll were kids?

M: Um hum.

S: How long have you known Devon?

M: Been knowing him bout', a long time too.

S: Did you go to school with him too?

M: (must have shook head)

S: Was he older or younger than you?

M: N-a-ah, I went to, he went to Greer, I went to down there in Duncan.

S: Okay, we're talking about the incident that happened on the 7th and I understand from you from our previous conversations that he owed you some money and you were just trying to collect this money.

M: Yeah,

S: What I'm going to do is talk about that day. On that day when was the first time that you talked to him, to Devon?

M: I talked to em' bout' 9 or 9:30 that morning.

S: Okay and what was that conversation about?

M: It was like, he uh, he in the country, I's like, well I'll talk to you when I leave out the house, call you when I leave out the house, he was like "alright."

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 2 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0002

S: You talked to him on his cell phone?

M: Yeah,

S: Do you know his cell phone number?

M: Yeah,

S: What is it?

M: I thank it's [redacted] something like that, [redacted]

S: Okay, so you talked about he's going to get you the money then that he owes you?

M: Yeah,

S: Okay, when was the next time that you talked to him?

M: I talked to em' bout' probably bout' 4, ____.

S: Okay, on his cell phone again?

M: Yeah,

S: Were you at, I believe you were at Ashley's house at some point and talked to him?

M: Yeah,

S: Okay,

M: No the first time I talked to em' I was at uh, the mechanic shop and I talked to em' when I had went over Ashley house.

S: Alright so when you talked to him at Ashley's house what kind of arrangements were made to meet up?

M: To come down to K O's house and follow em' to the country.

S: Okay,

M: And he was gonna um, go get the money and ride back with me.

S: Alright, where's K O's house at?

M: Uh, Greenline, Greentown,

S: Do you know what street it is?

M: (Must have shook head)

S: What does the house look like?

M: It's a green house.

S: Has it got a fence around it?

M: Yeah,

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 3 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

S: It does? Any other cars there besides the red Suburban?

M: (heard no response)

S: And his girlfriend is Monica Anderson? I've heard from other people.

M: Yeah,

S: Okay, alright what time do you think you got over to his house? Just roughly.

M: Probably bout' uh, bout' 5.

S: Was it just him and Devon there? K O and Devon?

M: Yeah they was sittin outside waitin on, cause me and T was going to the studio afterward,

S: Yeah, let me ask you that since you brought it up. When did you get up with T?

M: I got up with T after I had talked, left uh, Ashley's house, she had come like a little earlier that day,

S: Um hum,

M: She wanted to go to the studio.

S: Okay, so you had gone and picked her up.

M: Yeah,

S: Before going to K O's house?

M: Yeah instead of comin way back up there.

S: I understand. Alright so when you get there ya'll take off, and where are you following them to? Do you understand where that's going to be?

M: It was like, following him to the country.

S: To somebody's house?

M: Yeah, some white dude's house.

S: Okay, and the "country" being in Inman, Campobello, or,

M: Yeah, it was like, it was still in, it's in Lyman right there yeah.

S: In Lyman? Did you actually go to the guy's house?

M: N-a-ah we didn't even go.

S: Alright, what happened, how long did ya'll ride?

M: It was about twenty minutes, I knew something wrong though cause they kept turning around like they didn't know where they was goin and everything.

S: Did you call him on the phone and ask him what was up?

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 4 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB: (	SSN:

M: Yeah, he turned his phone off. 02-25-2005 0004

S: On that cell phone number that you gave me?

M: Yeah.

S: What phone would you call him from?

M: My uh, thank it was, [redacted]

S: Okay, alright so the last time that you talked to him on the phone before he turned it off while you were riding down the road, what does he say?

M: "He almost there."

S: Okay, alright what happens from there? Just go ahead.

M: Alright, then, alright we do down some other road it was like, Campobello,

S: Uh huh,

M: I knew, cause I remember goin down the road before. It was like goin towards Campobello, some big church,

S: Alright,

M: And he turned around, did a U-turn on another one, I was like, I'm tryin to call em', I was like, you know what I'm sayin, trying to asked em' but he had his phone off and me and T sittin in the car like, something ain't right you know what I'm sayin? I was like, I know, I been feelin like that since the whole ride.

S: Right.

M: So I, well I you know, they had turned around then goin down the road, I had put my um,

S: Alright, when you turned around, were you going back the way you came?

M: Huh? Yeah, but he kept straight on out that road but, instead we came out some other road where he turned to the left and went up and turned around at the church and came back down. That's how we ended up at uh, I think the street was Holly Springs or something like that.

S: Okay,

M: Yeah, so I put my high beams on em', you know what I'm sayin, and they pulled on this little dark road and I pulled,

S: To the right or the left?

M: To the right,

S: Okay,

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB: (	SSN:

02-25-2005 0005

M: Like a little farm, it was like a little farm across from it.

S: Across from a farm?

M: Yeah,

S: Was it a paved road?

M: Yeah,

S: It was?

M: Yeah, it had like cars out there in the fence,

S: Like a junkyard type,

M: No like a little farm, you know how they had like little older, little cars out there, it was like a couple of em', yeah I couldn't really see em' you know what I'm sayin, but I know they were old though.

S: Alright,

M: So, they pulled over and I pulled on to the uh, to the left of em'.

S: Alright, this is where it gets very critical and I'm going to stop you at each little point. So they pull off to the right side of the road,

M: Yeah,

S: And you pull up beside them where T's passenger side is facing K O's driver's door.

M: On the side of K O's, yeah.

S: And K O is driving the Suburban?

M: Yeah,

S: Alright,

M: So he was like, "yeah we almost, it's down the road," and when he said that,

S: K O said that?

M: Yeah, next thang he know, shot come out from the car! Dah, dah, dah, dah! It was about, I don't know it was a lot of em' though.

S: Um hum.

M: You know what I'm sayin?

S: Alright, let's talk about something, Devon says in his statement that he leaned in the car.

M: Right,

S: Alright, did you see Devon fire that gun?

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

M: Nobody, I didn't see nobody leaning in any no car. I didn't know it was him til T said it was him.

S: Okay,

M: T seen his face.

S: Alright, so after the shots were fired, while all that's going, and I know that's very quick, did anybody say anything?

M: Huh? Uh, uh. I just pulled, pulled out real fast.

S: Straight ahead?

M: Yeah.

S: Okay,

M: And came, like the road had ended into a curb,

S: Um hum.

M: And we came to the curb and like had came to a stop sign and I was tryin to fly down the road and get us some help.

S: Um hum.

M: See I thought I was just shot in the leg and T, I heard her when she said she was shot in the chest part, then I had like, put my blinkers on, on people to help us and everything and they act like they didn't wanna give us no help.

S: What do you mean?

M: Huh?

S: Well let's get back, so then you're on this road, the shooting happens, you take off straight,

M: Yeah,

S: You come to a stop sign.

M: Came to a stop sign,

S: And which way did you turn?

M: And I had turned to the left,

S: Okay,

M: Ended up on New Cut Road or something.

S: How far do you think you went before you got to that store that you mentioned you stopped at?

M: I don't know, I was drivin and panicking so,

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

S: I understand.

M: I don't even know.

S: Okay.

M: I do know that I had went down the road and you know how the car come up like, I was going down and the car comin up?

S: Yeah,

M: I pulled in that lane,

S: To get them to stop?

M: To get em' to stop. And when I did get em' to stop, the dude was goin tell me, I told em' that we was shot in the car,

S: Um hum.

M: You know, well he need to keep straight on up the road then.

S: Was it a black guy or white guy?

M: White guy.

S: White guy?

M: Yeah,

S: Who else was in the car?

M: He had, I thank he had a son or somebody in there, a grandson.

S: What kind of car was it?

M: Like a gray uh, what's the new Toyota truck?

S: Tundra?

M: Yeah, one of them. So I kept straight on up until I pulled over to somebody house, so I pulled over to their house and everything. They had cars in the yard but nobody didn't come out, I kept blowin the horn, ringing their doorbell.

S: Okay, you got out of the car and rang the doorbell?

M: Yeah,

S: Alright,

M: So I jumped back in the car, that when I felt my whole left side started going out.

S: Like you're numb?

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0008

M: Yeah,

S: Okay,

M: So I went down the road, then I pulled, turned to the left at the stop sign and I ran up in that little shop right there.

S: Okay, and the guy come out and moved your car?

M: Yeah, come out, and I was like, "my friend in the car, she's shot too."

S: Let's go back, that's the general story, now let's go back to where the shooting is at. He's alleged that you were shooting at him, and you at no time had a gun,

M: No time had no gun, no time, know that that was gonna happen.

S: Right. Why do you feel like this happened?

M: I feel that, now, what he said on his statement, it's a girl.

S: Is that true? I mean you talking Shan or have you ever talked to Shan his girlfriend?

M: To be honest, when they was havin them problems he had me to call her and tell her to drop charges, you know what I'm sayin?

S: Okay, so she's had him arrested for something before.

M: She put a charge on em' for something.

S: Okay, and her name is Shandra Henson?

M: As I know, uh, Shan, Shan.

S: You know her as Shan.

M: Yeah,

S: He has a baby by her?

M: Yeah,

S: Okay, alright the issue of the money, you told us he owed you five hundred dollars, ($500.00).

M: Yeah. He wouldn't even give me the money!

S: He made reference to fifteen hundred dollars, ($1500.00). Do you know what he was talking about?

M: What?

S: He said he had a five that he owed, he first says that you owed him and then he says, later on says that he owes you. Do you know what he's talking about? He just mentioned fifteen hundred dollars.

M: Um um. I don't owe him no money, he owe me that money.

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0009

S: Okay. We still need to, do you have any idea what K O's real name is?

M: Um um.

S: But he dates a girl named Monica.

M: Yeah,

S: Okay, how long have you known, when is the first time you met K O?

M: I met K O back like the beginning of the year.

S: Beginning of this year?

M: Yeah,

S: Alright, you ever had any problems with K O?

M: I don't even know no dude like this.

S: Alright, you ever had any problems before with Devon at all?

M: Na-a-h, suppose to be my cousin.

S: He's suppose to be your cousin. Is there anything else that you can think of? Let me ask you this, when you saw him at K O, when you saw K O and Devon at K O's house before ya'll start riding, do you remember what Devon was wearing?

M: He had like a white t-shirt on and um, Khaki pants with some white shoes.

S: Khaki pants and white shoes.

M: Yeah,

S: Did he ever wear a hat, does he have a hat?

M: No he didn't have no hat on.

S: Okay, what kind of guns do you know him to have?

M: That 9,

S: You know what brand 9 is it?

M: A Ruger.

S: A Ruger? Okay, and were there any other guns that he keeps?

M: Um um.

S: Has he ever pulled a gun on anybody that you've seen or knew before?

M: I ain't never seen em' pull, I seen a gun though.

S: What's his deal, what's he into?

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB: (	SSN:

02-25-2005 0010

M: Who? I don't know he needs some, some Motha Fuckin help.

S: Is he into drugs? Does he sell drugs?

M: If he do I don't' what the fuck wrong with Devon man!

S: Okay,

M: Like man, it's like, you don't know who, who he is, you know what I'm sayin?

S: Is there anything else that you can think of that might help? Let me ask you something that you brought up. At what point did T tell you it was Devon?

M: I like, "Damn," I was like, "We been shot up!" I's like "that's fucked up," she told me "Yeah that was Devon, that was Devon!" I was like "man that's fucked up."

S: And in your mind when you pulled up beside him, he had to have come from behind the car.

M: Yeah he come behind the car.

S: Okay, alright, and the only people you saw in that Suburban was K O,

M: K O and Devon.

S: And Devon. Alright let's talk about this Suburban. How old a model do you think it is?

M: It's about a ninety, I think it's about a ninety five, six.

S: Is it a bright red, burgundy,

M: It's red, it's like, it's red with like the bottom trim like, like a smoke black a smoke grey, something like that at the bottom.

S: Has it got any rims on it?

M: It's like a, uh, uh. It's like one of them fifteen hundred I think.

S: Four door?

M: Yeah,

S: Do you specifically remember, it saying "Suburban" or could it be a Tahoe or a Blazer?

M: I say it like, matter of fact it was like them GMC's too. One of them GMC's.

S: They look about the same.

M: Yeah,

S: Okay, any stickers on the back of it? Anything like that?

M: Not that I can remember.

S: Does it have a South Carolina tag or do you know?

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STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0011

M: Yeah it was South Carolina.

S: Is it a personalized or just a regular tag?

M: Regular,

S: Regular tag? Okay, do you remember what K O's wearing?

M: Um um.

S: What's K O's hair like?

M: Afro type. He got like a Afro.

S: Did he have a hat on or anything that tonight?

M: Um um. Well he had a jacket on though, a black jacket.

S: Black jacket?

M: When he was in the car.

S: Leather or what kind of jacket?

M: Like a, just a regular jacket.

S: Regular jacket,

M: Yeah,

S: Do you remember a shirt, pants, or anything?

M: Um um.

S: Okay, so he keeps a Afro ___

M: Yeah, brown skin,

S: Brown skin? Light, medium, dark?

M: Well I'm talkin bout' he brown skin.

S: Brown skin okay. Any facial hair he has?

M: Yeah,

S: What? Mustache,

M: He all that, (motioning to face)

S: Just a rough beard type,

M: Got out, yeah.

S: Any teeth missing, gold teeth, anything like that, tattoo's?

M: I don't know bout' that.

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 12 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0012

S: Okay, earrings?

M: Um um,

S: Any jewelry on his hands that you remember?

M: I just wanna know, what's the real reason behind it?

S: Yeah me too. Okay, what time if you can remember, would you say that this happened by ____you know the time on this?

M: Bout' six. (6:00)

S: About six?

M: Say between five and six. (5:00 – 6:00)

S: Okay, did you call anybody between the time you got shot?

M: Ashley,

S: You called Ashley to come over there?

M: I told her, cause I thought you know,

S: Ashley's last name is,

M: Culbertson.

S: Culbertson.

M: Cause I thought we probably wasn't gonna make it, you know what I'm sayin?

S: Right,

M: So I was like, "Devon shot, he shot us, he shot us,"

S: Did T say anything about being scared she was going to die?

M: Yeah, she kept praying for both of us.

S: She was praying in the car?

M: Yeah, for both of us.

S: Did you see T again once you pulled in that store?

M: Yeah, I was sittin in the back.

S: You got back in the backseat?

M: Yeah, I was listening to all that cryin.

S: Okay, did she say anything else to you then?

M: Yeah I was like, tellin her that we gonna be alright, alright.

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 13 OF 13
STATEMENT OF: Jonathan R. Martin	AGE:	DATE: 12/09/04
ADDRESS:		
PHONE #	DOB:	SSN:

02-25-2005 0013

S: What did she say?

M: She was like, "Yeah."

S: Could she move around?

M: Um um, she didn't move, she was like, I thank she was fallin unconscious though.

S: Did you see any bullets or shells, any damage in the car, any casings or anything in the car?

M: I just seen a lot of blood when I got out.

S: A lot of blood. Is there anything else you can think of before we end this statement?

M: Um um.

S: Alright, today's date is December 9th and it is 2:13 p.m. Alright if you wouldn't mind how about telling me your name and date of birth one more time.

M: I'm Jonathan Roshun Martin, .)

S: Thank you sir.

This was typed for Investigator Richie Strawn of the Spartanburg County Sheriff's Office by D. Hipp

ATTACHMENT D

AFFIDAVIT OF DOMINIC RAMON HUNTING

That the Affiant being duly sworn states the following:

1. My name is Dominic Ramon Hunting. On February 25, 2020, I was interviewed by William Stephen Russell from Russell Investigations, LLC, regarding the case involving Devon Michael Ford. Mr. Ford and I are distant cousins. All the statements made in this affidavit are true to the best of my knowledge.

2. On or about December 8, 2004, I was heading back to Asheville, NC, and met up with Mr. Ford at McDonald's. We later went back to Mr. Ford's house, and I noted Mr. Ford seemed to be anxious and said that someone got him into a bunch of shit. Mr. Ford cut off his ankle monitor and said he needed to stash his gun.

3. I recall Mr. Ford had a gun in his possession. The gun was black, had holes in the barrel, and looked like a Tec-9-semi automatic handgun. I told Mr. Ford that a few friends and I were heading back to Asheville, NC. Mr. Ford asked if he could ride along, and I said yes. On the way to Asheville, NC, Mr. Ford asked me to stop at a friend's house. I do not recall the exact address; however, I remember the house was big and maybe white in color. Mr. Ford exited the vehicle and entered the residence with his gun. A few minutes later, Mr. Ford exited the house without his gun. Mr. Ford did not volunteer any information as to why he was in possession of the gun or why he dropped the gun off at the residence.

4. I tried many times to get in touch with Mr. Ford's attorney after he was arrested. I was not asked by police to give my account prior to Mr. Ford's trial.

FURTHER AFFIANT SAYETH NOT.

Dominic Ramon Hunting

Sworn to before me this 5th day of March 2020.

Notary Public for the State of North Carolina

My commission expires: 12/08/2024

Amanda Brock
NOTARY PUBLIC
Buncombe County
North Carolina
Comm. Exp. 12/8/2024

ATTACHMENT E

CASE: 2004120412	VOLUNTARY STATEMENT	
STATEMENT OF: Deven Michael Ford	AGE	Date: 12/08/200
ADDRESS:		02-24-2005 0111
PHONE #	DOB:	SSN:

Identities: L = Detective Reid Lindsey
G = Detective Richard Gary
F = Devin Ford

Today is the 8th of December and it is approximately 9:40 pm, myself,along with, I am Detective Reid Lindsey, along with Detective Richard Gary who is also present in the room along with Devin Ford.

L. Mr. Ford, you have been read your Miranda Rights by myself and Detective Gary. Is that Correct?

F. Yes, sir.

L. And you agree to give this statement of your on free will, correct?

F. Yeah.

L. O.K. if you would just tell us what happened yesterday on the 7th of December in Spartanburg County.

F. Where do you want me to start from? Start from where I feel?

L. Mm-uh.

F. Okay, Mr. Martin I hope you hearing this too, so you can verify this, and don't tell the people the fake stuff, tell'em the reality of whats reality of whats really happening. It all started off, when, over, he owed me some money.

02-24-2005 0112

G. Who owes you money?

F. Oh, Mr. Martin.

L. O.K. Who, who owes you some money over some little something that we ain't talking about. Then what it boils down to, he wanted about $500 to go Christmas shopping and I said, "Yeah, I but, I got this 500 plus this 15, just be straight up with me" so, it all boils down to, we get down out and the nigger pulls up on me and my homeboy "K".

L. O.K. when you say we, who are you talking about?

F. Talking about K.O., when he pulled up on me and K.O.

G. When who pulled up on you and K.O.?

F. When Mr. Martin pulled up on me and K.O.

G. O.K.

F. Mr. Martin

F. So, when Mr. Martin pulled up on me and K.O. he said, "Man, you bullshittin", so I said, What you talking about I'm bullshittin, he said you bullshitten , so I said, "What's up?"and he said, "Just follow me." So, we started heading out toward the country. We riding and riding and keep on riding then I'm sittin here, me and "K", wondering what the hell is this nigger doing? He ain't never sit up here, and let me muthafuckin, we had to ride out here. I knew something was funny from the damn jump start. So, we ride and ride on, we probably ride on for about damn 10 minutes. I know I seen a sign talking about

Campobello and shit, so next thing you know, we gets out, this nigger pulls in the muthafuckin middle of the road and I'm like, shit, I'm ready to handle my business. So, I'm like, shit, I'll be right back "K". So, I jumped out of the car and handed his nigger the money.

02-24-2005 0113

G. Who?

F. Mr. Martin and when I handed Mr. Martin the money, trying to hand him the money, he acted like he wanted to take my money and pulled out the pistol on me, so, when he pulled out the pistol on me, I'm like, "Hold up Bo Bo!", that's when I ran in front running away from his car while he damn shoot'en at me like a damn clown. He could have been trying to hit me or he couldn't, so, I did some Matrix shit, dodging around and went into the damn ditch. I busted off one shot but I knew I didn't damn shoot, I didn't hit him but I busted..

G. Who?

F. Mr. Martin, when I see him walking back to the car my homeboy KO was already backing up because I guess KO didn't want to get hit. This nigger saw the whole time, I guess Mr. Martin thought I was dead and "K" was going to leave me out here stranded, so, when I jumps up, I started bust at him. I let -

G. What do you mean, bust at him? When you say bust at him what do you mean?

F. I started shooting at him, then I start.

G.. Who?

F. Mr. Martin. When I start shooting at Mr. Martin that is when he was jumping in his car, so this nigger hurried up, Mr. Martin hurried up and jumped in his car. I ran up to the car and started shooting at him.

02-24-2005 0114

G. Which side of the car did you run up on?

F. I ran up on the passenger side.

G On the passenger side?

F. I was on the passenger side. I know for a fact that I was sitting there shooting at him the whole time.

L. Who was in the passenger seat?

F. Huh?

L. Who was in the passenger seat of the car?

F. I didn't know who was in the passenger seat until ya'll told me that she was in the passenger seat.

L. O.K.

F. When I say she, I mean "T", as in Aketha Davis, the girl that is dead. You understand what I'm saying?

G. Go ahead..

F. So, when I ran up to the car and started busten', I'm shooting at him while I start shooting at him , that is when he hurried up and pulled off. I probably didn't get no bout than three (3) shots out of the damn whole ordeal or more, you know what I'm saying. . Probably about four (4) shots I know for a fact. You know what I'm saying? About three or four shots. By that damn time my gun was already mother fucking empty . I seen the damn thing go back, you know the damn gun go back, whatever. Damn gun go back so, hell, I'm like damn, I'm like mad as hell because I want to go after this nigger but "K" he seen that I was alright and he said hurry up and get into this car Bro, hurry up and get into this car. He is asking me, "Doc, are you alright"? "Are you alright"? I am checking myself to make sure I'm alright to. Because before this nigger pulled off, I know he was trying to shoot his gun too. But by this time when he was shooting his damn gun I damn done moved to the damn side and he pulling off like this and plus he started god damn

T trying to do some mutha fucking Rambo shit and shooting on the top of the hood of the car.

L. Who is doing that?

F. Mr. Martin. Mr. Martin is the one doing this. I know by the time when he was about to pull off, when I was in there shooting at his ass next thing you know, he done shoot off his - he damn shoot off his gun, my shit was already, I've done went to the mother fuck'in side so he probably shot off about one or two times and this thing, you know, I know this nigger had his shit off in the air, you know what I'm saying? Shooting his shit still.

G.. Mr. Martin?

F. Mr. Martin, or had his gun, or you know, reached his hand after he has done shot out the mother fucking car. He had the shit going so fast so I see that nigger doing like this. Shooting out of the mother fucking air and I guess he is trying to shoot at me by that time, I'm ducking and hiding, I done ran to the mother fucking car with KO. Like I already done

said one time, the nigger asked me if I'm alright and the only thing I see is mother fucking brake lights and shit ahead of us, he is going fast as hell.

02-24-2005 0116

L. So, KO was driving the red suburban?

F. Yes.

L. O.K.

G. Let me ask you, were you pretty sure that you hit him, you said you practiced?

L. Hell, yeh,! I hit his ass, I know !

G. How do you know you hit him?

F. Huh?

G. How do you know you hit him?

F.. I know I hit him about damn two times before he jumped in the car because the nigger said "Oh-h-h!" and he hurried up and jumped in the car then. I was trying to give him a face shot so, shit,he probably got hit in the shoulder or somewhere up in this mother fucking area.

G. When you say this area, which area are you referring to?

F. The area I mean is damn up in the shoulder part, around here, I'm saying any mother fucking where. Really, to tell you truth, the reason why I said I hit his ass is because

when I got to this damn car I was at this nigger, I was right - like how me and you was close to each other, I was right here at this nigger.

02-24-2005 0117

L. You were leaning up into the car?

F. Yeh, I was in the car at this nigger the whole time. I could have shot his damn seat, you know what I'm saying, right there on the side, right there on side right there, but I know I was at this nigger the whole time.

L. You leaned in from the window?

F. Yeh.

G. The passenger side?

F Yes, on the passenger side, so hell, the whole time, while I'm sitting up here at this niggers, I see him pulling out his damn gun and by that time I done mother fucking let off my second or third shot. My shit was empty so I hurried up and jumped my damn hand out of the damn car and he probably got about like one shot off, two shots, I don't know, you know what I'm saying. Cause there was a lot of shots going out there, by that time I'm ducking down on the side of his damn car about ran my hand over and this nigger starts busting out the window.

G. Mr. Martin?

F. Mr. Martin, then he starts busting out this damn window, you know what I'm saying, so tell you the truth I don't mother fucking know if he was damn shooting out of which window, you get what I'm saying?

G. Yes.

02-24-2005 0118

F. But I know I seen that damn hand in that fire on top of the damn hood.

L. What caliber was your pistol?

F. Shit, I had a damn 9.

L. What did he have, do you know?

F. Shit, he probably had a 9 to, you know what I'm saying, on the the truth.

L. Are you sure?

F. I'm saying I know he had a 380 and I know he had just bought this 9, you know what I'm saying, he had bought this 9 from this mother fucking crack head, you get what I'm saying?

G. Yes.

F. The crackhead was letting the 9 go for $100.

G. Let me ask you Devin, if you can think back do you remember what it was that you saw coming out of the top of the hood.

F. All I know is that it was a big pistol, you know what I'm saying.

G. O.K.

F. That mother fucker was big, that is the only thing I know. When this nigger pulled out that damn big pistol from the first jump start, I am like, "Oh-h- Shit!" that is when I damn started 02-24-2009 01:19 running away from the damn car and ran into the damn ditch, you know what I'm saying. It is like the mother fucking bullets were damn (sound effects) Pe-ou-ou-ou!! Pe-ou-ou-ou!!. I'm thinking I had me a fucking protective shield the hold time or something, when I hear my back on that damn rock that is when I thought I was hit. So, I'm in there just prayin,damn my life done went ahead, you know what I'm saying, my life going right now. That is the only thing I was thinking. Damn I am looking at my whole life pass before my eyes and I been, two seconds, when I damn done realize, oh hell no, even if I was hit or if I wasn't hit I was going to hit this nigger but I know for a fact still that that girl wouldn't have got shot, I know he wouldn't have went to the police, if he would have went to the police, if that girl wouldn't have got shot he would have went to the police station or the hospital and he wouldn't have told ya'll, know what I'm saying, what went on. You feel where I coming from, he would have just kept quiet and then try and have a day of beef on the street, you get what I'm saying?.

L. Yes.

F. The reason why he bought the other gun, the reason why he bought the other gun was because of that beef what he was telling you that the dude had a hit out on him.

G. O.K. Let me ask you. KO did he have anything to do with what's happened.

F. Hm uh , Nah

G. To clear this up KO, what is KO's real name?

F. Hell, I don't even know KO real name.

02-24-2005 0120

G.. You know his real name?

F. It's Camren or some shit like that? It is Calvin or Cameron we just call him just call him KO, you know what I'm saying?

L. Do you know his last name?

F. I couldn't even tell you his last name Bo. We just now , what I'm say Homeboys, you feel me?

G.. Yes

F. Like the reason why the people know my Alias and ya'll know what I'm say around that way is because they grew up with me. They went to school with me so you know they are going to know your alias and -

L. What is your street name, what do you go by?

F. Who?

L. Doc?

F. Yes.

L. Doc.

F. You know what I'm saying and they just cut his shit off KO, you hear what I'm saying. KO doesn't even know my name, you know what I'm saying. He know my name, you know what I'm saying, I know his name but it is hard to explain, you know what I'm saying,

because his son name Cameron or something like that and he named his son after him like I named my son after me, you get what I'm saying, that is how come you know my name. You feel me?

02-24-2005 0121

G. Yes.

F. If I sit up here and think about the shit even more and I know I could figure out his name, his last name but hell KO didn't even know what the hell was going on the whole time, you know what I'm saying.

L. That is what we are trying to get on the record.

F. Yes. If KO knew what was going on, KO would have brought his pistol, you know what I'm saying. You know what I'm saying? But we thinking this is, you know what I'm saying, is a old normal thing and we going to meet this nigger and I am going to get my shit and you know what I'm saying, we called even. You know what I'm saying?

L. Are you and Mr. Martin related?

F. Yes.

L. Who is he to you?

F. He is my cousin. Supposed to be my cousin anyway but we ain't kin, you know what I'm saying for the simple fact that of what I've seen, um, you know what I've seen here.

L. Did ya'll know Ms. Davis?

F. Did I know her? I used to fuck her. That was one of my you know what I'm saying, little millies, you know what I'm say'in.

02-24-2005 0122

L. A few years ago?

F. Shit man, I'm 20 years old now and last time I fucked her was when I was about 17 years old. You know what I'm saying. I was bout' 17 years old. I could have fucked her this year, what I'm saying how old I am now, but I didn't want to go back to the past because if you get ugly girls then no pretty girls want give you no props, you get what I'm saying? If I hit with this girl then I'd be fucked up with my baby's momma so I just left it at that. You know what I'm saying. Last time me and T talked was about, what's the days hmm, probably about two days ago.

L. Now you said T now -

F. Iketha, last time me and her talked we were about two days ago. I was smoking blunt with her and we were just sitt'in there chilling, know what I'm saying but it wasn't nothing damn there on serious, you feel me?

G. Let me ask you this Devin. After the shooting occurred where did you go?

F. Shit, I came back to Greer. I had done met up with my cousin and them.

G. Your cousin?

F. Yes, Dominic, some people from North Carolina.

G. And what happened? Tell us what happened there?

F. OK this is how the whole dealio' went -

G. Where did you meet them?

02-24-2005 0123

F. Where did I meet them at?

G. Yes.

F. McDonalds

G. O.K. go ahead and tell us what happened from there.

F. OK when me and KO was trying to find our way out of the country. The only way we got out of the country was because I seen a Greer sign saying Greer 11 miles, or whatever, 11 or 12 miles. I'm like damn! Bro so I said "Let's go this way, let's go this way Bro, Let's go this way"!. So we keep on going, I didn't know where. The hell I was until I seen Holly Springs. When I seen Holly Springs I said Bro, "We good because I know that church right there . I said, "that's the church, I keep said I done been on this road before keep going on this road just keeps going straight, .so, while we kept on going my baby's momma called me at the same time.

L. What was that?

F. Shandra Henson, she called me saying she needed some damn money so that we can, you know what I'm saying, get up here, so I give her this money so she can go Christmas Shopping for my son, you know what I'm saying. So I am like damn! The whole time, I'm like shit! K had to go pick up his grandpa or whatever, you know what I'm saying. He was scared to go pick up his grandpa, you know what I'm saying. He thinking this nigger going to shoot at him now, you know what I'm saying. The whole time we going back to Greer! we are thinking this nigger behind us, you know what I'm saying but it wasn't nothing, it

wasn't him that was behind us it was a damn another car. So he was scared the whole damn time. He was like, "Boy, I'm telling you Bro, I've got your back man if somebody is trying to harm you man. K.O. he is like man don't even worry about this nigger, you know what I'm saying, shooting at you man, don't even worry about it because I was sitting there pissed off the whole time. He said, "Don't even worry about it Bro, don't even worry about it man, if that nigger wanted you, know what I'm saying, to handle some stuff then we will handle him, a couple of days but you need to chill because you're on this house arrest." And yes, I feel you Bro, go ahead, so hell, we'll go to my cousins, we go with my cousins at that damn McDonalds. I said shit,Bro, it is time for me to meet my cousins I'm going to chill because I got to be home in a minute anyway.

02-24-2005 0124

G. Do you remember who was at McDonalds? Your cousin Dominick?

F. Dominick, and ----

G. What was his last name?

F. Hunting, Huntingten ??

G. Who else is with him?

F D.G. and umm Trey.

G. Do you know their real names?

F. Trey that is his real name. See I've just, the only reason why I'm up here. The only the people I know up here is my cousin, you know what I'm saying? And my cousin, he is just damn put me on these people. I don't know these boys because I just went to parties with these boys up here. D.G. if ya'll get what I'm saying, D.G. his name is probably in that

damn paper anyway but that was just that was his little alias or whatever bull jive D.G., Trey is the white boy with the 24 or 22 on his car, you know what I'm saying. It was D.G., Trey, D.G. was in the drivers seat, Trey was in the passenger and Dominic was in the back.

02-24-2005 0125

G. O.K.

F So, I said -

G. Go ahead.

F. So, I said, "Come on cuz, just follow me to the house". So, when we get to my house KO was all damn shook up and shit and he like boy I'm about to go home boy, he said, boy, this nigger about killed me. Only thing he is thinking about is he could have been hit. You know what I'm saying? He is scared and shit and I'm like shit Bro I will keep in contact with you man. He said, "If them niggers come by here, if that nigger come by your house or anything just call me and let me know." I said, " bet then."

G. O.K., Let me ask you this, you were in the car with K.O. when you met with your cousin Dominic and your friend.

F. Yes.

G. O.K. and did KO drop you off there at McDonalds?

F. Nawl He didn't drop me off we got them to follow us.

G. To where?

F. To my house.

G. O.K. 02-24-2005 0126

F. So when he followed us to my house KO let me out the car and I let my cousin ya know, come in. You know what I'm saying?"

G. O.K.

F. So my cousin came in and they were looking at me and the whole time I am sitting there like, I am sittin' here shaking because I didn't want to tell them what's going on. You know what I['m saying?

I'm like, boy, this nigger done started busting at me, the only thing they know is that somebody was shooting at me. You know what I'm saying, so I'm like boy.

G. You never told them exactly what happened?

F. No, I did'nt told them what happened, ya know what I'm saying. The only thing they know is just that I was talking on the phone with my momma. You know what I'm saying. Telling my momma to be careful, I'm trying to tell my momma, damn, to go down to my grandma's house because I don't want nobody, you know what I'm saying? Come to shooten at her. Shooting my mamma's house up. That's the most thing I'm sitting up here scared of right now, You know what I'm saying. These niggers sitt'in up here, he know, Mr. Martin know, and then if "T" was still alive she would know, that is the reason why they sat up there and told ya'll, that is why they already had their game plan story told ya'll that I did the shit, but, only thing I've been sitting up there worried about it's her cousin coming by my momma's house so ya'll know from today that anybody come by my momma house or anybody come by my baby's momma's house is her cousin that did it. You understand what I'm telling you? It is either her cousins or this nigger, Martin, Mr. Johnathan Martin is coming

by my momma's house doing this shit. You understand what I'm saying? That is the only thing I've been scared of. They come by my momma's house thinking I'm there. You know what I'm saying? 02-24-2005 0127

G. Well, let me ask you, when you were at your house after this shooting occurred did you have the gun with you?

F. Hell no.

G. What did you do with the gun?

F. Shit, I threw it in the river.

G. Which river?

F. Shit I can just show you where the river is, the lake is, you know what I'm saying..

G. Was it in Greer?

F. It was in the country. It was basically Greer to because it was this old white old dudes house named, ya'll say where he stays at, you know what I'm saying? Only thing I had to do with it , you know what I'm saying, put it on the side of the road and go down the damn, into his yard, his old yard, go down the steps ---and toss my shit, you know what I'm saying, I just tossed my shit for the simple reason because I know I can go get me another gun and plus I will go hit this nigger, well, not the next day. Well, I'll promise you this if this nigger wouldn't have went to the hospital or both of them went to the hospital, and if I would have been the one that was shot or if I wouldn't have got shot, wasn't nothing popped off about he didn't get hit or her didn't get hit and I didn't get hit I was for sure going to get his ass. When I woke up the next morning it was going to be, because when I

went home the reason why they said they seen me all I was shaky was because the only thing I was sitt'en up there like, hey, I just have got to make it to the next morning. I've just got to make it to the next morning, I just gotta make it to the next morning.. When I wake up I'm going to get this nigger. 02-24-2005 0128

G. Who are you talking about when you say that?

F. I'm taking about Mr. Martin, I'm going to wake up and I'm going to get this nigger, that is the only thing. This nigger just tried to shoot at me. This nigger just tried to kill me!!!! That's the only think I'm thinking, even if he wasn't trying to kill me, just try to scare me off, nigger you could have hit me dog!!!! You feel where I'm coming from, you could have, I just like Man! Only thing in my mind, I'm like, Boy before I damn sit up here and go shoot'en this nigger I'm going to need, you know what I'm saying, for my momma, I'm, Ya'll is the reason why, on this side, I was like, don't go do it, just let the shit chill and fuck what they say in the streets because my momma and them but I have to go handle this nigger anyway because he was shoot'en at me dog on the real. That was in my heart man, I had to Man! I was going to have to! Because I just felt totally disrespected, that is just like somebody like, when yau cut on ya'lls job somebody starts shooting at ya'll, you understand?

G. Yes.

F. Only thing it was for me was self-defense. That is the only thing I was thinking in my mind was self-defense, self-defense. I was sitting at home, my cousin and them was about to leave, I wasn't worried about a damn thing, I am just sitt'en in the house and so, I am trying to get my mind on these bitches, you know what I'm saying. I'm trying to think about getting me some cock, you know what I'm saying.. Next thing you know this girl called me, telling me, Devin, what did you get into, what have you been doing. I said, "What the hell you talking about.?"

L. Which girl is that?

F. This is the girl uh

L. What's her name?

F. Tiffany

L. What is her last name?

F. Jones

L. Tiffany Jones?

F. The girl I was staying with, you know what I'm saying with, ?

L. The girl you live with.

F. Yes

L. Where are you living with her at?

F. So, was saying, Tiffany like, "Hey, dude what have you been getting into?" and I said, "What the hell you talking about, I'm sitt'en at the house", because she said like, "I heard you got into some trouble". I said, "Man, I ain't got into shit, what the hell are you talking about. She said, "I just heard and I'm making sure you're O.K." so, I said, "O.K", I hung up the phone with her and I called my baby's momma, I said "What's up, baby?"

L. What's her name?

02-24-2005 0130

F. Shandra Henson, I called my baby's momma and said, "What's happening baby?" and she liked T and Pig are in the hospital. I said, for real, I said, "T"?. Yes, she said, "T is in the hospital, like that. She said Piggy doing more better than T , so I'm thinking.

L. Let's go with Piggy again, that is

F. Mr. Martin. She said Mr. Martin is doing better than T and that's Aketha, you know what I'm saying, so, and I said, "For real baby?" and she like, "Yeh", so she like "Yeh" so I'm like, "O.K. then" so I said just get your momma to call them back and see what is happening because I just heard in the streets that they are saying that I did this shit. So she like bet baby, I'll call you right back, so my baby's momma call me back and she like, "They are trying to say like you were doing this shit, that you did the shit". I said, "Man, you are crazy as hell". I say, "Man, people are getting this shit twisted in the street all mother fucking ready. I said, " I am not worried about it, I said I'm going to, I will wait until Spartanburg County come or Greer City or whoever was going to come for me. I'm sitting in the house the whole time. The only thing I am thinking about is, Man, Damn - If I sit up here and damn , they go question me, that is going to violate my damn probation because the only thing I'm thinking about was, shit, I go take the questions, you know what I'm saying. I'm going to go take the questioning and let them do what they are damn going to do because I know I'm innocent. You know what I'm saying , I sitting here telling myself, I'm telling my cousin, I don't give a fuck,. I'm read for'em, letting them come up here, if they come see what the hell. I doing because I am going to question'em but I was like "Damn"! Even when I get questioned, no matter when I prove my innocence or that they try to find me guilty, I'm going to have to stay in jail anyway for 4 years, 5 years for this house arrest shit. That is the only thing in my mind was boy I'm going to go to jail, man for these damn 5 years. I was like fuck this shit about them in the hospital. That was the last thing on my mind. Only think I'm thinking about these 5 years on my ankles so I will cut

them mother fucker's off and jumped in the car. Only thing I was thinking about was shit, it's alright, you know what I'm saying. Because I'm in the car, I ain't even concerned, I'm 02-24-2005 0131 thinking, you know, saying "T", alright, you know what I'm saying, I don't even know what the hell damn T's situation was. To tell you the truth I didn't even know the bitch was in the car, you know what I'm saying. I didn't know she was in the car untill damn, my baby's momma told me the shit. So in my mind, I'm like,fuck it, she alright, you know what I'm saying. The only thing I'm thinking is she's alright and I'm going to come back in about two weeks or whenever it takes and I'm going to handle this nigger. That is the only thing I'm saying. This nigger done started shooting at me so I'm going to leave for this two weeks and when I come back, I am going to handle this nigger. I'm going to pay my lawyer, I am going to pay my lawyer this money so he can go ahead and get on my case and so he can sit up there and that is going to help me even more to prove my innocence when I got my lawyer. :You get where I'm coming from? So, I will go up this way, stack my little cheese and then when I came back to mother fucking proved that I done damn, my innocence with my lawyers and then the only I was going to get my lawyer, heck, to help me out to prove my innocence on this shooting shit and plus and only thing I want my lawyer to do, was just talk to my probation people with this ankle thing. That is basically the only thing I was sitting up here concerned about. Let me get my lawyer some money so he can, you know what I'm saying, get this shit with my ankle straightened out, you know what I'm saying? I am going to tell him straight up. Hell, I was just damn, you know what I'm saying, I was just damn scared that ya'll was going, you know what I'm saying, sit up here, and damn, and shop here damn when I got back out of questioning ya'll let me go and then was I still will have to stay in jail. You know what I'm saying?

L. That is why you left?

P. That is why I left. See I knew for a fact, you know what I'm saying, after ya'll came and questioned me. I will go damn, I knew for a fact, that ya'll were going to sit up there and let me go. That's the only thing in my mind. Hell, the only thing they are going to do is just

question me about the shit and they are going to let me go. You know what I'm saying? But after they let me go, hell, I got to sit up here and do damn 4 1/2 or 5 years because I 02-24-2005 01 knew after ya'll let me go, when I went in there in front of damn Greenville County. They weren't gonna set me no bond D06. There wouldn't be no bond or nothing. You know what I'm saying? I just looked at it like this, no matter what I was going to go stack my money so if ya'll, if, you know what I'm saying ya'll were going to let me go or didn't let me go, I was going to have that bond money, BAM! So I can get out, but I started thinking, damn, I ain't going to be able to get out at all dog because um, I got this thing on my ankle and they will put me in jail and so after ya'll would have let me go from Spartanburg County, I was going to get shipped to Greenville County, and have to sit in Detention Center until the lord knows when, until my case got brought back up.

L. That is why you left and went to Asheville?

F. That is why I left and came up here to Asheville right now. Let me see your lighter? That is why I came up here to Asheville. I really tell you the truth, I wasn't going to stay here long, you know what I'm saying? And if damn I knew, you know what I'm saying, this shit that this ----shit was going to be serious you see, only thing in my mind, I'm just thinking the whole time and my mind was like, boy, T, I said well, if T was in that mother fucking car she goin be on that nigger's side to help him get away with his shit. That is the only thing I'm thinking. Why is this bitch going to end up letting him , you know what I'm saying, I'm thinking in my mind the whole time, if "T" was in the car then her and him are going to put their lies together to try to put this shit on me, you get what I'm saying?

L. That is how you ended up here leaving with your cousin and coming up to Asheville?

F. Yes.

L. That is when you were picked up at the hotel up here.

F. Yeh.

L. Alright, Hmmm if you would just state your name and your date of birth and your social security number so we can identify that it is you.

F. Alright, I am about to state my name on everything but let me before I am saying this on this tape, the reason why I am saying this like this on this tape, is for the simple fact know that if "T" wouldn't have got shot they wasn't going to the hospital, they weren't going to the police and tell them nothing but the only reason why "T" wanted to talk to these people and talk to

L. Who is it?

F. "T" is Ms Davis, Aketha , the only reason why "T" went to the police and told the police my name is to keep her out of trouble with that shit., and plus keep him out of trouble and Mr. Martin, and when I say him, I mean Mr. Martin. That is the reason why she sit up there and told what she told. To keep her ass out of the damn, I guarantee you that if she wasn't dead, if shw wasn't dead, she would be sitting here talking to keep her ass out of trouble.

G. But she was accurate in saying that you did the shooting and not KO.

F. Why do you think she was so calm man. The only thing she is thinking about is getting out of trouble. I know her because I used to fuck her.

G. What I'm asking you is, she was accurate on who it was that did the shooting. It was you, and not K.O.

F.. Hmm uh, yes she was accurate on that. K.O. didn't have no gun. Like I said on the tape if 02-24-2005 0134 ya'll will replay this tape, I said what KO said. If he would have had his gun he would have been bustin' to you get what I'm saying, but KO was scared, he didn't have shit, you know what I'm saying. KO, to tell you the truth, KO ain't go nothing to do with it., you know what I'm saying, KO ain't got a damn thing to do with this. This is between me and Mr. Martin when this went on. He is saying that I owe him some money, and I'm saying he owes me some money, you know what I'm saying, when the real point truth was, he was going to try and take my money out there. That is the reason why he said I owe him some money, you get where I'm coming from? Reason why he said I owe him some money was because he was, I owed him a little $500 and he was going to take the rest of my money, get where I'm coming from. The rest of that money, that is where he is coming from saying I owe him so money so if he would have started, if I you know what I'm saying, started busting and that girl would not have gotten hit and only thing he would have been saying in the street was I took that niggers money.

G. Let me ask you this, if you hadn't started busting

F. Uh, oh yes

G. When you say busting, what are you talking about?

F. Shooting, If I hadn't started shoot'en and he would have pulled off///// with his pistol and shit then the only thing, he would be saying in the street. Hell, that money I took from Doc, he owed me anyway. You feel where I'm coming from ? So, his whole plan was to take my money and then go on the street and say, because when I was going on the street, I would say this nigger done robbed me. You know what I'm saying? He ain't wanting to go out like that. He don't want the streets to know that he took my money. Do you feel what I'm saying? He was going to go out there and say, "Yeh, I done took nigger, this nigger, I took this niggers money" He owes me anyway. You know what I'm saying? But I'll be out there in the streets saying this nigger done robbed me, he done robbed me with $1,500 that is why I am going to get this nigger, that is what the whole dealio would have been today or the next day. This nigger done took my money plus this nigger been shoot'en at

me but he would have been saying "Aw naw dog he owed me that money anyway, only when I started shooten at him because act like he was trying to get bucked. You know what I'm saying.

02-24-2005 0135

G. Is there anything else you need to add.

F. Uh, is there anything I need to add? Well, the last thing, what I need to add was, the same stuff I was saying about 1 minute and 30 seconds ago that him and "T" planned this story out to say that to cover their ass. I know I'm innocent with the whole ordeal they just need to check thesem bullets, check them bullets and see whose finger they was on. If I can find the place where we was at we are going to get the nigger bullets to. Hell, he had to have that 9 because, I know that 9 is bigger than a 380. You get what I'm saying.

G. Anything else?

F. Anything else, shit, I'm innocent and plus they sit up there plotted that shit on me the whole time but the only thing I'm wanting the judge to hear and what whoever hears this tape, what I want ya'll to know is just think of the other side of the story. Just look at if the story would have been flipped over how it would have ended up. That is the only thing I want you know what I'm saying, if that girl hadn't of got killed, wouldn't nobody got shot, how would the story look then. You feel where I'm coming from? How would it end up being, you feel me?. It wouldn't no police and it wouldn't have been no hospital and it wouldn't have been nothing. Only thing it would have been was ya'll heard this on damn News Channel 7 that somebody been shooting out in Greer or somebody got killed in Greer. That is the only thing ya'lls, you know what I'm saying say --had to do and for one, this goes to "T's" family or whoever. I ain't had nothing against "T". I ain't damn sit up here and -shoot "T". The only thing I did was try to love "T" because for the simple fact "T" is kin to my son. You understand what I'm saying? All this thing is family anyway dog.

You know what I'm saying? Because Greer is so small everybody family. I am the only one in Greer, out of like 2 or 4 more people that ain't kin to these people, these certain 02-24-2005 0136 people, you hear what I'm saying, so for real, for real tip now when the shit goes down, when people look at my son, when my family, When my baby's momma's family look at my son, her and my son, they going to be saying , damn, that boys daddy, you know what I'm saying, had something to do with his cousin getting shot. You know what I'm saying? So it has effected my son, his momma, her momma, you know what I'm saying they family, it's the whole family ordeal Dogs. You get what I'm saying? It is the whole family ordeal on a for real, for real tip.

L. Can you go ahead and identify yourself, your name and social security number?

F. My name is Devin Ford, and it ain't spelled with no "O" it is spelled **D-E-V-E-N M. Ford** by the car. F-O-R-D. That is my name and my **social security number is** . . . .nat is the whole dealeo but I know for a fact , like I was saying, I know for a fact that they plotted this shit out because I promise you, and this is my word as bond if "T" wasn't dead right now , the only thing she would be doing is trying to save her ass so she don't get in no shit. That is why she said the last words to you, what's your name?

G. Detective Richard Gary.

F. Mr. Richard Gary. That is why she ran to Mr. Richard Gary to protect her ass. She didn't know she was about to die like you told me, she didn't know she was about to die. Only thing she is thinking is she was about to live. That is what's on my mind, what you are telling me. You said she didn't know she was about to die. You said she was calm the whole time, hell, why do you think she was so calm because she was trying, to sit up there she had to be calm to tell ya'll to damn to get her up off of this shit so she don't have to go to court and do no time or nothing because she was in the middle of it to. The whole period, point blank. She probably was the one mutha fucking holding the stuff you know

what I'm saying.. She is probably the whole main, I betcha she was going to get some money out of it anyway, when they took the money because she is a broke whore anyway. 02-24-2005 0137 She ain't never had no job she don't do nothing so I know she was part of sticking me up to. I know this for a fact , after it all boils down if you going to take my money so how much money do you think she was going to get out of it? About $300 or quick what is it if you get some money for free? You understand what I'm saying? If you ain't doing nuttin' and you ain't got no hussle and you ain't got no job but your grandma needs some money, what do you think she was doing? I know you, I know him and I know her and I know you would give her about a free 2 or 3 hundred dollars just for ridin'. That is why she would hurry up and tell you that I did this shit so she could still have this same money you get what I'm saying and don't be nothing involved with her so they both collided their story so they both could get out of this shit and just put it all on me but if I wouldn't have had my pistol who would it have been on. That's the only thing I want to know. If I wouldn't have had my gun what would it have been on G? You feel me? That is the only thing I'm saying, If I wouldn't have had my gun and started shooting ya'll wouldn't be sitting here talking to me right now the only thing ya'll would have damn found out a damn week later, or 3 days later or today is somebody, Mr. Martin end up dead. That is the only thing ya'll would have heard. Mr. Martin dead and then now, when they found out Mr. Martin dead and ya'll would have been coming at me with this shit saying that I murdered him, but I am glad it went the way it did so I could have my say so. Because if I had murdered him, wouldn't nobody would have ever known this side of the story what I'm sittin up here, I am telling you now. You understand where I am coming from? Ya'll wouldn't have known the story, what I'm saying, that he is coming out with this because ya'll wouldn't have found out. They would have went home, went to sleep and everything is OK, he would have gave his baby's momma some money, gave "T" some money to do a little Christmas Shopping and he would have been all O.G. Do you hear what I'm saying? That is how the whole dealio would have been. And then only thing, I would have woke up I would have popped this nigger and what I mean pop, I would have shot this nigger and after I shot him then ya'll would have been looking at me for a murder. Murder, murder that is the only

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thing, ya'll wouldn't even question me about nothing. Because how would I be able to defend myself if I done ran up on the nigger and shot him with a shot gun? Or shot him with the shot gun (sound effect) Boo Ya-ah!!! Or face shot Boo Ya-ah!!!!You know what I'm saying. If I had shot him with this shot gun he would go down regardless, you get what I'm saying? The only thing ya'll would have me would be murder, murder, murder, murder! and I wouldn't never told no side of the story, the only thing, I'd be sitting up here doing is looking crazy, the whole time, just looking crazy, just looking crazy straight up looking crazy and ya'll wouldn't have known because the story I would have told, the story I am telling ya'll now, it wouldn't have made no sense and ya'll wouldn't even gave a fuck about this story. You understand where I'm coming from? Ya'll would not have cared, ya'll would been like, fuck it he done murdered him, that is the end of the case. (sound effect) Bink! And the judge would hit that damn thing (Boo ya-ah?) that's the end of the case. The story I'm telling ya'll wouldn't of mattered but now this story right here matters, you understand what I'm saying? Ya'll need to go ahead and check the bullets dog, you know what I'm saying. Because I know for a fact, see like by me sitting up here you know what I'm saying and talk about it again and keep on thinking about it because the shit was going fast. Like I told you, it was like the Matrix when I was sitting out there dodging these bullets and shit but I know a 380 is small Dog . I know a 380 is small, about like this big, you get what I'm saying? The nigger 9 been mother fucking, I'm thinking this is the mother fucking 9 look like a 45 coming at me and the nigger pulled a gun out like that and I'm like , Oh Shit!! Only thing I could think about was a mother fucking,run . I don't know where the fuck I'm at, if KO would have left me out there Hell, really I was damn mad at KO because this nigger was about to pull off without me. I could have been dead out there man. I could have been sitting out there just plain off - like some shit off the movies, you know what I'm saying, sitting over here barely can breathe and shit. This nigger left me out there KO would have been scared and left me out there. I didn't know where the fuck , how in the fuck am I going to get to damn gas station or a damn anywhere. I didn't even see no houses Dog on the real. Wasn't no houses or nothing around. I benn out there fucking 15 miles from fucking Greer and probably more than that, bleeding going home. Sitting up

there trying to make it just to see my son, Dog ! Ya'll think I would have came to the police and told ya'll al this, you know what I'm saying? I wouldn't have had no choice but to say it was a drive by or you know what I'm saying? Or something. I wouldn't have damn told the police that, damn, yeah this nigger such and such shot me because the only thing that would have been on my mind if I still lived was that I was going to kill this nigger. That is the only thing that was on my mind, I;m going to get this nigger. Fuck the bullshit, he done shot me, if I would live, I'm telling you now Dog, I was going for his head. Fuck the little punk ass chump change that we were sitting up there talking about, I would have charged him $1,500 dog. The only thing I knew is that I have to give it to this nigger here because I can get that money back in you know what I'm saying? No specific, time you feel me? It is a simple little fact man. I just want the courtroom to understand my story. That is why I'm keeping on talking. That is why I'm still talking dog. I hope I got it down real clear what I just said. Do ya'll understand what I'm talking about?

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L. Yes, We do.

G. Yes, We do

F. Ya'll understand what I was saying. I thank you, and I appreciate both of ya'll Detectives being nice to me and calm to me instead of coming here with all this rough stuff standing me against the window and all this and that, you understand where I'm coming from?

L. We don't to work that way.

F. The only thing I just need ya'll to do, the only thing I need you to do, what's your name?

L Detective Lindsey.

F. Mr. Lindsey and Detective?

G. Gary? Mr. Gary and Mr. Lindsey, only thing I need ya'll to do is sit up here and defend me too. Ya'll know this story ya'll know the true story and what is going on and this is my story and I'm sticking to it because I ain't have to sit up here muthafucking and think about no damn lie, Dog but like I was sitting up here saying to myself as things keep on going through because I had been smoking out there the whole time, you know what I'm saying. The only reason why is the story I told you before I said that and ya'll may see that I done, you know what I'm saying about the damn gun you know what I'm saying, talking about the damn gun or whatever but what I'm sittin' up here telling you , I'm not, my whole mind is, I'm getting killed so I didn't damn think about nothing, you know what I'm saying, it was straight blurry out there because it was a damn dream anyway, it was dejavu the whole time the only thing that I knew it was dejavu that I hit my damn back on that rock. Dog, I said "Oh!" I remember me fucking rolling in my dream. Because I was sittin there rolling in my dream and the only thing I said this is dejavu like a mother fucker. I thought I was damn running from the police in the dream or something, you know what I'm saying. This dream ain't even been damn over been two weeks because or a week Dog! You know what I'm saying the girl I was sitting up there sleeping with, you know what I'm saying. She was like damn Deven, you OK, you know what I'm saying because , I'm sitting there like, I was sitting in the bed like this, touching myself and the bitch smacking me waking me up because in my dreams I'd be flipping and kicking and shit you know what I'm saying and she done smacked me and she said, "Deven, wake up" and I said, "What" and she said "You sitting up holding yourself, what the hell have you been dreaming?" "What you been dreaming"? Nah, I thought somebody done shooting at me, you know what I'm saying. The reason why I didn't add shit up, was because I've seen my cousin's face. I'm thinking why what the fuck this nigger going to shoot at me for? This is my people man, you know what I'm saying. The only thing I'm thinging about . This is my peoples. Only thing I done been straight loyal to this nigger, just straight loyalty, I'm for real with this loyalty man. If you are real with me, I'll be real with you Dog. Like how ya'll can see if I was sitting up there talking to ya'll or now you understand what I'm saying but if ya'll would be some dick

heads and I would have been like, Hey, fuck that, fuck you, fuck , what ever it is ya'll are talking about man.

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L. I'm appreciate you talking to us.

F. Yeh, I appreciate ya'll talking to me because if ya'll don't want to talk to me ya'll don't even know my side of the story. Ya'll wouldn't even know what was going on, you know what I'm saying..

L. Well, Devin, that pretty much, you've got your story on the record is that correct?

F. Yeh, I pretty much got my story on the record, I just hope that ya'll got my story on the records. I hope that you know what I'm saying, ya'll don't sit up here and damn take this another way, I want ya'll to go up there and get Mr. Martin and see what's the whole dealio. You know what I'm saying? But before this tape is ended with and over with my man KO didn't have nothing to do with it. Period, point blank, you know what I'm saying? Only thing he was doing was sitting up there scared man, you know what I'm saying . He was just scared dog. . Period, point blank. I was mad at KO but the only reason why I'm mad at him is that I think he was about to leave me out there. Because I think he was about to leave me and I mean leave me for dead, dog, you know what I'm saying.and, I'm like, damn, boy, and you are supposed to be my nigger and you going to leave me dead? What are you going to tell my baby's momma? Hell nigger, you didn't know where you was at? Hell, I would have been out there ass -----I know if I had been shot in the leg Dog I would have died out there man on the real and out there in the country man and they ain't nothing but white folks out there and so what do you think if a nigger comes knock on your door and it is night time. Them mother fuckers are going to try to shoot me, am I right or wrong?

G. I don't know about all that.

F. Shit, but you get what I'm saying though. If a nigger is knocking on your door now you don't say, your wife for instance, you get what I'm saying, if you see and you are at home with your wife and kids and you see a nigger knocking at your door and you a police officer ain't you going to bring your pistol out there.

L. No, my partner here is black and I don't have that kind of opinion of blacks.

F. I'm not saying, it don't matter if it was a white man or black man, the reason why I said black was because it is the South, Dog. You are from the south to. You get what I'm saying? Andwhere I from, there is racism down there and ya'll can't tell me you don't know nothing about racism. Am I right or wrong?

G. Everybody knows about that.

F. Everybody know, you know how racism is down there man.

L. We are talking about - let's just stick with what happen out there. Let me just clarify this so we will be clear about it, if it is OK with you. With your permission we will turn the tape off in just a second. You have gotten what you to say on tape about the incident?

F. Yeap.

L. You made your points, am I correct?

F. Yes.

L. You've given your statement and you are happy with your statement?

F. Definitely, I don't have no choice but to be happy because I ain't got nuttin, I can't sideline the shit. Do you get what I'm saying? 02-24-2005 0143

L. If I have your permission Deven, I'd like to go ahead a turn the tape off now. Is that OK.

F. Hold on, let me think about anything else I need to say.

L. O.K.

F. Think about anything else I need to say before you turn that tape off. Is my mother, um, my baby's mother going to hear this tape?

L.. Not right now. No.

F. But they will hear it?

L. If there is a trial or something it may be in trial.

F. OK , the onlything, you know what I'm saying, the think , I want , See, I know it will be a trial Dog, it needs to be, you know what I'm saying. Because I'm not going down with no shit that I didn't damn do Dog. I'll go do them damn 4 or -5 years or whatever for that house arrest, I'll go do them 4 years for that house arrest, you know what I'm saying? Or, I'll go down for shooting at this nigger but hell that is called self-defense, do you get what I'm saying? But the only thing I wanted to say is tell my momma that I love her, my son Davian JeMicheal Ford, I love you too and plus his mother Shandra Henson, I've got love for you to. I love you to with all my heart, That is the only thing I need to say I love you and my son with all of my heart, just hold me down and shit besides that I know that by me sitting up here shooting at him, you know what I'm saying, and doing this and you know what I'm saying, keeping me away from you and my son I'm sorry that I did, you

know what I'm saying, I was shooting at him, I'm sorry but baby I'm trying my best to get to you soon. That's all I got to say, you understand, period, point blank, .man!

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L. Today is the 8th of December it is now approximately 10:33 and with Devens permission I will turn off the tape. OK Deven.

F. If I want to say anything else I'll get you to turn it back on or something.

ATTACHMENT F

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 1 OF 5
STATEMENT OF: Devon Ford	AGE:	DATE: 12/10/2004
ADDRESS:		02-24-2005 0148
PHONE #	DOB:	SSN:

Time: 8:14 p.m. This is a Voluntary Statement given by Devon Ford. Present in the room is Investigator Richie Strawn of the Spartanburg County Sheriff's Office and Devon Ford. This is referencing case # 2004120412 which is a shooting that occurred on the 7th of December; the victims being **Ikethia Davis**, (T), and **Jonathan Martin.**

IDENTITIES: S: = Investigator Richie Strawn
F: = Devon Ford

S: Mr. Ford, we have previously reviewed your Miranda Form, this pink form here. Did you sign stating that you understand your rights, and that you agreed to talk to me correct?

F: Correct.

S: Okay, for the purposes of the tape would you state your full name and date of birth for me please?

F: Devon Michael Ford,

S: And I went to the jail today and talked with you the first time about some issues, about your side of the story saying that Piggy shot at you. Correct?

F: Correct.

S: Okay, and that is still your story that Piggy shot at you and you fired back.

F: Correct.

S: Alright, now in that conversation you have told me that the gun that you used was a what?

F: Tec-9.

S: Okay, now after the shooting, what happened to that gun?

F: After the shooting, is only thang I just said about,

S: Yeah, we're going to talk about where the gun went,

F: Okay after the shooting, I went I was comin out the country, I found my way outta the country, and I took the gun to Flint,

S: Who is Flint?

F: Flint, he was my boss man.

S: You know his last name?

F: Flint Rhem.

S: And your boss man, what company does he own?

F: A grading company.

S: Do you know how to spell his last name?

F: R-H-E-M.

S: And where does he live at?

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 2 OF 5
STATEMENT OF: Devon Ford	AGE:	DATE: 12/10/2004
ADDRESS:		
PHONE #	DOB:	SSN:

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F: I don't know his address.

S: Okay, but it was near Greer?

F: It's in Greer city.

S: Greer City.

F: It should be Spartanburg County man. That's why I was tellin you that we could go ahead up there,

S: Okay,

F: You understand? We need to go ahead and get there, and then find his gun and we call it a night, we call it a day, call it a night whatever ya'll gotta do ya'll investigation.

S: Alright, well you tell me about this gun and we're going to start with his gun okay? When you took it to Flint Rheno's house who did you give it to?

F: I left it at Flint house!

S: Did you give it to him, did you put it somewhere, what did you do with it?

F: I gave it to em'.

S: Okay,

F: And I gave him,

S: Did you give him instructions about what to do with the gun?

F: No.

S: Okay,

F: I just gave it to em' and I said, and _____ 45, I told em' I'll trade,

S: Is that the same 45 that they caught you with in North Carolina?

F: Yeah,

S: Okay,

F: And then we he gave, he didn't wanna give me the 45 what I'm sayin, know what I had did with the Tec , you understand what I'm sayin?

S: Right,

F: He didn't wanna give it to me because for the simple fact cause he love his gun, and he didn't wanna damn, he didn't know where my gun came from _____, his gun was registered, you know what I'm sayin?

S: In your first statement you talked about throwing the gun that you used into a pond.

F: Um hum.

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 3 OF 5
STATEMENT OF: Devon Ford	AGE:	DATE: 12/10/2004
ADDRESS:		
PHONE #	DOB:	SSN:

02-24-2005 0150

S: That wasn't true?

F: Nope.

S: Alright, is there anything else that you said in your first statement that wasn't true that you want to clear up now?

F: Like what?

S: I mean any, I'm just asking you.

F: I'm just tellin you the same story like I told uh,

S: Okay, I mean I'm just asking you a question.

F: Yeah.

S: Okay, describe Flint's house for me, what does it look like?

F: I, it's just a big house in a white neighborhood.

F: Big house in a white neighborhood,

S: Alright, is there anything else about the gun, the Tec-9?

F: Like what?

S: Is there anything you want to say I mean this is your statement?

F: U-h-h, uh, basically man, only thang I need to say is, is I done told em' my story, you understand?

S: Right,

F: Basically I done told em' my story, like, but like I, I'll say it again, I'm gonna say it again, by the time all bout' the damn shootin in that damn car you know what I'm sayin, fired one shot went off, and then my shit jammed.

S: Shooting in the car from the passenger side?

F: Yeah,

S: Okay,

F: When I was, when I was leaning in the car, I had it on him no reason why couldn't damn keep shooting for the simple fact the shit jammed , and by that time this nigger done damn shot at me some more times was still shootin, so I just hit the ground and bout' ran my damn fingers over and shit, and hell, after that, you know what I'm sayin? He was shootin at me, I know he didn't hit me because I had already, I'm surprised he didn't bust out the damn back window while he was shootin that, you know what I'm sayin? And then when he see he didn't

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 4 OF 5
STATEMENT OF: Devon Ford	AGE:	DATE: 12/10/2004
ADDRESS:		
PHONE #	DOB:	SSN:

02-24-2005 0151

hit me when he was shootin out the window, he pointed the pistol out his side of the window and started shootin. Well by that time, I was already Damn off the ground running to damn K O car, he was already down the damn road. When he started shootin he was movin and shootin at the same time.

S: You mean walking or driving?

F: Driving!

S: Driving.

F: He was drivin and going at the same time.

S: Okay and what kind of car was he in?

F: A white car.

S: A white car okay. Alright is there anything else?

F: (must have shook head no)

S: Okay, did you give this statement of your own freewill?

F: Yeah.

S: Okay,

F: Nobody threatened me.

S: This will be the end of the statement at 8:20 p.m.

(Resumes)

S: Okay Devon Ford has requested that I turn the tape recorder back on, he has something else he wants to say.

F: Yeah! Only thang I need to say was ya'll need to get him to go ahead and I mean him and then Piggy to go ahead,

S: When you say "Piggy" say his real name.

F: Um, John Mr. Martin. Ya'll need to go ahead and since I'm givin up my pistol, ya'll need to ask him where he took us, and where he threw his pistol at.

S: Okay,

F: That's the only thang I need to sit up there and say; because I was what you told me about um, my pistol, only way you gonna know the evidence is between my pistol and his pistol you understand what I'm sayin? So I'm givin up my pistol so he need to go ahead and give up his pistol, that's the only thang ya'll to know the evidence, that the evidence come back to my pistol shot her, then ya'll know then understand that my pistol shot her, but ya'll won't know the evidence until ya'll have both of the pistols.

CASE # 2004120412	VOLUNTARY STATEMENT	PAGE 5 OF 5
STATEMENT OF: Devon Ford	AGE:	DATE: 12/10/2004
ADDRESS:		
PHONE #	DOB:	SSN:

02-24-2005 0152

S: Well let me ask you since you said that. Do you think there's a possibility that you did?

F: No!

S: Okay,

F: I, I don't think, I know it ain't no possibility.

S: Okay,

F: You know what I'm sayin? Now if it was, if I, I'm gonna tell you like this, if I, you know what I'm sayin would have shot her, I woulda shot at the damn front window. That's the only way I could see that I coulda shot her when I was shootin at him and he was goin back to his car.

S: Okay,

F: That's the only way, you know what I'm sayin? I know that I woulda shot her then ya'll woulda said, then ya'll wouldn't be sittin here talking to me now because ya'll woulda seen a bullet go through that front window, you understand what I'm sayin?

S: Is there anything else?

F: That's it, that's all.

S: Alright, this is the end of the second portion of the statement at 8:22 p.m.

This was typed for Investigator Richie Strawn of the Spartanburg County Sheriff's Office by D. Hipp

ATTACHMENT G

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG)

STATE OF SOUTH CAROLINA,) TRANSCRIPT
) OF
PLAINTIFF,) RECORD
)
vs.) 05-GS-42-3376
) 05-GS-42-3377
DEVON MICHAEL FORD,)
)
DEFENDANT.)

December 5th, 2005
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE DOYET A. EARLY, III, JUDGE.

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

ROBERT COLER
ASSISTANT SOLICITOR
Attorney for the State

MICHAEL BARTOSH
PUBLIC DEFENDER
Attorney for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

INDEX OF WITNESSES

(There were no exhibits marked or testimony taken during this hearing.)

PROCEEDINGS

SOLICITOR COLER: May it please the Court, Your Honor. Judge, before you is Devon Michael Ford. Mr. Ford is represented by Mike Bartosh.

THE COURT: Turn around and face me, son.

SOLICITOR COLER: Represented by Mike Bartosh of the Public Defender's Office. Mr. Ford is here to plead guilty to two indictments.

On Indictment 05-GS-42-3376, he's pleading guilty to one count of murder. On Indictment 05-GS-42-3337, he's pleading guilty to one count of assault and battery with intent to kill.

As Your Honor knows, the murder carries 30 to life, and the assault and battery carries zero to 20. State's recommending that the assault and battery charges, the punishment run concurrent with whatever Your Honor gives him on the murder charge.

MR. BARTOSH: And Your Honor, we'd be entering this plea under North Carolina versus Allford.

THE COURT: Mr. Ford, would you raise your right-hand and be sworn?

(Whereupon, the defendant was placed under oath at this time.)

THE COURT: Put your hand down.

Now, hold on.

What's all this going on back here?

SOLICITOR COLER: Your Honor, this is the other victim, Mr. Martin. He's, he's presently in the custody of the Department of Corrections. But he's here for the trial. So, I thought we'd bring him in here. He's standing in here.

THE COURT: That's fine.

Officer, thank you.

All right. All right. Mr. Bartosh, do you represent Devon Michael Ford on both of these indictments?

One for murder, that's 3376, and the other one is for assault and battery with intent to kill, which is 3377?

MR. BARTOSH: I do, Your Honor.

THE COURT: And have you explained to him the charges contained in the, each indictment, and the possible punishment, i.e. on murder is 30 to life in prison without parole?

MR. BARTOSH: Yes, sir.

THE COURT: And on assault and battery with intent to kill, up to, zero to 20?

MR. BARTOSH: That's correct, Your Honor.

THE COURT: And have you also explained to him that these are classified as violent and most serious on both, and the prior, and the ramifications that may give him in

the future?

MR. BARTOSH: Yes, sir, I have.

THE COURT: And have you also explained to him this is what we are generally refer to as an 85 percent -- well, no, strike that. That's not correct.

On the murder charge, you do day for day?

MR. BARTOSH: Yes, sir, I've explained that to him.

THE COURT: And it's my understanding he wishes to enter a plea under North Carolina versus Allford or on Allford versus North Carolina?

MR. BARTOSH: That's correct Your Honor.

THE COURT: And have you, sir, in reviewing all of the evidence, do you believe that, if this case went to trial, the State would prove beyond a reasonable doubt the guilt of your client both on the murder and the assault and battery with intent to kill?

MR. BARTOSH: I believe they could, Your Honor.

THE COURT: Have you explained to your client that, if I accept this plea under Allford, that I have to treat it as a guilty plea and the Department of Corrections treats it as a guilty plea?

MR. BARTOSH: I have.

THE COURT: Is it your opinion that the State could prove beyond a reasonable doubt his guilt, and that he wants to take the benefit of the bargain, that is that the two

sentences would run concurrently?

MR. BARTOSH: Yes, sir, I've gone over the, the evidence against him, and I think he believes that, that were he to go to trial, that it would be likely that he would be convicted, and also he gets the benefit of the recommendation of concurrent time.

THE COURT: All right. Mr. Ford, please listen to me. If I ask you anything you don't understand, say judge, please repeat it.

Is that fair?

DEFENDANT: Yes, sir.

THE COURT: First of all, how are you this morning?

DEFENDANT: I'm, I'm -- you know what I'm saying?

THE COURT: Huh?

DEFENDANT: I'm -- I guess you could say I'm all right, you know what I'm saying, cause some things I don't understand.

THE COURT: Well, what don't you understand?

DEFENDANT: About the arm---

THE COURT: About the what?

DEFENDANT: About the day for day thing and about some more evidence that we ain't able to bring up.

THE COURT: Well, your lawyer tells me you want to enter a plea under North Carolina versus Allford, which says that judge, I've reviewed all the evidence, and I believe

that the State could prove, beyond a reasonable doubt, my guilt, and the State is offering to allow these two sentences to run concurrently, run at the same time, and you want to take the benefit of that bargain, and you don't want to run the risk of trial where you might get an X amount of sentence on the murder, and behind that, consecutive on the assault and battery with intent to kill.

DEFENDANT: Yes, sir, that's the reason why they came with the plea because they say I can catch a life sentence.

THE COURT: No, sir.

You may be found guilty by a jury and I can sentence you anywhere from 30 years to life. I don't know what I would do.

DEFENDANT: Yeah. Yes, sir.

THE COURT: But you got to tell me that, that you, you believe the State can prove you guilty beyond a reasonable doubt. If you don't want to do that, we'll stop right now and I got a jury coming at 2:15. We can draw your jury, and we'll go through the trial. So, whichever one you want to do.

If we go through the trial, and you are convicted for murder, I must give you a minimum of 30 years if you're convicted, and you do that day for day.

DEFENDANT: Yes, sir.

DEFENDANT: I can sentence you anywhere from 30 to

life. If you're convicted of the other situation, assault and battery with intent to kill, I can give you anywhere from zero to 20 and I can run those sentences on top of each other, which means concurrent, or I can run them consecutively, which means you serve one and then you serve the other.

So, be glad -- if you're not sure and you're not ready to tell me that you think the State can prove you guilty beyond a reasonable doubt --.

DEFENDANT: Yes, sir.

THE COURT: -- we'll stop right now and we'll draw the jury at 2:15, and we'll start your trial.

Which one you want to do?

DEFENDANT: We don't have to draw the jury.

THE COURT: I know we don't have to.

DEFENDANT: I'm saying I don't want to draw the jury, Your Honor.

THE COURT: Do you believe, from your review of the evidence with your lawyer, that if this case went to trial, the State could prove your guilt beyond a reasonable doubt both on the murder and the assault and battery with intent to kill?

DEFENDANT: Yes, sir.

THE COURT: And you don't want to take that risk and you want to get the bargain they've offered you, which is I

sentence you under the murder anywhere from 30 to life, and the assault and battery with intent to kill runs on top of that.

Is that what you want?

DEFENDANT: May you repeat that for me, please?

THE COURT: Yes, sir.

The benefit of the bargain -- the bargain is that they are recommending that the two charges, your sentence on both charges run concurrent as opposed to consecutive. It means you run, you do the time together as opposed to consecutive, which means you do the time on one and then you do the time on the other one.

You understand that?

DEFENDANT: Yes, sir.

THE COURT: Is that what you want to do?

(Pause.)

DEFENDANT: Yes, sir.

THE COURT: Have any questions you want to ask me?

DEFENDANT: No, sir.

THE COURT: All right. Let me ask you a few questions.

You understand that, under the murder charge, I must give you a minimum of 30 and I can give you up to life in jail where you never get out.

You understand those charges and that possible punishment?

DEFENDANT: Yes, sir.

THE COURT: Do you understand, on the assault and battery with intent to kill, I could give you anywhere from zero to 20 years?

DEFENDANT: Yes, sir.

THE COURT: All right. So, you understand the nature of the charges and the possible punishment, is that correct?

DEFENDANT: Yes, sir.

THE COURT: And understanding that, do you still wish to enter a plea under Allford versus North Carolina, which I just explained to you what it's about, or do you want me to bring the jury in at 2:15, and we try the case?

Which one would you rather do?

DEFENDANT: I go -- I'd rather go with the plea, Your Honor.

THE COURT: All right. Now, do you understand, by going with the plea, that you give up your Constitutional right to remain silent?

You have to talk with me like you're doing.

You understand that?

DEFENDANT: Yes, sir.

THE COURT: And you also give up your Constitutional rights to a trial by jury. The jury is waiting and ready to go. And if we start the trial, you will have the right to confront and cross-examine everybody who testifies against

you through your lawyer.

You will have the right to present your own case. That is put up your own witnesses, any exhibits, or evidence that you may have, and you can testify in your own defense.

If you exercise your Constitutional right to remain silent, then I would tell the jury they could not hold your failure to testify against you in any manner whatsoever, and I would further instruct them or charge them that they couldn't even consider the fact that you didn't testify when they deliberated whether you were guilty or innocent.

You would be presumed innocent throughout the trial under the Constitution, and the State would have the burden of proving you guilty beyond a reasonable doubt to a jury of 12 people. And in order for that jury to convict you, all 12 would have to unanimously agree that you were, in fact, guilty. And even if found guilty, you would still have the right to an appeal.

Now, do you understand your rights to trial by jury?

DEFENDANT: Yes, sir.

THE COURT: All right. Understanding that, do you wish to enter this plea under North Carolina versus Allford or do you want me to set the case for trial?

DEFENDANT: May I ask my lawyer something please?

THE COURT: Yes, sir.

(Pause.)

THE COURT: Any questions?

You don't have to do this. If you feel uncomfortable, we'll back off and start your trial at 2:15.

DEFENDANT: Only, only question I'd like to ask you, Your Honor, is about the, by me pleaing, is the appeal, and then I'll plea about the appeal.

MR. BARTOSH: Your Honor, I think what Mr. Ford's concern is that when the Court told him that he, by entering this plea, he's giving up all his constitutional rights as far as jury trial, remain silent, confronting the witnesses against him. But he feels he also gives up his right to an appeal, and I've explained to him that he does not. He can still appeal the, the sentence of the Court.

THE COURT: Sure.

DEFENDANT: Okay.

THE COURT: But the only appeal you would have is whether or not you knowingly and voluntarily and intelligently, intelligently made. I'm asking you all those questions now. But you would still have the right to an appeal, and I'll go over that with you in just a few minutes.

DEFENDANT: Yes, sir.

THE COURT: But do you want to give up your right to trial by jury?

DEFENDANT: Yes, sir.

THE COURT: And enter this plea under North Carolina versus Allford?

DEFENDANT: Yes, sir.

THE COURT: Has anybody promised you anything, held out any hope of reward, or threatened you in any manner in order to enter this plea?

DEFENDANT: No, sir.

THE COURT: Are you satisfied with the representation provided by Mr. Bartosh?

Satisfied with your lawyer?

MR. BARTOSH: Are you satisfied with my representation?

DEFENDANT: No.

THE COURT: Okay.

MR. BARTOSH: Thank you.

THE COURT: All right. We'll stand aside and we'll start at 2:15 drawing the jury.

Thank you.

And I'm not gonna take a plea at 2:15. That's it.

MR. BARTOSH: Yes, sir.

(Whereupon, Court was in recess for the lunch hour.)

THE COURT: All right. Mr. Bartosh, I understand you've had some counseling with your client over lunchtime, and I understand he wishes to continue with his plea.

MR. BARTOSH: That's correct, Your Honor. In talking with Mr. Ford, I believe he, he misunderstood the question

that the Court had asked him about the---

THE COURT: Well, it's a pretty easy question.

Anyway, I'll ask it again, very simply, are you satisfied with the representation provided to you by Mr. Bartosh?

DEFENDANT: Yes, sir.

THE COURT: Do you think he's had enough time so he can spend with you to understand all of the case, share with you all of the evidence, enough time to research the law, and to investigate the facts so he can properly represent you here today?

DEFENDANT: Yes, sir.

THE COURT: Is there anything else you want him to do other than speak up on your behalf before we proceed today?

Anything else you want him to do?

That's a simple question.

DEFENDANT: Anything else I want him to do?

THE COURT: Other than speak up on your behalf.

What else you want him to do?

DEFENDANT: He already, he already done it.

THE COURT: What's that?

No, you got to tell me.

DEFENDANT: I'm talking about the things that he told me that he was gonna say. I don't, I don't know the things that he say he was gonna say.

THE COURT: Well, he's gonna speak up when it's his turn to speak.

That's what you want him to do, right?

DEFENDANT: Yes, sir.

THE COURT: Tell him -- he's gonna -- you want him to tell me about your good side?

DEFENDANT: Yes, sir.

THE COURT: All right. Well, he'll do that.

Are you today under the influence of any alcoholic beverages, drugs, or prescription medication?

DEFENDANT: No, sir.

THE COURT: Are you today unaware of any mental, nervous, or emotional condition which would keep you from understanding what we're doing here today?

DEFENDANT: No, sir.

THE COURT: Have you understood all my questions?

DEFENDANT: Yes, sir.

THE COURT: Understood your conversations with your lawyer?

DEFENDANT: Yes, sir.

THE COURT: Understand what Mr. Coler has had to say to me?

You know what we're doing here today, right?

DEFENDANT: Yes, sir.

THE COURT: Are you entering this plea under Allford

versus North Carolina because you believe that if the case went to trial, the State could prove, beyond a reasonable doubt, that on January, I'm sorry, that on or about December 7th, 2004, you did, with malice aforethought, kill one Ikethia, Ikethia Davis by shooting her and also committing a violent injury upon one Jonathan Martin?

Do you believe, after all the evidence is in, the State could prove, beyond a reasonable doubt, that you're guilty of these two offenses and you don't want to take that chance and you want to take the benefit of the bargain, that is a consecutive, a concurrent sentence, is that correct?

DEFENDANT: Yes, sir.

THE COURT: Any questions before I accept your plea?

DEFENDANT: No, sir.

THE COURT: All right. I find your decision to enter a plea under Allford to be freely, voluntarily, and intelligently made. You've had the representation of competent counsel in Mr. Bartosh who you say that you're satisfied with, and I will accept your plea.

If you disagree with my sentence or these proceedings, you have ten days from today's date to file a notice of intent to appeal.

Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Thank you.

Mr. Coler.

SOLICITOR COLER: Thank you, Your Honor.

May it please the Court.

Judge, this incident happened back on December 7th of 2004. Almost one year ago on Wednesday. That day, the victims, Jonathan Martin, standing to my left, and Ikethia Davis, who is deceased, were following the defendant and a man named Ken Lilly. The defendant and Lilly were in a red Suburban, and the victims were in a, a white Maxima.

They were going somewhere to pick up some money. The testimony would of been that Lilly and Devin Ford were going to get some money that Devon owed to Jonathan Martin. They got out into the country, in Spartanburg County, and after a while Mr. Martin got the Suburban, being driven by Mr. Lilly and Mr. Ford being the passenger, to pull over.

When the car pulled over, Mr. Martin pulled his car up to the driver's side of the Suburban. While Mr. Martin, in the driver's seat of his car and Mrs. Davis in the passenger seat were talking to Ken Lilly whose the driver of the Suburban, the defendant, Devon Ford, got out of the passenger's side of the red Chevy Suburban, came around, and came up to the passenger window of the Maxima, and fired at least four, perhaps as many as seven shots, into the Maxima. Several of those shots hit Jonathan Martin, and -- but he survived the gunshot wounds.

One of those shots hit Ikethia Davis, struck her in the right chest. It was downward angled generally front to back. So, it went in like that and into her abdomen and, and lodged, the bullet lodged itself in her chest. Mr. Martin pulled off immediately and took off and drove as fast as he could. He drove about 3 miles till he got to a restaurant, Fast T's. He rolled out or got out of the car and went into Fast T's and got help. Mrs. Davis stayed in the car. EMS arrived and took both to the hospital.

Mr. Davis was treated and did survive his gunshot wounds. Mrs. Davis expired at about four o'clock the next morning after several surgery attempts.

The police quickly developed Devon Ford as a suspect because Jonathan Martin knows him from growing up with him in Greer, and Ikethia Davis also knew him, has even perhaps dated or seen him on previous occasions.

She gave a dying declaration of who the shooter was. Mr. Martin identified the shooter for the police. The testimony at trial would of also come from Ken Lilly, the driver of the Suburban, that Devon Ford was the shooter in this case.

Based on all that, he was charged with murder and, and one count of ABWIK, and is offering his plea today.

He does have a prior record I'll be glad to share with the Court at the appropriate time. I also have Ikethia

Davis' mother, Kim Davis, here, Your Honor. If the Court would entertain the, the, her speaking at the appropriate time. And, as you can see, Mr. Martin is here if he has anything to do, relay to the Court, we'd ask you to---

THE COURT: All right. Give me his prior record.

SOLICITOR COLER: 2001, Mr. Ford was convicted of trespassing.

2002, possession of marijuana.

2004, possession of crack cocaine.

THE COURT: All right, sir. Be glad to hear from you. Your name?

MR. MARTIN: I'm Jonathan Martin.

THE COURT: Anything you want to tell me?

MR. MARTIN: (Nods negatively.)

THE COURT: Ma'am, your name?

MRS. DAVIS: My name is Kimberly Davis. I'm Ikeithia's mother.

THE COURT: Yes, ma'am.

MRS. DAVIS: I lost my child in this. I mean I know it can't bring her back, you know, and I'd do anything to bring her back if I could. But---

THE COURT: I understand.

MRS. DAVIS: I ask you for the max for him, you know. Like I said, I lost a child. At least he's still living. I just ask for the max for him that justice will be served so

we won't have to worry, my family, and put this thing behind us.

THE COURT: Mr. Bartosh.

MR. BARTOSH: Thank you, Your Honor.

Your Honor, in discussing the evidence with Mr. Ford, this would be a triable case, but for the dying declaration by, by Mrs. Davis. I don't think that -- the witnesses that the State would call all have contradictory statements, and, and it would be -- it would just be a question of who the jury believed. However, with Mrs. Davis' dying declaration, I don't think that really would -- I think there's a, an excellent chance Mr. Ford would be convicted based on, based upon.

Your Honor, I don't think there's doubt this was a drug deal that Mr. Ford and Mr. Martin were -- Mr. Martin was his supplier. He, he had, he had, had sold some fake drugs to Mr. Ford. He had paid him some money, but still owed him about $500, and they were on the way, depending on whose version of the facts you believe, they were on the way for Mr. Ford to get Mr. Martin's money or Mr. Martin to get Mr. Ford his money. But at any rate, that's what the trip was about.

And at some point it, it turned bad. I don't mean to excuse it in any way what happened, Your Honor. But unfortunately, Mrs. Davis just happened to be caught in the

middle of all this, and she's the one that paid the price. And, and from talking with Mr. Ford, he's very remorseful about it. But it, it's, it's just an awful awful tragedy.

He's 21, Your Honor. He went to the ninth grade. As the Court well knows, mandatory minimum for murder is 30 years day for day. He would be 51 when he got out if the Court were to give him the mandatory minimum.

Your Honor, he has no history of violence, no convictions for any crime of violence. Mr. Martin is serving a five year sentence for common law robbery in which he pistol whipped a, a person and took their money.

So, we just ask, Your Honor, if you would, consider the mandatory minimum, Your Honor.

THE COURT: Mr. Ford, anything you want to tell me?

Anything you want to tell me?

DEFENDANT: He -- Mr. Bartosh take care of it for me, Your Honor.

THE COURT: Mr. Bartosh will take care of that for you?

DEFENDANT: The only thing I like to say, Your Honor, is that I have a 16 month old child out there right now. And from what Mr. Bartosh is stood there and told me that, that, that North Carolina plea, what's that called, Your Honor?

THE COURT: Allford.

DEFENDANT: Yeah. Yes, sir, the -- what's that called?

MR. BARTOSH: Well, Your Honor, I think what, what Mr. Ford would like for everyone to know is that he is not -- he's pleading under North Carolina versus Allford.

THE COURT: I understand.

MR. BARTOSH: He's not admitting to, to doing this. However, he feels that it's in his best interest to enter this plea because, knowing the evidence, that he believes there's a good likelihood he'd be convicted.

Is that---

DEFENDANT: Yes.

MR. BARTOSH: Is that it?

DEFENDANT: Yes, sir.

And what was that again you said, that ten day, ten day thing I have a thing to do, Your Honor, please?

THE COURT: I said if you're not satisfied with these proceedings or my sentence you have ten days to file a notice of intent to appeal.

DEFENDANT: Yes, sir.

THE COURT: There ain't no sense in pleading if you're gonna appeal. Why are you -- you don't have to do this. I'll back out of it right now. We'll let a jury decide if you're guilty or not guilty.

DEFENDANT: We'll go ahead with it, Your Honor.

MR. BARTOSH: With the plea?

DEFENDANT: With the plea.

THE COURT: Well, you know you're going to jail for a long time. I don't have any choice unless you consider over 30 years a short time.

You want to back out of it?

Got a jury ready to go. They may find you not guilty. You go home. They may find you guilty, and you're looking at, anywhere from life, 30 to life plus 20.

Your choice.

DEFENDANT: We'll go ahead.

THE COURT: I'll let you back out right now.

DEFENDANT: We'll go ahead with the plea, Your Honor.

THE COURT: That's because you believe, from reviewing all the evidence, that you feel the State could prove your guilt beyond a reasonable doubt, and you want to take advantage of this concurrent sentence, is that correct?

DEFENDANT: Yes, sir.

THE COURT: Ask him whatever you want to ask him.

(Pause.)

THE COURT: Now, last chance, my jury is sitting there waiting. They're ready to come out here and draw a jury for you. I will allow you to withdraw your plea unless you are totally convinced, from review of the evidence, that the State could prove you guilty beyond a reasonable doubt.

Now, you want me to go forward or do you want let's stop and let's draw the jury?

You may walk home tonight. You may go to jail for whatever I'm giving you now or more. I don't know what would happen.

DEFENDANT: We can go ahead with the plea, Your Honor.

THE COURT: You want to tell these people you're sorry?

(No response.)

THE COURT: You don't have to. That's fine.

DEFENDANT: But, but, but what I'm sitting up here---

THE COURT: No, sir, I don't---

DEFENDANT: What I want to say was I'm sorry that it happened.

THE COURT: Gentlemen, look here.

(Whereupon, a bench conference was held at this time.)

THE COURT: All right. Let the record reflect I had a bench conference with both lawyers.

And I'll ask you one last time, Mr. Ford, I'll be more than glad to set this plea aside. I'll be more than glad to let you exercise your right to trial by jury.

But if you tell me that you believe the State can prove, beyond a reasonable doubt, that you're guilty on both of these things and you don't want to take that risk and you want to take the benefit of the bargain, I'll do that for you.

The last chance.

What do you want to do?

DEFENDANT: I'll go ahead with the plea, Your Honor.

THE COURT: All right, sir. On Indictment 05-GS-42-3376, for murder, Sentence of the Court you be committed to the State Department of Corrections for a period of 37 years.

On the assault and battery with intent to kill, you be committed to the State Department of Corrections for a period of 20 years.

That is to run concurrent with 05-GS-42-3376.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: Thank you.

SOLICITOR COLER: Thank you, Your Honor.

THE COURT: Good luck.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 5th day of December, 2005.

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

December 22nd, 2005

Pamela E. Green

PAMELA E. GREEN, Court Reporter

ATTACHMENT H

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS NONJURY
COUNTY OF SPARTANBURG)

DEVON FORD,)
APPLICANT,) TRANSCRIPT
vs.) OF
STATE OF SOUTH CAROLINA) RECORD
RESPONDENT.) 08-CP-42-0395

September 18th, 2008
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

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

DAVID ALFORD
ESQ.
Attorney for the Applicant

MICHELLE J. PARSONS
ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

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THE COURT: All right. You may call the next case.

MS. PARSONS: Sorry, Your Honor.

The State calls Devon Ford, 2008-CP-42-0395. Mr. Ford was indicted in August of 2005 in Spartanburg County for murder and assault and battery with intent to kill. He was represented by Mike Bartosh who is since deceased. For -- December 2000, 5th, 2005, he pled guilty to the indicted charges.

He was sentenced to 37 years for murder and 20 years for ABWIK. They were set to be served concurrently. An Anders brief was filed on his behalf. The Court of Appeals affirmed his conviction, and the remittitur was issued on October 3rd, 2007.

MR. ALFORD: Thank you, Your Honor.

As a preliminary matter, I'd like to file a motion for a continuance. As I understand the situation, this case was scheduled previously this week. Due to my trial -- it was suppose to go Monday. We, we first continued all these and then we reset them for today.

THE COURT: Yes, sir.

MR. ALFORD: As I understand, talking to my client, that he was told I think yesterday to be prepared to come up. Normally they are given adequate time and notice that

they're gonna be coming up for PCR. Because of that, there's, you know, various stuff he wanted to be able to bring. Possibly two additional witnesses to get word to me, which I understand were in a message to my office from yesterday, which I haven't been in my office about five minutes since yesterday afternoon. We do have his mother here.

But because of the nature of the rescheduling and the adequate time to make sure that he had all his stuff with him, he feels he's prejudiced cause he has some notes he wanted to make sure that he was able to submit to the Court. He has put together a pretty extensive communication to me of what we want. And I understand he would want to add, you know, maybe his notes that he is looking at.

And on that basis, I would request a continuance so that he would be properly prepared in terms of, of notice to come up for today or for the next hearing.

THE COURT: Well, now, be sure I understand you, he's, he's -- he feels like there's some information he should of brought with him?

MR. ALFORD: As I understand it, yes, sir.

THE COURT: And there's two witnesses he wanted to call?

MR. ALFORD: In, in addition to his mother. He got -- we got word to his mother. He got word to his mother.

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There's a brother and sister he wanted to call.

THE COURT: Where are they located?

MR. ALFORD: That I don't know, Your Honor. I will, I will, I will submit to the Court that he, supposedly yesterday in a phone call, and I believe, I believe him, that they'll be a message for me in the office to try and request them to come. Mother got the word and apparently came. But he also had some papers or some documents that he wanted to bring that were his notes.

THE COURT: Now, can you tell me what, a little bit about what these witnesses might be testifying to?

If I -- if you're wanting me to continue the case, I need to find out if they are material or necessary---

MR. ALFORD: Well---

THE COURT: ---or we can proceed with the hearing today and leave the record open to receive additional testimony at a later time. So, I'm trying to figure out exactly what we're talking about as far as these witnesses are concerned.

MR. ALFORD: Okay. And Your Honor, I'll submit to the Court that the, the existence of these witnesses is -- I've, I've just learned of them. So, the, the brother/sister, Selena Mills and a Mark Ford, were apparently at the scene and can---

THE COURT: Scene of the crime?

MR. ALFORD: Scene of the crime. Well, they were at

the scene of the crime.

Now, in terms of an ineffective assistance of counsel, if I understand it, and I, and I may be misspeaking here, is that at the day of the trial one of the testimonies is gonna be is, is they weren't called -- in other words, at the, the trial that he was---

THE COURT: Well, this was an Alford plea.

MR. ALFORD: Okay.

THE COURT: I just looked at the transcript.

MR. ALFORD: Right. But he's saying that, that, at that time, that Mr. Bartosh was not prepared, did not have witnesses that, you know, could of helped him at the trial, and, and I'm assuming that these two individuals would have been witnesses at the trial and apparently were not called.

THE COURT: Well, there was no trial.

MR. ALFORD: There was no trial. I understand that.

THE COURT: You know, at a, at a guilty plea, the only witnesses that a person, or a, even an Alford plea, that a defendant is allowed to produce are people who wish to speak in mitigation for sentencing. They don't speak as to whether or not he should or shouldn't offer a plea. So, I'm just trying to find out what these people are gonna be speaking as to.

APPLICANT: May I speak?

THE COURT: Talk to your lawyer, sir.

(Pause.)

MR. ALFORD: Part of the issue we're raising is Mr. Bartosh not being prepared for trial, had not interviewed these two persons as potential witnesses. And because they had not, he felt prejudice that they would of gone to trial if he had known he had witnesses I guess to corroborate or support his story. One of the issues is, is that apparently Mr. Bartosh never interviewed or talked to these, these two family members.

THE COURT: And you're saying they would offer some testimony as to his guilt or innocence of the crime?

MR. ALFORD: Well, I guess it would be obviously for the innocence of him.

THE COURT: Well, now, did this plea take place on the eve of trial?

So, the case had been called for -- I'm gonna ask the State now.

You reviewed the file, Ms., Ms. Pearson---

MS. PARSONS: Parsons.

THE COURT: Excuse me. Parsons.

MS. PARSONS: I have reviewed the file. I'm not sure if they -- you're right. They did have a jury ready, yes, sir.

THE COURT: Okay. All right. What's the State's position as far as the continuance is concerned?

MS. PARSONS: The State's position is that this case has been on the roster for a long time. It wasn't continued until very late last week, and then it almost immediately was put back on the schedule when we began discussing it, putting it on today, on Monday. So, we're talking about a period of a few days when it was taken off of the schedule.

I think maybe it was continued Thursday or Friday with discussions of putting it back on on Monday. I notified SCDC that they were coming on Tuesday. Today's Thursday. I'm thinking he had plenty of time to identify to his attorney about his intent to bring his witnesses.

We're here today. We have members of the victim's family here today. We're set to go forward. He hasn't shown that these witnesses are material, and, furthermore, he had time to notify his attorney and failed to do so.

THE COURT: Anything further, Mr. Alford?

MR. ALFORD: I'm instructed that my client says he wants to proceed anyways, Your Honor.

THE COURT: Is that true, sir?

APPLICANT: The reason why I just told him that, I said we can go ahead and proceed if you want to. If you don't want to give me no continuance, we'll go ahead and proceed. That's what I just told him.

THE COURT: Well, sir, I hadn't made a ruling on the continuance. If you wish to proceed, I will proceed.

APPLICANT: No, sir, I would like the continuance so I can be better prepared for this because they came and got me on short notice. On Wednesday, they just came and rushed me up out the dorm to come to Court and I wasn't prepared. I forgot my documents I wanted to present to the Court right now today. And this -- and then at SCDC, we don't have no phones where like we can call or whatever collect like the county. We have to be on my telephone sheet so I can contact them to notify him of this and contact my witnesses.

Your Honor, that's the reason why he didn't have no witnesses on the stand. This is my first time talking to him since --.

THE COURT: When's the first time you talked to him, Mr. Alford?

MR. ALFORD: Well, we've been communicating. We came up -- I know they were suppose to be over here one time before. We filed two, we filed two amendments to the PCR.

THE COURT: All right. I'd ask the attorneys to approach briefly.

(Whereupon, a bench conference was held at this time.)

THE COURT: All right. I inquired of the attorneys as to whether or not a, a continuance had been granted in this case earlier. I've asked them to put on the record their responses.

Is that a correct statement of our bench conference,

Mr. Alford?

MR. ALFORD: Yes, sir.

THE COURT: And Ms. Parsons, Ms. Parsons, you had some information you shared with the Court. I ask you to put it on the record at this time.

MS. PARSONS: Thank you, Your Honor.

The State would submit that there has been one prior continuance in this case. Additionally, the applicant has been in communication with his attorney as evidenced by two amended applications. Further, I would say that the applicant has not demonstrated sufficiently that he would have been prepared had this case gone forward on Monday on its scheduled time since he had not communicated up until Monday his intent to call these witnesses. So, I don't think the scheduling change has been a factor here.

THE COURT: Mr. Alford.

MR. ALFORD: Well, I'll stick with where I was before, Your Honor. I understand that and I can't explain that except for the fact it was a quick rescheduling. They pulled him out and there are some documents that he informed me that he wanted us to be able to---

THE COURT: All right. I'm gonna deny the continuance.

You may call your first witness, Mr. Alford.

MR. ALFORD: Thank you, Your Honor.

I'll call Mr. Devon Ford.

THE COURT: Come forward to be sworn, sir.

DEVON FORD, being first duly sworn, testified as follows:

THE COURT: Have a seat in the witness stand please, sir, and if you would, please state your name for the record.

WITNESS: Devon Ford.

THE COURT: Mr. Alford, it's your witness.

MR. ALFORD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mr. Ford, who was your attorney in this case?

A Mr., Mr. Mike Bartosh.

Q Okay. And you've -- if your -- you should have -- and I apologize, Your Honor. I probably should of just made sure. I had a second amended petition for post-conviction relief. I wanted to make sure that we had that.

THE COURT: I'll -- if I don't have it I'll let you know.

You may proceed.

MR. ALFORD: Thank you, Your Honor.

Q Mr. Ford, in that, you had several issues you've raised arguing ineffective assistance of counsel.

The first one I'd like to talk about is, as I understand it, you were sentenced to 37 years.

A Yes, sir.
Q Can you explain to the Court the issue you have with that?
A Well, if I'm not mistaken, which I had the, the murder statute right here, right here on 16-3-20, the, the conviction for murder, it states a person who's convicted or pleads guilty to murder must be punished by death, by death, by imprisonment for life, or the mandatory minimum term of 30 years.
Q Okay. And if I understand it right, your issue is the sentence of 37 years would be in contravention to what's allowed under the statute?
It should of been 30 years?
A Yes, sir.
Q Okay. And we'll, and we'll get to that.
Now, the -- for the record, Your Honor, the transcript, if it's in, the page, as well as Page 25, Page 25 of the transcript, I can turn it in as an exhibit, but -- and, and as shown on the sentencing, the indictment for murder, Sentence of the Court is you're committed for a period of 37 years. The, the assault and battery was a period of 20 years. It runs concurrently.
The issue is, and I'll sort of make this argument later, but I just want to, since we didn't really have opening, the first issue deals with the constitutionality of

that statute, and that's raised a certain Issue A of the PCR.

Following your, your plea, did your attorney object to the imposition of 37 years, Mr. Ford?

A No, sir.

Q Okay.

A Mr. Alford, may I ask you a question please?

Q (Nods affirmatively.)

A Can I go ahead and present my three issues that I have on the, on my PCR conflict starting with the conflict of interest?

THE COURT: Let him go.

MR. ALFORD: Thank you, Your Honor.

Q Please proceed, Mr. Ford.

THE COURT: Yes, sir.

A All right. Your Honor, on the day that -- while I was in the county jail, starting from December of '04, I had an attorney named Christopher Brough. Christopher Brough was on my case from December I think 7th to August 17th. I was having plenty of problems with him not coming to see me, not being in contact with me, not doing anything to help me with my case.

So, I had wrote some people in Columbia or whatnot, and I had asked them can they relieve this man's counsel on my case. So, on August 17th, which is, here's a copy of the

transcript right here for an exhibit, I went in front of judge -- excuse me. I had all my stuff written down, but I forgot it at the county.

I went in front of Judge Mark Hayes August 17th of 2005, and I had stated everything to him about what Mr. Brough was doing.

Now, from what I read in the law books, Procedure S-22, it states if your counsel has been relieved or you have any problems with counsel, that no other attorney from that law firm may be prohibited to be on your case. So, that's why I'm stating my conflict is my first issue for conflict of interest, and here's my copy of the transcript.

THE COURT: Mr. Alford, do you want to get that---

MR. ALFORD: Yes, sir.

THE COURT: ---and make that a part of the record?

MR. ALFORD: Yes, sir, I will.

This is a copy of the---

THE COURT: Just one second. Show it to the -- have you seen this, ma'am?

MS. PARSONS: No, I haven't seen this.

Your Honor, I have no objection. I would just ask for a copy to be given at some point for our files.

THE COURT: All right.

WITNESS: I've got another of it for you if you need it.

MS. PARSONS: Thank you.

THE COURT: That will be marked as Applicant's Exhibit No. 1.

MR. ALFORD: And for the record, Your Honor, this is Transcript of Record August 17th, 2005, before the Honorable J. Mark Hayes.

(Whereupon, the transcript was marked as Applicant's Exhibit No. 1 and received into evidence at this time.)

WITNESS: All right. May I start my next issue?

THE COURT: Pass that up to me.

Thank you, sir.

Go ahead.

A All right. Starting on my conflict, on my ineffective assistance of counsel issue -- I'm sorry.

THE COURT: That's all right.

Go ahead.

A I been stuttering a lot.

Mr. Bartosh is, was on my case from August 17th to December 5th, which is three months and five days while he was on my case. During that whole three months and five days Mr. Bartosh failed to come see me except for like three times. He failed to communicate with me, failed to, to appear upon blank do anything for me till like three, three days, I'm gonna say three times right before trial.

Now, the whole time while I was asking Mr. Bartosh to

come see me I was writing him numerous letters asking can you please come see me.

THE COURT: Now, any time during that period of time were you objecting to Mr. Bartosh representing you?

WITNESS: Was I objecting?

THE COURT: Yes, sir.

WITNESS: Did I---

THE COURT: Did you file a motion with the Court to have him relieved---

WITNESS: Your Honor?

THE COURT: ---during that period of time that you were meeting with him?

WITNESS: Oh, no, sir.

THE COURT: All right. Go ahead. I'm listening.

A Okay. Now, while we was -- while he was on my case or whatever, I kept asking him can you present certain evidence for me as in my witnesses and other evidence that I kept asking him to please represent for me.

Now, as we going onto the, to this case, and on February, in February 2000, 2000, February, February 9th, 2007, I wrote SLED on the Freedom of Information Act, present this as evidence as well, asking, asking for my ballistics test with my pistol.

Now, SLED wrote me back February 26th, 2007, 2007, stating that my pistol is not a match to the victim's body.

Now, the whole time I kept asking Mr. Bartosh can he get my ballistics test for me. He kept telling me they did not have them, they did not have them, they were not ready.

So, that was one part of the reason why I pled guilty because I didn't see no -- I didn't have no evidence or seen this man was trying to help me. And then in April, on April the 6th, 2006, while I was in SCDC, some more evidence came up where the victim did not have no gunshot residue on her shirt cause the prosecution is stating that I ran to the car and shot the person in point blank range, which I'm gonna put these, both these in for Court Exhibits.

Now, the way that the, the way the victim got shot and killed, she was in the passenger side of the vehicle, and I have the, the exhibit, you know what I'm saying, from looking at the, looking over my cases this whole three years I been down. The driver of the vehicle, which is my codefendant, Kim Terrance Lilly, the way she got shot was in a downward area. They was in a Maxima. The car we was in was in a Suburban. Now, a Suburban sits higher than a Maxima.

The way the victim got shot was in a downward area showing that she got shot from the driver's door, and apparently, and the evidence is showing that the real killer is on the street and that Mr. Bartosh would of properly, in investigating my case, he would of seen that, that I did not

commit this crime, Your Honor.

Q All right. Let me stop and get these marked. We've got, we've got three exhibits, which is your Freedom of -- your FOI request. You've got your -- let's see. These would be different. One is firearms ballistic and one is the trace evidence. If we could mark these as Petitioner's 2, 3, and 4, Your Honor.

MS. PARSONS: Your Honor, may I see them before they're marked?

THE COURT: You may.

(Whereupon, the Freedom of Information request was marked as Applicant's Exhibit No. 2. Two SLED reports were marked as Applicant's Exhibit Nos. 3 and 4. The above exhibits were received into evidence at this time.)

Q Have you talked about that yet?

A It's just a copy of a piece of paper where I wrote to SLED.

Q Okay.

A You can put that in evidence as well if you want to.

Q Yeah, I think you've testified that you received this.

May we continue, Your Honor?

THE COURT: Yes, you may.

Q Mr. Ford.

A And I continue, as if you look on my Transcript Page 6, Lines 21, 22, when I asked the judge, the judge -- they

asked me was there anything that I don't understand. When I said about the day for day thing, about some evidence that we're not able to bring up, this was evidence I was stating the whole time about my pistol.

And as we go on, as I been down, I wrote the South Carolina Offices of, Office of Indigent Defense, the South Carolina Office of Indigent Defense asking them what all did Mr. Bartosh do for me as in what everything he did or whatnot, and they sent me a letter stating that my attorney did not submit no time sheet on -- they only provided funds for expert witness, which I did not see no expert witness nor hear anything about no expert witness.

Now, to me getting into, coming in with the conflict of interest, I feel that if it wasn't for the conflict of interest, that Judge Early would not have put this man on my case. He would of properly tried to help me, which I feel I was---

THE COURT: Now, Judge Hayes put him on your case.

WITNESS: I mean -- I'm sorry. Hayes. I'm, I'm tongue tied. I'm sorry.

THE COURT: Go ahead.

A Judge Hayes would of not put Mr. Bartosh on my case, I feel he would of properly investigated for me. But for the, the people that I wrote, it was making his, his employees look bad and him as well. So, I feel if he wouldn't of put

this man on my case, which prejudiced me, I would of had a fair trial, and just I feel I was prejudiced in the field -- and I -- excuse me.

The reason why I say I'm prejudiced because if Mr. Bartosh would of properly investigated my case I would of had a fair trial and I feel I was prejudiced if Judge, that was Mr. Hayes, right?

Hayes did not have put him on my case, I would of had a fair trial, and I'd like to put this in evidence as well from South Carolina Office of Indigent Defense where they wrote me.

THE COURT: Any objection?

MS. PARSONS: No objection, Your Honor. I'd, again, just like a copy.

THE COURT: It will be received as marked, and be marked.

(Whereupon, the letter was marked as Applicant's Exhibit No. 5 and received into evidence at this time.)

A Here you go, Mr. Alford, the exhibit that I, how the victim got shot in the downward area as well. Put it in evidence.

(Whereupon, the diagram was marked as Applicant's Exhibit No. 6 and received into evidence at this time.)

A Mr. Alford?

Q Yes.

A Can I see you for a minute please?

MR. ALFORD: May he, Your Honor?

THE COURT: Yes, sir.

(Pause.)

MS. PARSONS: Your Honor, again, before we go any further, I'd like to get those copies.

MR. ALFORD: I, I didn't hear that, Your Honor.

THE COURT: You would like to see the copies?

MS. PARSONS: Yeah, do you mind, before we continue just so I can be looking at them?

MR. ALFORD: Yeah, I'm sorry. Please the Court.

WITNESS: Can you find that other envelope for me too please?

THE COURT: We have a copying machine if you'd like to make some copies.

MR. ALFORD: May have to, Your Honor. I had a stack of them. I had three sets.

THE COURT: All right. What do you wish to have copies of?

MS. PARSONS: The SLED reports.

WITNESS: I got some for you if you need it I believe.

THE COURT: Mr. Bartosh -- I mean -- Mr. Bartosh.

Mr. Alford?

MR. ALFORD: Yes, sir.

THE COURT: See what's, see what he's got copies of.

MR. ALFORD: All right.

(Pause.)

MR. ALFORD: Your Honor, may we proceed?

THE COURT: Uh-huh. (Affirmative).

Did you produce copies for her?

MR. ALFORD: Yeah, I think the only one that I think we're short.

MS. PARSONS: This will suffice at this point.

THE COURT: You're okay?

MS. PARSONS: Yes, sir.

THE COURT: All right. She's okay.

WITNESS: May I say something to my lawyer please before---

MR. ALFORD: Oh.

(Pause.)

A For my third, for my third issue, Your Honor, I'm raising counsel misled me on my plea as well. If we go to the Transcript Page 13, Lines from 8 to 12, the Court asked me are you satisfied with the representation provided by Mr. Bartosh, and Mr. Bartosh asked me again are you satisfied with my representation, and I stated no on the record.

Now, we went to stand -- the judge stated that we was going to go to trial at 2:15 and draw the jury. He said he was not gonna take no plea anymore after that.

Now, the whole time during, on break, when we stepped out of the conference room, Mr. Bartosh kept saying -- I kept saying I'm going to trial, I'm going to trial, I don't care if you don't have evidence or what. I'm not pleading to no 37 years. I'm not pleading to no 30 years to something I did not do. I kept telling him I'm not pleading to something I'm not gonna do.

So, he tell me I'll get you five years for involuntary manslaughter and five years for ABWIK, would I plead guilty. So, I tell him to go ask my mother if she thinks should I plead to five years for involuntary manslaughter and five years for ABWIK. So, my mother tells me go ahead and do it. It'd be the best thing. I'll be home in no time.

So, I comes back in after the break or whatnot like an hour or so later and continue the plea. As in -- as we continued the plea, and you can go look on -- my whole intentions was coming back to get five years for involuntary manslaughter and five years for ABWIK. So, my whole intentions was that's the only thing I know I'm coming back to plead to.

So, we're going on the transcript, on Page 14, starting from Lines 13 to 25, the Court asked me is there anything else you would want him to do other than speak up on your behalf before we proceed today, and I say anything else you want me to do. He said other than speak up on your behalf.

And I told the judge he already done did it. The Court said what's that, you know, you got to tell me. And on Lines 23, 25, I'm told -- I'm talking about the things that he told me that he was gonna say. I don't know. I know the things that he say he was gonna say, and the whole time I was sitting there talking about the five years for ABWIK and the five years from involuntary manslaughter.

As we go on through, go on through the plea, he's -- they talking, and the solicitor talking, everybody keep talking. So, my whole mind intention is I'm gonna be getting five years for involuntary manslaughter and five years for ABWIK.

Now, as we, as we go to Page 21, Lines, Lines 14, Lines 14 through 16, the Court asking Mr. Ford, is there anything you want to tell me, anything you want to tell me, and I stated Mr. Bartosh gonna take care of it for me, Your Honor. So, the judge said, on Line 18, Mr. Bartosh will take care of it for you, and I stated to him, on Lines 19 through 23, the only thing I'd like to say, Your Honor, is that I have a 16 month old child out there right now. And from what Mr. Bartosh stood here and told me that, that, that North Carolina plea -- what's that called, Your Honor?

The whole time while we went on break and we went on trial I kept asking him certain questions because I did not understand nothing about this plea. That's why I asked

earlier as I put it on the record, on Page 6, about the, the day for day thing. On Page 6, Lines 21, 22, about the day for day thing, about the evidence we ain't bring up, and I'm asking about this North Carolina plea. The only thing Mr. Bartosh was sitting up there just giving me the run around telling me okay, the North Carolina plea on day for day and then coming back telling me I'm gonna get five years for involuntary manslaughter leaving me straight confused the whole time.

So, that's why I was asking the judge questions. And then, as we go back, that's why I stated on the, on the record earlier I was not happy with this man representation thinking the judge gonna take this man off my case because what I was period point showing, this man is not trying to help me. Three months and five days is not enough time to prepare for no murder, murder trial.

So, as we go on, as we go on through the transcript, the -- well, I'm going to go to line -- I'm going to go to page, I'm going to go to Page 23. Well, you know you going to jail for a long time. I don't have the -- the judge say well, you know you going to jail for a long time. I don't have any choice unless you consider 30 years a short time.

So, as we -- I'm, I'm -- when he saying 30 years, I'm thinking in my mind why is this man sitting up here telling me I'm 30 years. So, as -- on page -- we go on down. I ask

the judge can I ask him a question, and then the judge was like ask him whatever -- ask him, on Line 17, ask him whatever you want to ask him, and I asked Mr. Bartosh I say why this man sitting up here talking about 30 years and you just tell me I'm about to get five years for involuntary manslaughter or five years, and five years for ABWIK.

So, he telling me just be easy. Everything is still going as fine. Everything still gonna go as planned. So, I said all right. We kept proceeding. And then we -- as we going to the Page 24, the judge kept on saying you, you may walk home tonight, you may go to jail for whatever. I'm giving you now or more. I don't know what, what happened.

THE COURT: That had to do with the jury trial?

WITNESS: That's still, still talking about the jury trial because the whole time the judge kept looking at me seeing I didn't want to proceed with this plea cause I kept -- me and Bartosh kept arguing the whole time. So, he keep asking he like do you want to take a plea, do you want to, do you want to take this trial. We got that trial sitting here waiting on you. The judge, as you can see in the whole transcript, the judge keeps saying -- and then we go back to Page 22, Line 19, the judge say they ain't no sense in the pleading if you're going to appeal. Why argue -- why don't you do -- you don't have to do this. I'll back out of it right now. We'll let a jury decide if

you're guilty or not.

So, the whole reason why I'm kept continuing I'm gonna plead because the man kept telling me I'm gonna get five years for assault and battery with intent to kill and five years for ABWIK. So, as we go on to Page 24, I'm thinking when they, when the Court, when the judge stopped and said gentlemen, look here, and asked -- a bench conference was held at this time on Page 24, Lines 13. I'm thinking the whole time they going to talk about this plea with this man telling me what I'm about to go get.

Then next thing, you know, we go to, we go to Line 24 and 25. This is the last chance, what you want to do. I told, I told him we can go ahead with the plea, Your Honor, and this man sit up here and sentenced me to 37 years to the Department of Corrections. And me and Bartosh started arguing at this point in time and then the judge forced all us to get up out the courtroom, till, start saying all type of stuff.

So, my third, my third issue for ineffective assistance of counsel, counsel misled me on my plea. Telling me I was gonna get five years for involuntary manslaughter and five years for ABWIK.

Now, if counsel wouldn't of misled me on my plea I would of proceeded on going to trial. And, again, I'm stating on the record, again, if counsel would of properly

investigated my case, I would of proceeded on going to trial, Your Honor, and my mother right here today to testify on this, on my behalf -- well, Bartosh stated to her as well about me getting five years for involuntary manslaughter and five years for ABWIK.

THE COURT: Anything further, sir?

MR. ALFORD: There is a -- the, the argument that you---

WITNESS: Can I say something to you before you---

(Pause.)

MR. ALFORD: Your Honor, there's a, there's sort of a fourth issue that was raised. It's, it's actually part of the, the argument called Issue D in the amended PCR and that sort of deals with the double sentencing issue. It goes along with the 37 years. Mr. Ford has set out his argument and this goes back to having his notes so that he could coherently explain to the Court his understanding of the double sentencing.

I mean I, I think I can. But in fairness to the Petitioner, we wanted to be able to address his understanding of how that comes about. That is an issue that, that, to me, is, is related back to the sentencing under the---

THE COURT: Whether or not -- you're asking whether or not -- he's raising the issue of whether or not the Court

had the right to sentence him to 37 years?

MR. ALFORD: Well, that's one. And then two, there's a, there's another issue he's raised in his, in his brief, and that's more of a legal argument.

THE COURT: Today would be the day to explain that to me then.

MR. ALFORD: Okay. And, and that's why we had asked for a continuance cause this is where his notes are---

THE COURT: I already ruled on that.

MR. ALFORD: I understand, Your Honor.

Q Okay. Let me hand this to you, Mr. Ford.

Now, as I understand it, you've been sentenced to 37 years. You have the -- go to the last page.

(Pause.)

Q Okay. Put that into the record?

A Yeah.

MR. ALFORD: Okay. Your Honor, for this issue on double sentencing, the Petitioner has asked to make sure that it is in the record. It is attached and included in the, in the amended post-conviction relief starting on Page 7, 8, 9, 10, and 11. I don't, I don't know this is a factual issue. This is more of a legal argument. I could read it. I know Mr. Ford would like me to, but it is in the record.

THE COURT: I'll read it.

MR. ALFORD: Excuse me, Your Honor?
THE COURT: If it's in the petition I'll read it.
MR. ALFORD: It is, it is in the petition included in each of the amended petitions, those pages.
THE COURT: Okay.
MR. ALFORD: I know Mr. Ford wants to make sure that that is before the Court and part of the record, and I think I could -- we can, we can assure him it is as part of the record.
THE COURT: It is.
MR. ALFORD: So -- and that deals with the issue number four.
Q Is there anything else you'd like to---
A The last -- I'd like to present my last argument, involuntary guilty plea, how my plea was involuntary. That's what I'm up to.
Q Okay.
A My opportunity?
THE COURT: You're on the stand.
A My last argument is that my plea was involuntary. To start off, the reason why I say that my plea is involuntary, I was not knowingly that my pistol did not match the victim's body, Your Honor. I was not knowingly that this evidence was being withheld from me. If I was knowingly and had intelligently mind state of knowing this, I would not

have pled guilty to no murder charge cause evidence is appeared and showing that I ain't killed nobody this night, Your Honor.

And to state again, while my plea was involuntary, because I not knowingly I was gonna come in this courtroom December I think 5th knowing I was gonna get 37 years cause counsel misadvised me telling me I was gonna get five years for ABWIK and five years for---

THE COURT: You've, you've covered those grounds already. Let's get on to the---

WITNESS: That's---

THE COURT: ---the new stuff.

A That's why I'm stating that my plea was involuntary, it was an involuntary guilty plea, and it prejudiced me from having a fair trial. If counsel would of proper investigated my case I would of had a fair trial.

THE COURT: Anything else, Mr. Ford?

WITNESS: No, sir.

THE COURT: You may cross-examine -- anything else, Mr. Alford, before we---

MR. ALFORD: No, Your Honor.

THE COURT: You may cross-examine, Ms. Parsons.

MS. PARSONS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. PARSONS:

Q Now, Mr. Ford, do you admit being at the scene?
I know you testified here today about what kind of car you were driving and what kind of car the victim was driving.
A To put on the record, I was not driving. I was a passenger.
Q Okay. So, you were a passenger at the scene?
A Yes, ma'am.
Q And you also admit to carrying a gun?
A Yes, ma'am.
Q Okay. Is one of the reasons that you pled an Alford guilty plea because both the victim that survived and the victim that deceased identified you as the shooter?
A They stated I was. The victim who lived stated in the transcript for my motion for discovery, he stated that he heard the victim say that was me that had shot him. That's why I presented the evidence as well to show everything what the prosecution was stating was negative.
Q Okay. So, when the prosecutor said that the victim gave a dying declaration that you were the shooter, that the surviving victim identified you as the shooter, that the driver of the Suburban identified you as the shooter, do you remember that at trial, I mean at your guilty plea?
Do you remember the solicitor giving those facts?
A Yes, ma'am.

Q Okay. Now, the State's facts, was that one of the reasons you chose to plead guilty, because they were gonna present that at trial?
A May you repeat that one more time please before I make my---
Q Did you plead guilty because the State was gonna present that evidence at trial, that three people at the scene identified you as the shooter?
A The only reason why I pled guilty was because my codefendant and the victim that lived was all against me and that my attorney did not present any evidence to prove otherwise of what the prosecutor was stating.
Q So, you were gonna plead guilty to avoid the testimony of the codefendant and the victim that survived?
A Ma'am?
Q So, you were gonna plead guilty to avoid the testimony of your codefendant and the surviving victim?
A Yes, ma'am, because without the evidence that I needed, which what I finally got from SLED --
Q Okay.
A -- shows that if I without the evidence that I just got from SLED, and with them prosecuting, with them stating that I did this, I kind of figured that they was gonna say, find me guilty of the charges.
Q Okay. Now, do you remember the judge telling you that,

because of the murder charge, he could not give you less than 30 years?

A At that time I was really blind to the fact because the only thing I was thinking about was what Bartosh was saying.

Q But did you hear the judge tell you that?

Do you remember agreeing that you understood that?

A As I recall, yes, ma'am.

Q Okay. So, even though Mr. Bartosh was telling you some things, the judge, who's in charge of the show, told you that he could not give you less than 30 years and you said that you understood that?

A Yes, ma'am.

Q Okay. Do you also recall the judge giving you multiple chances at a trial in front of a jury?

A Yes, ma'am, I remember he kept on stating we can go to trial. But like I kept presenting and all saying, stating, why can't we bring up this evidence. That's the reason why I did not want to go to trial from the beginning because this man would not help me or present the evidence and call my witnesses as well. That's why I was proceeding with the plea because I knew, without this man probably investigating my case nor trying to help me at all, ain't no way I could win cause I seen all odds was against me.

Q Okay. So, you remember giving up your right to a trial by jury?

A Yes, ma'am.
Q Okay. Do you also remember the judge telling you that the only appeal you would have from this will be whether your appeal was knowingly and voluntarily and intelligently made?
A Yes, ma'am.
Q And that you told him that it was all those things?
A Yes, ma'am.
Q Do you remember telling the Court that no one promised you anything in order to get you to plead?
A Where is that at?
Q Page 13, Line 4.
A May you repeat that one more time please?
Q Uh-huh. (Affirmative).
Do you remember telling the Court that no one promised you anything in order to get you to plead?
And if you'll see, Line 7 is your response.
A Yes, ma'am, I remember stating that. That was right before I stated I was not happy with his representation.
Q Okay. But you did tell them that no one had promised you anything?
A Yes, ma'am, because at that time Bartosh hadn't promised me anything. That after I told, after we went to jury -- what's the -- recess.
Q Okay.

A He didn't promise me anything until after recess.
Q Now, after recess, you came back and you told the Court that you were satisfied with his representation.
A Yes, ma'am.
Q Okay. Now, when you are telling the Court that there's something else you want your attorney to handle for you---
A What page are you on?
Q Let me find it. Page 21, Line 19. Well, actually it starts out at 14, Line 14, and the, the judge is asking you if there's anything you want to say.

Do you remember saying my attorney is gonna take care of it for me?

A Yes, ma'am.
Q And then the Court kind of asked you a little bit more about that and he said what are you talking about, and you said the only things I'd like to say are that I have a six month old child---
A Sixteen.
Q Sixteen month old child and that I would like a North Carolina plea.

Do you remember that?

A I asked him what was the North Carolina plea.
Q Okay.
A That's what I asked him.
Q Now, you ended up getting an Alford plea, is that

correct, which means you did not admit guilt in Alford to, the North Carolina v. Alford plea?

A Can you like bring to an understanding of what you're trying to say?

Q Were you able to plead under North Carolina v. Alford?

A Yes, ma'am, I was pleading up under North Carolina versus Alford as I recall.

Q Okay. Now, earlier today, when you gave your testimony, you sort of indicated that that time period when you went back and forth with the judge that we just looked that what you were really meaning to say was that Mr. Bartosh was gonna take care of a five year deal for you?

A Yes, ma'am.

Q Okay. But the record sort of reflects that you were actually talking about an Alford plea, isn't that right?

A Mr. Attorney General --

Q Yes.

A -- the whole, the whole time, just to, to let you know---

Q Uh-huh. (Affirmative).

A -- I was ignorant to what was really going on. Only thing I knew the whole period of time was we just come in here to plead and for what Bartosh had told me. The only thing he reminded me, told me to say was just say yes and state, stay strictly to what the judge wants you to do. So,

the only thing, when I came back in, was just yes, sir, yes, sir, instead of all that stuttering and stuff I was doing ahead of time that you can see during the whole transcript.

Q So, it's your testimony here today that you weren't actually looking for an Alford plea, but that you were talking about a five year deal that you and Mr. Bartosh had discussed?

A Yes, ma'am, that's what I was looking for was that five year, five years for involuntary manslaughter and five years for ABWIK. That's what I was looking for the whole time we came back to plead after recess.

Q Okay. And even though the judge never mentioned it when you were pleading, you still thought that that had somehow been arranged?

A Yes, ma'am, because when they -- from when he told me to ask him whatever I, whatever you want to ask him on Page 23, Lines 17, that's what I asked Bartosh. And from -- and then on Page 24, when they went to the bench conference, on Line 13, that's what my whole understanding I thought what was going on.

Q So, when the judge gave you time to express to him, to tell him what you were thinking Bartosh was gonna do for you, why did you not choose then to talk about the five year deal y'all had talked about?

A Because the whole time I been thinking that is the

judge getting real mad at me during the whole time I told him. I'm not happy with this man's representation. He was leading me no choice in being like okay, you, you don't -- you're gonna plea or we'll go and take a jury trial, and that's why I asked the judge earlier what's up with this evidence that we're not able to bring up.

So, the whole time, while we doing this plea, I felt the judge been against me, Mr. Bartosh been against me, the witnesses been against me, even my codefendant been against me, and, you know, as you can see, when I -- the only trust I had was Bartosh.

Q Okay.

A That's the only trust that I had, and that's the only trust that I been looking for. And then when they went to that bench conference, that's where my whole intentions was because I was nervous and scared at the period of point in time the whole time. That why I was stuttering during my whole transcript. So, that's why I thought what was gonna happen, when he went to the bench conference, everything was going as Bartosh had planned.

Q So, even though you thought it was important to tell the judge about your baby and to tell the judge about the Alford plea, you didn't want to anger him by mentioning the five year deal?

A When the judge asked me that, when I said about my

baby, I was just period point stating -- can we go back to what page that was on?

Q 21.

A All right. When he asked me is there anything that you want to tell me, the only reason why I told him about my child, I was just like being leniency as in asking like for leniency as when I remember pleading to in drug charges one time before they asked me do you have a job or whatnot. I just like, you know, I have a 16 month old child. That's the reason why I stated that, and I wasn't stating about no five years for involuntary manslaughter and five years for ABWIK because the simple fact, like I told the judge, Bartosh would of had everything for me on pages, on Page 14.

Q Okay. No more questions. Thank you.

THE COURT: Redirect?

MR. ALFORD: No, sir.

THE COURT: You may step down.

MR. ALFORD: Like to call Mrs. Avery Waddell to the stand.

THE COURT: Come forward to be sworn.

AVERY WADDELL, being first duly sworn, testified as follows:

THE COURT: Have a seat in the witness stand please. Once seated, state your name for the record.

WITNESS: Avery Waddell.

THE COURT: Mr. Alford, your witness.

MR. ALFORD: Thank you.

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mrs. Waddell, what is your relation to Mr. Ford?

A He's my son.

Q Okay. Were you present on December the 5th, the day of the plea?

A I was at the trial, yes.

Q Okay. Were you present with Mr., when Mr. Bartosh talked with your son?

A No, I wasn't present with him and, when they had their conversation. He talked to me later.

Q Okay. And, and what did he say later?

A He told me that he was gonna try and get the manslaughter charge, involuntary manslaughter charge five years.

Q Okay. And were you able to talk to him after the sentencing to discuss why he didn't get the five years, why he got the 37?

A After the sentencing, we didn't talk about that. What he told me, he said he could do an appeal. He was allowed to do an appeal. And that -- for like a PCR, cause the appeal would probably be turned down. For the PCR, to do ineffective counseling.

Q Okay. Now, you had contacted his office prior to December, correct?
A Yes, I had.
Q How did you contact his office?
A I had wrote a letter and I also got an appointment with him and I went down to talk to him.
Q Okay. Now, you didn't have any facts about the actual incident, did you?
A No.
Q Okay. Did he discuss with you in anyway as to the, what evidence there was?
A No, only thing he said was that he was waiting on the ballistic reports to come back. And each time we went to a bond hearing, that's what the main thing was about, waiting on the ballistics report to come back, which they never did come back before the trial --
Q Okay.
A -- or before the hearing.
Q Is there anything else you can add to the discussions you had with Mr. Bartosh?
A The only thing I can add is that the day of the hearing or the trial, whatever you want to call it, he wasn't prepared when he came to Court. He came to Court -- cause I met him right outside this door here, and he say he was coming in to ask the judge for a continuance. And he had a

doctor's appointment. He left and went to the doctor. The next thing I know, he come back and he said they had called him and ordered him to come back cause they was going on with the trial.

Q Okay. Were there witnesses here?

Do you know what witnesses he had planned to call?

A No.

Q Do you, do you know Selena Mills and Mark Ford?

A Yes.

Q Who are they?

A Devon's sister and brother, half sister and brother.

Q All right. Were they present on December 5th?

A No.

Q Please answer any questions that Ms. Parsons has.

THE COURT: I have no---

THE COURT: Ms. Parsons, your witness.

MS. PARSONS: I have no questions, Your Honor.

THE COURT: You may step down, ma'am.

Applicant wish to call any other witnesses?

MR. ALFORD: No, Your Honor.

THE COURT: State may call its witness.

MS. PARSONS: Thank you, Your Honor.

The State would call Clay Allen.

THE COURT: Mr. Allen, come forward to be sworn.

CLAY ALLEN, being first duly sworn,

testified as follows:

THE COURT: Have a seat in the witness stand please. Once seated, I'd ask that you state your name for the record.

WITNESS: Clay T. Allen.

THE COURT: Ms. Parsons, your witness.

MS. PARSONS: Thank you.

DIRECT EXAMINATION

BY MS. PARSONS:

Q Mr. Allen, you weren't the attorney on this case, were you?

A No, ma'am.

Q Was the attorney Mike Bartosh?

A He was, after Chris Brough, yes, ma'am.

Q Has Mr. Bartosh since deceased?

A Yes.

Q Okay. Do you work in the same office?

A Yes.

Q Okay. From Mr. Bartosh's file, were you able to see any evidence of an investigation into this case?

A There's not a great deal of notes. There are some items of discovery, and there's something in there about, it might of been included in the matter that, that you forwarded to me, about an order authorizing expenditures from Indigent Defense for Don Gurnt, a crime scene expert.

I do not know what, if anything, Mr. Gurnt did cause there's no notes or any reports or anything to that effect.

Q Now, do we know if this is the complete file or is it possible that there were other documents that are just not in the file?

A There -- it is possible there are some other documents not in the file. But this is what we have.

Q Did it appear that Mr. Bartosh was preparing for trial?

A I can't answer that cause there aren't that many notes to the file. Mr. Bartosh was well known to keep a lot of things in his head.

Q Okay. Are there any notes indicating, indicating interviews with anyone?

A No, ma'am.

Q Okay. No further questions.

THE COURT: Mr. Alford, your witness.

MR. ALFORD: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. ALFORD:

Q The -- I think your office forwarded me a copy of your file.

A Correct.

Q I didn't see any notes in there either of a hearing. Doesn't seem like you have any preparation of any witnesses.

Have you had any opportunity to review the file in

terms of details?
A While we've been here in, in Court.
Q Okay. So, you're really not prepared to discuss the absence of any ballistics match or --?
A I was looking at that when Mr. Ford testified to that effect, and I did flip through every page in the file that I've got, and I did not see any ballistics information or any SLED reports.
Q All right.
A Now, I was also looking through items that were forwarded to me by Ms. Parsons. There is what I call the solicitor's evidence receipt or whatever, and I noticed that there was some items, it looks like ten pages, were given to Mr., were disclosed to us or picked up in February. They were date stamped apparently according to the receipt 12/2/05. I can't read the date that it was picked up. But it appears that that particular item was filed on December 6th of '05.
Q That would of been the day after the plea?
A Right, it was actually filed. But, you know, I mean it could of been picked up prior to the plea. It's ten pages. I've tried looking at the, these date stamps to see if I can see anything date stamped 12/2/05. I do not see that. So, I can't tell you what that was all about. I mean it is possible that could of been the SLED report. It could have

been something else. I can't, I can't tell you. It's not in the file or it's not in our office file.
Q All right. The -- if your office looks at the question such as the angle of the bullet hole, the matching of the ballistics, the residue on a shirt, that would of been done by a crime scene investigator?
A It's normally -- well, it's normally done by, by SLED. I mean obviously by the time we get crime scene investigators involved, if they're not being able to handle the evidence, they can look at things to tell us, and Don Gurnt especially cause I've talked to him in the past in other cases, and he can look at our files and then he helps us go out to the scene and try to help explain---
Q Okay.
A ---things. They may also, because of experience, he can tell us what's missing and what we can be, as far as evidence or as far as documents that should be present, and tell us to, how to go after that or suggest we need to get this, that, or the other thing.
Q Looking at issues such as the angle of projection, the lack of residue, the lack of or say lack of ballistics match, or maybe the absence of a ballistics test, would that be something that your office would routinely have this expert come in to review?
A Oh, well, yeah, sure or just simply to ask, you know,

what the status is of the ballistics. I mean there is a evidence sheet in here. There was a Tech 9 gun recovered. So, I don't know. I mean --.

Q It would -- if there was an order authorizing the expenditures that you just mentioned --

A Yes.

Q -- though, you don't see anywhere that there was any monies expended?

A I don't. But that may not have made it to the file because, after the case is over, the expert will present his voucher for payment, another order will be issued, and the payment will be made. Normally, if we didn't pay him straight out, then it would be made payable straight by, from the Indigent Defense once they receive the order authorizing the final payment. Now, it's my practice to put the order authorizing that final payment into the file, but I can't speak for Mr. Bartosh.

Q Okay.

THE COURT: The Tech 9 you're referring to---

WITNESS: Yes, sir.

THE COURT: ---I assume that's the Tech 9 referred to in the ballistic test?

WITNESS: That would be my assumption, Your Honor.

THE COURT: Or is that the Tech 9 that was recovered from the defendant?

WITNESS: Somehow, from what I understand, the defendant indicated or led them to or told them where to find a Tech 9, and---

THE COURT: I'll get into that later. You're not -- you -- there's nothing in the file that indicated a Tech 9 was recovered from the defendant or are you aware of that?

WITNESS: I'm not aware that it was actually recovered from the defendant.

THE COURT: All right. Go ahead. Just my curiosity.

WITNESS: Yes, sir.

MR. ALFORD: Nothing further, Your Honor.

THE COURT: Yes, ma'am.

Anything in redirect?

MS. PARSONS: Just one question.

REDIRECT EXAMINATION

BY MS. PARSONS:

Q Mr. Allen, was Mr. Bartosh known not to keep everything he had worked on on a case collected in a file?

A Yes, even after his death we were finding papers and I mean---

Q Okay.

A So, yeah.

Q Thank you.

THE COURT: Any other questions, Mr. Alford, of this witness?

MR. ALFORD: No, Your Honor.

THE COURT: You may step down.

State wish to call any other witnesses?

MS. PARSONS: No, Your Honor.

THE COURT: I do want to clear up the source of this Tech 9, and in the record -- I, I've read the record of the plea. I don't see anything that indicates to me where that -- they didn't get into the evidence in the plea. They just talked about facts alleged.

MR. ALFORD: If I understand---

THE COURT: The documentation in front of me just indicates that they tested a Tech 9, and that they fired a test bullet from it and they had bullets that were recovered from the body of the victim, from a driver's door, from -- well, actually two from the driver's door anyway, and they found several cartridges, spent, spent rounds, I guess casings actually is what they were.

Where did the Tech 9 come from?

Is there some record in the case that would indicate where that came from?

Yes, sir, Mr.---

MR. ALLEN: If I may speak?

THE COURT: Yes, sir, I would -- I, I---

MR. ALLEN: I'm not familiar with all these pages, but I think there was something in here, and if -- I, I don't

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know how quickly I can flip through and try to find it or the Court indicated---

THE COURT: Let me know if you see something. I'd like to get it on the record before we quit.

MR. ALLEN: Yes, sir.

MR. ALFORD: Your Honor, I can put on the record what I, what I think is in here and I've read somewhere.

THE COURT: Well, let's see if we can put something -- I'd just like to know the source of the gun.

MR. ALFORD: I mean my client will testify to that.

THE COURT: Well, if you want to put him back up on the stand put him back up on the stand.

MR. ALFORD: I call Mr. Ford.

THE COURT: Just for that purpose.

Mr. Ford, just have a seat in the witness stand. You're already under oath for purposes of this hearing. You're still under oath at this point in time.

DEVON FORD, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ALFORD:

Q Mr. Ford, I understand that you wanted to explain to the Court the source of the Tech 9 that's referred to in that report.

A Yes, sir, the night of the shoot out, it was me and my

codefendant. The reason it wasn't -- the gun come from -- that was the pistol or the time of the incident, and the reason why I presented my gun to the officer cause the officer was like tell me how this happened, tell me how this happened, tell me how this happened. I said man, look here, I ain't killed nobody, man. I said man, go ahead and get my gun because where they got my gun from is where me and my codefendant went at after the shoot out.

I had stashed my gun there at Flint Rim's house. I put my gun up there at Flint Rim's house. Somehow, some way, besides me, you know what I'm saying, also aware my codefendant was telling them as well that my gun was there at Flint Rim's house, and also like two days after I got arrested I told them, I said, man, y'all go ahead and get my gun, go ahead and get my gun from over there. So, Flint Rim say the police went and raided Flint Rim's house and they got my gun from them.

THE COURT: So, this Tech 9 was recovered from somebody named Flint Rim's house?

WITNESS: Yes, sir, that's who I had put my gun at.

THE COURT: And you had indicated to the police that that's where it was located at?

WITNESS: Yes, sir, and I had -- when I had put my gun up, I had got a .45 from him cause I didn't want to hold my gun to more---

THE COURT: So, you exchanged guns with Mr. Flint Rim?

WITNESS: Yes, sir, cause I didn't want to have my gun anymore cause I knew it was, be related to this crime.

THE COURT: Okay. Any others questions, Mr. Alford, you wish to ask?

MR. ALFORD: No, sir.

THE COURT: Mr. Allen, you been able to -- well, let me ask.

Ms. Parsons, do you wish to ask any questions of him on this point?

MS. PARSONS: No.

THE COURT: You may stand down, sir. Thank you very much.

Have you found anything in the file that indicates the source of the gun that was, that may of been tested?

MR. ALLEN: Yes, Your Honor. This is coming from an investigation report---

THE COURT: And I'll remind you, you're still under oath. So, at -- the Court's asking you the question.

Go ahead.

MR. ALLEN: Yes, sir, from an investigation report, and it indicates that the officer was questioning Mr. Ford, who was talking about the Tech 9 who told to him that the Tech 9, that that was the system, the Tech 9 was the gun he used in the shooting, and that he was telling the truth. I

allowed the detective to call Flint Rim and tell him that the police were coming to pick him up or pick it up. I, I then talked to Flint Rim and told him that I would call before I came. I told him to leave the gun as it is till I got there.

And then further on down in the report, after they took his statement, then they -- let's see, the officer talked about they called Flint Rim's cell phone, asked him to come to the door. He stated he wasn't home, did not know when he would get back. He told me he put the gun in the trash can in the garage. I could get it out of there.

I asked if the gun was loaded or not loaded. So, I consulted Sergeant Neal Urch and then collected the gun at 20, 21:22. That would be 9:22 p.m. I returned to the Sheriff's Office and released the gun to Officer Bogan, and then he described that as a Intra Tech, 9-millimeter model Tech 9, and then writes the serial number down.

THE COURT: All right. Thank you very much.

Mr. Alford, do you wish to offer any argument?

MR. ALFORD: Yes, sir.

Sir, they're two -- there's four issues, but there's sort of two different arguments. One is the, dealing with the, the 37 years. As set out in the brief, essentially the Statute 16-3-20 Subsection A, which is the punishment for murder, a person who is convicted, and then it gets into

must be, and uses the word must, punished by death, by imprisonment for life, and then this is the, the phrase I guess that we're contending, or by a mandatory minimum term of imprisonment for 30 years.

Now, if we look at the statutory construction, the question is if it says a mandatory minimum term for 30 years, then that doesn't suggest that it could be 37. Now, if it had been written a mandatory minimum sentence of at least 30 years or to life or the use may be of another, another phraseology, but we're not suppose to interpret what the Legislature meant especially when it comes to this.

If we look at -- and, and, again, it's pretty much set out in the brief, and I didn't really want to add to it because I think he goes through it quite well. But if we look at that one phrase and make a question, then obviously the Courts, because other cases have, have maybe given more than 30 years, believing that that phraseology allows it to be between 30 years and life. But if we look at the strict reading of it, the argument is that would be a mandatory minimum sentence for 30 years. Not of, of 30 years or at least 30 years.

That is Issue A. That has been brought out. And if that's true, then, you know, what, what we're asking for is that sentence wouldn't be constitutional. It would have to be struck.

That leads to the, sort of the last issue in the PCR about the double sentencing. And without sort or regurgitating what is in the brief, it lays it out. It's a question about being eligible. It cites the Statute 24-21-560. Obviously a sentence for murder for life or 30 years is a sentence that has to be served completely. You don't qualify for any reduced time, and that invokes the 24-21-560 statute.

Now, I did look at the, I call, I call it, the 16-3-20, the, the sentencing statute, was amended after the community service. So, to the extent that the intent of the Legislature, I'd have to represent to the Court the sentencing statute obviously is the latest statute.

However, if we look at that phraseology, what does that mean?

And, and I, I know that I've looked at some other sentence guidelines that I think, if I understand the Courts, they sort of treat that as a 30 years to life. You know, it has to be a minimum. But if we look at the language in the strict construction standpoint, I think that's what the PCR raises and seems to raise the argument very well.

The issue of double sentencing goes, as I understand it and able to articulate it, and I won't regurgitate it, but it seems to be tied into sort of the, the reading of those

two statutes that I cited, and to the constitutionality of it.

The other ones deal, sort of the middle two issues, deal with the ineffective assistance of counsel. We obviously don't have Mr. Bartosh here to, to ask him. But if we look at the record we have a very convoluted crime scene. We, we have the, the shooters. We have submitted in sort of the ballistics, if you will, that don't match up to a Tech 9. There's an angle, as you can see on the diagram submitted, the lack of residue.

The question is what evidence or, or, or what investigation had been done in, in preparing this case for trial cause it certainly was called for trial on the 5th. And, and as Mr. Allen admits, there's nothing in this file that shows anything and I think the Court would have to acknowledge that unfortunately Mr. Bartosh did not have the ballistics match even or the ballistics test results available to him.

So, the question is was he prepared for trial, and then in terms of advising a client if he was unprepared for trial, and then you got the testimony that my client believed he was getting a five year involuntary and ABWIK, five year ABWIK issue, looking at the transcript, the transcript, as my client pointed out going through it, it wasn't just a cut and dried plea. There were some pauses.

There were some stumbles going out. And then the question is if he didn't feel his counsel was prepared for trial, did he feel sort of coerced into accepting the plea thinking it might be the five and five.

Those are the issues, I think they're set out in there, probably with the exception of the factual testimony from Mr. Ford on the stand. What is interesting is it's obviously a, a he said he said situation with one of the individuals deceased. Mrs. Waddell's here to testify that, you know, she spoke with Mr. Bartosh, who indicated to her that he thought he was gonna get the five and five sentence. So, at least there's some corroboration or credibility that that was the belief by the petitioner.

Thank you, Your Honor.

THE COURT: Yes, ma'am.

MS. PARSONS: Your Honor, briefly in regard to the argument on the 30 years, I think the language where it says a mandatory minimum, mandatory minimum term of 30 years is suggestive of other options. It doesn't say or 30 years. It's just mandatory minimum, which, to me, the language, taken on its face alone, reflects a minimum, which would then infer other options.

Okay. Moving aside from that, in regard to the ineffective assistance of counsel, we don't have the opportunity to put Mr. Bartosh on the stand. However, we

have had testimony that it was his general reputation not to keep everything contained in the file. And so, the file is not necessarily reflective to all the information he had available to him.

Furthermore, I would submit that the testimony about the five years just isn't credible. The witnesses have reason to testify to that. So, the corroboration should be taken with a grain of salt. There's nothing indicating that that would of been an option available, and I don't see any way Mr. Bartosh would of suggested that to this client. Furthermore, the judge sets forth the 30 year minimum at the very beginning. And so, he should of known that five years---

THE COURT: Set forth at the end too.

MS. PARSONS: So, he shouldn't -- that shouldn't have been an option. And he was given opportunities by the judge to express exactly what he thought Mr. Bartosh was gonna do for him, and he took that opportunity to talk about the Alford plea. And I think that the transcript reflects that is what he had in mind all along, and this five year thing is a new thing we're just gonna talk about now.

All in all, really we're just gonna have to let the transcript speak for itself in the absence of Mr. Bartosh. But I would say that it was not your typical plea. There was some back and forth. But he was clearly advised of his

rights. And had he gone to trial, it would of been an extremely difficult trial where you would have the codefendant's, the victim giving a dying declaration that he was the shooter, and the surviving victim identifying him as the shooter. And so, I'm not seeing any prejudice where the State had an extremely strong case against him.

THE COURT: Thank you very much.

MR. ALFORD: Very briefly?

Two seconds, Your Honor?

I was listening---

THE COURT: It better be two seconds, yes, sir.

MR. ALFORD: I was listening very carefully to Ms. Parsons when she's talking about the language of the statute.

THE COURT: Yes, sir.

MR. ALFORD: Like everybody else, a mandatory minimum sentence, and she uses of 30 years. That's not what it says. It says for 30 years. Everybody assumes it's of.

Thank you.

THE COURT: Thank you.

MS. PARSONS: Thank you, Your Honor.

* * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 18th day of September, 2008.

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

November 8th, 2009

Pamela E. Green

PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG) H683101
) H683102
)
)
)
STATE OF SOUTH CAROLINA,)
)
)
vs;) TRANSCRIPT OF RECORD
)
DEVON M. FORD,) ORIGINAL
DEFENDANT.)

August 17, 2005
Spartanburg, South Carolina

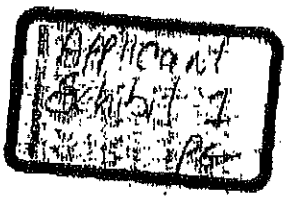
B E F O R E:

THE HONORABLE J. MARK HAYES, II, JUDGE.

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

ROBERT P. COLER, ESQ.
Assistant Solicitor

CHRISTOPHER BROUGH, ESQ.
MICHAEL BARTOSH, ESQ.
Attorneys for the Defendant



HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

NO.	DESCRIPTION	ID.	EVD.
	(Defendant's Exhibits)		
D-1	Letter dated 8-12-05	8	8
D-2	Letters	8	8

All Exhibits were retained by the Clerk of Court for Spartanburg County.

THE COURT: This is the matter of Devon Ford.

Are you Mr. Ford?

DEFENDANT FORD: Yes, sir.

THE COURT: Come on around, sir.

Mr. Ford, you had forwarded to me, as the chief administrative judge, a letter concerning the representation of your counsel, Mr. Brough.

Do you recall that?

DEFENDANT FORD: Yes, sir.

THE COURT: All right. And what this hearing does is this hearing gives you an opportunity to be able to let me know of any information that you want me to know so that I can address the issues that you raised in your letter.

DEFENDANT FORD: Yes, sir.

THE COURT: Yes, sir.

I'll be more than happy to hear from you.

DEFENDANT FORD: Okay. Go ahead and start?

THE COURT: Uh-huh.

DEFENDANT FORD: "Dear Chief Administrative Judge: Request for change in counsel, Christopher Brough."

"I met my counsel in December 2004. I did not meet with him again until February '05 before my preliminary hearing."

"From February until July, I have not spoken with my counsel. I wrote numerous letters for contact and

requested my Brady and discovery material, which I did not receive until July 8th '05. And this information was brought to me by another party."

"My second bond hearing was scheduled for March '05. My mother, Avery Waddell, spoke with Mr. Brough. And he informed her to call him any time. My mother tried calling him in May and in June and left messages with no response. The reason she was trying to make contact was because you were giving me another bond hearing 90 days after that."

"My mother was not able to contact Mr. Brough in which she got a private attorney, Mr. John (Jack) Riordan of Leatherwood, Walker, Todd, and Mann to take me back for another bond hearing."

"Your Honor, I know Mr. Brough has a heavy case load, but I have two very serious charges against me and Mr. Brough has not shown me any type of defense."

"On July 20th, '05, Mr. Brough was at my institution visiting another inmate. When I saw him, I got his attention and he acted like he didn't know me. We did talk, but I was unable to discuss my case or defense in detail."

"Judge, I am asking the Court to decide if Mr. Brough is in violation of Rules of South Carolina Professional Conduct, 1.1, 1.2, 1.3, and 1.4, and appoint me legal

counsel that is aware of my case and represented me on my previous bond hearing on July 28th, '05, Mr. Jack Riordan."

"All the letters I have written to Mr. Brough, Chief Administrative Judge, and South Carolina Supreme Court, and South Carolina Supreme Court Disciplinary Board requesting that I discuss my case with my legal counsel was to no avail. I need to properly prepare my case to prove my innocence and plea of not guilty."

"Your Honor, they are trying to have me in court by September 12th. And Mr. Brough has not been to assist me or discuss a trial strategy, a defense, or anything about this criminal matter. And I have all my letters here where I wrote Mr. Brough numerous times and the Chief Administrative Judge telling him about Mr. Brough."

"And I feel like it would be a conflict of interest if you give me another public defender. Plus, I need proper adequate counsel for the charges I am facing."

THE COURT: All right. Did you want me to have that written document that you read from?

DEFENDANT FORD: You can, if you want.

THE COURT: Okay. Thank you, sir.

All right. And I had provided a copy of your letter to me to the Clerk's Office and also to Mr. Brough. And Mr. Brough has brought Mr. Bartosh with him. I believe

Mr. Bartosh is here as his employer.

Is that correct?

MR. BARTOSH: Yes, sir.

THE COURT: Yes, sir, Mr. Bartosh.

MR. BARTOSH: Your Honor, I've discussed this matter with Mr. Brough concerning Mr. Ford's allegations.

Your Honor, it's clear that there's some problems that could come down the road if Mr. Brough continued to represent Mr. Ford. What I would respectfully suggest to the Court is that we will reassign the case within the office and I'll take the case, if Mr. Ford wants us to continue to represent him. If not, then I would suggest, Your Honor, he could either represent himself or he could hire private counsel.

We would -- that's how we would handle it. We would -- I would reassign the case to myself. My understanding is that the Solicitor would have no objection to the case being continued so that I could come up to speed.

MR. COLER: That's correct, Your Honor.

THE COURT: Is he -- and he's correct when he talks about the September 12th potential for the trial date?

MR. COLER: Yes, sir, Your Honor.

We told Judge Cole at a bond hearing two weeks ago that we would be prepared to try it September 12th based

on him making a second motion before Your Honor. I think he, certainly, waived his right to have that tried on the 12th. And, certainly, Mr. Bartosh would require some time to get up to speed on the case. And we'll be glad to set it in October or November of this year, Your Honor. That would all still be within one year of the incident date.

THE COURT: And what's he charged with?

MR. COLER: He's charged with murder. And he's also charged with one count of assault and battery with intent to kill.

THE COURT: All right. Mr. Ford, what they're proposing to the Court is to have the case reassigned to Mr. Bartosh. I'm inclined to accept that recommendation. Mr. Bartosh is imminently qualified in doing this type of work. His reputation is excellent in the legal community. So I'm confident that Mr. Bartosh can provide that representation for you.

If you -- now, that's going to mean that you're not going to go forward on September the 12th. So the case will be delayed a little bit further.

But I will -- that's going to be the Court's order in regards to what you've requested.

DEFENDANT FORD: Yes, sir.

THE COURT: Good luck to you, sir.

DEFENDANT FORD: All right.

MR. COLER: Thank you, Your Honor.

MR. BARTOSH: Thank you, Your Honor.

THE COURT: And we'll make --

Mr. Ford, we'll make a copy of your letter a part of this proceeding.

DEFENDANT FORD: All right. I appreciate it.

THE COURT: Uh-huh.

(WHEREUPON, Defendant's Exhibit Nos. 1 and 2 were marked for identification and admitted into evidence.)

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 17th day of August, 2005.

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

June 20, 2007

Hollie M. Jenkins

Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

150

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

February 9, 2007

Copy

Deven M. Ford #312731
Lieber Corr. Inst. / Edisto A-19
Post Office Box 205
Ridgeville, SC 29472

RE: Freedom of Information Act Request

Dear Deven Ford:

In order to adequately search our database, please use the space below to provide our office with additional information:

DATE OF CRIME December 7, 2004
TYPE OF CRIME Murder and Assult and Battery with intent to Kill
COUNTY OF CRIME Spartanburg County
ARRESTING AGENCY Spartanburg county Detective Richard Strawn
FULL NAME OF SUSPECT(S) Devon Ford AND Kim Lilly
FULL NAME OF VICTIM(S) Keithy Davis and Johnathan Martin

Once you have provided the above information, we will search our database and advise you of our findings. Please use this form and refer to FOI#2007-92 when submitting additional information for this request.

Sincerely,

M. C. Perry

Mary C. Perry
FOIA/Subpoena Compliance Coordinator

MCP/FOI#2007-02

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

TRACE EVIDENCE DEPARTMENT

Detective Richard Strawn

Spartanburg County Sheriff's Office
366 North Church Street
Spartanburg, SC 29306

April 06, 2006

SLED No: L05-10889
Your Case No: 2004120412
Incident Date: 12/07/2004
(S) Ford, Devon
(S) Lilly, Kim
(V) Davis, Iketha
(V) Martin, Jonathan

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 9 Pink T-shirt

RESULTS:

No holes or physical effects indicative of gunpowder residue were found on the pink T-shirt. The garment was analyzed for the presence of lead, however no lead was detected.

P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

April 06, 2006
L05-10889

Joseph D. Powell
Lieutenant

P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

FIREARMS DEPARTMENT

Detective Richard Strawn
Spartanburg County Sheriff's Office
366 North Church Street
Spartanburg, SC 29306

November 9, 2005
SLED Lab No: L05-10889
Your Case No: 2004120412
Incident Date: 12/07/04
(S) Ford, Devon
(S) Lilly, Kim
(V) Davis, Iketha

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item 1: One Intratec Model TEC-9, 9mm Luger caliber pistol, serial number 33523, with magazine.

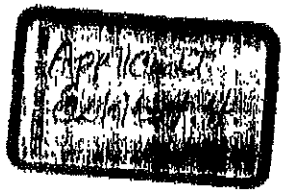
Item 2: One fired bullet removed from body of victim.

Item 3: One fired bullet removed from driver's door.

Item 4: One fired bullet removed from bottom of driver's door.

Item 5: One fired 9mm Luger caliber cartridge case, headstamped "G.F.L. 9mm LUGER", recovered from center console of Nissan Maxima.

Item 6: One unfired 9mm Luger caliber cartridge bearing the headstamp "FC 9MM LUGER". NOTE: Item 6 was incorrectly listed on the Evidence Inventory Sheet as being a "Ruger .9mm FC Live Round".



Item 7: Two fired 9mm Luger caliber cartridge cases, headstamped "G.F.L. 9mm LUGER", recovered under right rear side of driver's seat of Nissan Maxima.

Item 8: One fired 9mm Luger caliber cartridge case, headstamped "G.F.L. 9mm LUGER", recovered from right front seat of Nissan Maxima.

RESULTS:

The Item 1 pistol was examined, test fired, and found to be in working order.

The Item 6 unfired cartridge was the correct caliber for use in the Item 1 pistol or in other 9mm Luger caliber firearms.

The Item 2, 3, and 4 bullets were examined and microscopically compared with each other and with test bullets fired by the Item 1 pistol. Items 2, 3, and 4 were most consistent with bullets loaded into some 9mm Luger caliber cartridges. Matching individual characteristics were found on Items 2, 3, and 4. It was concluded that the Item 2, 3, and 4 bullets were fired by the same gun barrel. Differences noted on test bullets fired by Item 1 were sufficient to conclude that the Item 2, 3, and 4 bullets were not fired by the Item 1 pistol.

Based on their general rifling characteristics, possible makes or origins of 9mm Luger caliber firearms that could have fired Items 2, 3, and 4 include, but are not limited to, the following:

Agram	American Eagle	Arcus	Argentine Industries
Australian	Belgium	Beretta	Bergmann
Browning	Calico	C.Z.	Chinese
Colt	Daewoo	E.A.A.	English/British
Federal Eng.	Feg (KBI, Inc.)	F.M.	FMJ (Cobray)
F.N./Browning	Fox Carbine Co.	German	Heckler & Koch
Hi-Point	Hungary (Kassnar)	I.M.I.	Keltec
Luger	Masterpiece Arms	Mauser	Navy Arms Co.
Norinco	Pietter	Radom	Ruger
Sardius	Springfield Armory	Sten	Sterling
S.W.D/	Tanfoglio (Excam)	Walther	Wilkinson Arms
Witness (E.A.A.)	Zastava		

The Item 5, 7, and 8 cartridge cases were examined and microscopically compared with each other and with test cartridge cases fired by the Item 1 pistol. Matching breechface markings were found on Item 5, on both Item 7 cartridge cases, and on Item 8. It was concluded that the Item 5, 7, and 8 cartridge cases were all fired by the same firearm.

SOUTH CAROLINA OFFICE OF INDIGENT DEFENSE
1122 Lady Street, Suite 1110
Post Office Box 11483
Columbia, South Carolina 29211-1483
Telephone: (803)734-1343
Facsimile: (803)734-1345
E-Mail: executives@scoid.state.sc.us

T. Patton Adams, Esq., Executive Director
Lisa Barfield, Administrative Manager

March 7, 2006

Deven Ford #312731
LCI EA
P.O. Box 205
Ridgeville SC 29472

Dear Mr. Ford:

This is in response to your letter received on March 6, 2006.

Your attorney did not submit a time sheet. We only provided funds for the expert witness.

Sincerely,

Lori Shirley
Administrative Specialists

156

02-24-2005 0097

Name Ikethia Tervia Davis Autopsy No.

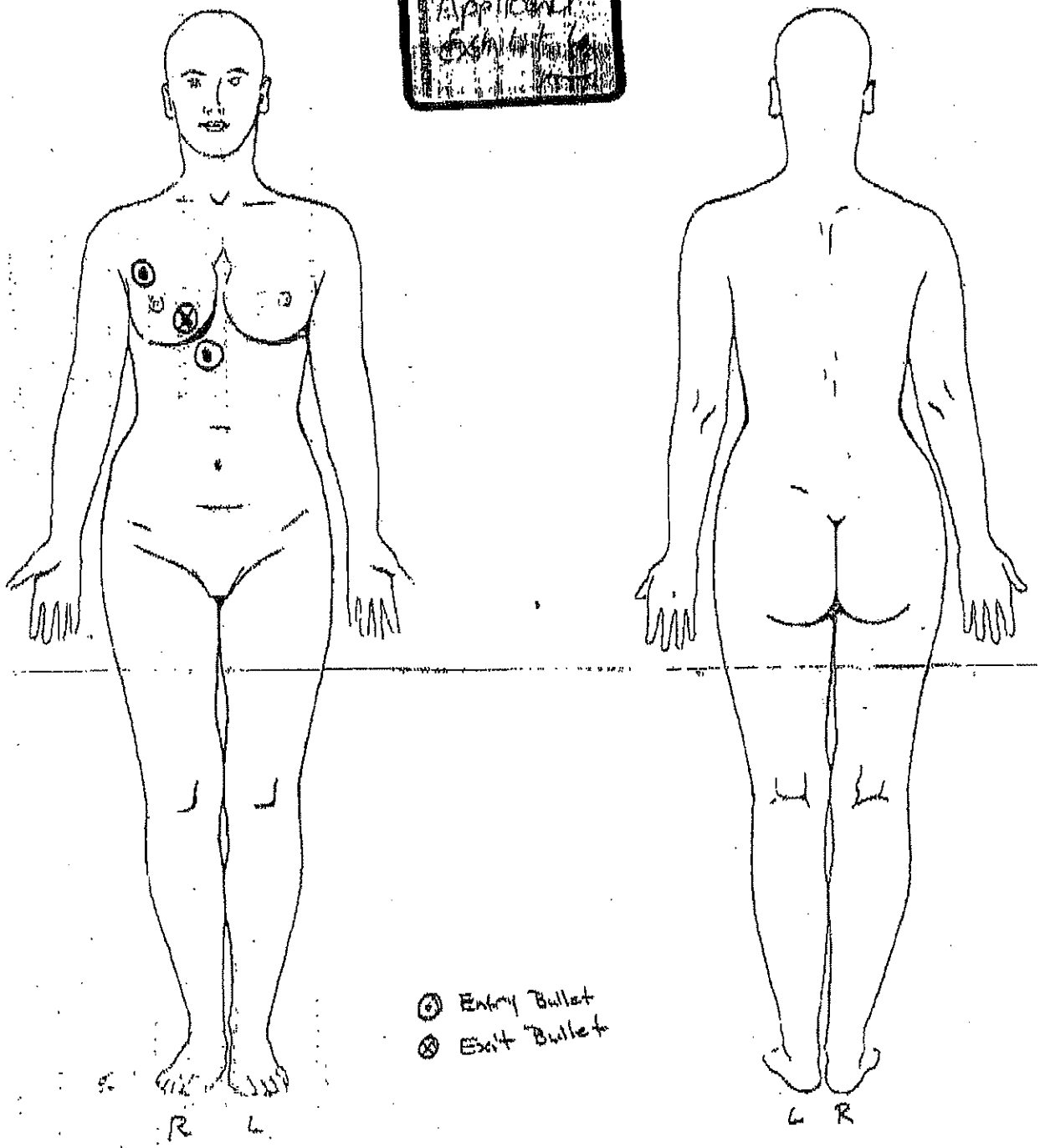
DoB [redacted]82

Hgt: 5.5'

Wgt: 245 lbs

Date 12/08/04 @ 1050hrs

Applicant Exhibit 1



Autopsy performed By DR. David Wren
:D officer S. Pedman and Detective Taylor
witnessed

For protocol only:

SOUTH CAROLINA OFFICE OF INDIGENT DEFENSE
1122 Lady Street, Suite 1110
Post Office Box 11433
Columbia, South Carolina 29211-1433
Telephone: (803) 734-1343
Facsimile: (803) 734-1345
E-Mail: executives@scoid.state.sc.us

T. Patton Adams, Esq., Executive Director
Lisa Barfield, Administrative Manager

March 7, 2006

Deven Ford #312731
LCI EA
P.O. Box 205
Ridgeville SC 29472

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Sincerely,

Lori Shirley

Lori Shirley
Administrative Specialists

ATTACHMENT I

11/22/2005 10:21 0(05/01/12) 00004

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FACSIMILE

TO: CHRISTIE BEALL @ SPARTANBURG SOLICITOR'S OFFICE DATE: NOV. 22, 2005

PHONE: _____ FAX: 864-596-2386 PAGE 1 OF 4 PAGES

FROM: DAN DEFREESE @ SLED PHONE: 803-896-7289 FAX: _____

MESSAGE:

REPORT ON L05 10889 FOLLOWS.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
PO BOX 21398
COLUMBIA, SC 29221-1398
(803) 737-9000

HEADQUARTERS	(803) 896-7041
FORENSICS LAB	(803) 896-7351
NARCOTICS	(803) 896-7192
LOW COUNTRY REGION	(843) 797-3662
PIEDMONT REGION	(864) 467-8121
CJICS	(803) 896-7022
PEE DEE REGION	(843) 662-5201
MIDLANDS REGION	(803) 896-7259
REGULATORY	(803) 896-7037

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor

ROBERT M. STEWART
Chief

FIREARMS DEPARTMENT

Detective Richard Strawn
Spartanburg County Sheriff's Office
366 North Church Street
Spartanburg, SC 29306

November 9, 2005
SLED Lab No: L05-10889
Your Case No: 2004120412
Incident Date: 12/07/04
(S) Ford, Devon.
(S) Lilly, Kim
(V) Davis, Iketha

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

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Item 4: One fired bullet removed from bottom of driver's door.

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RESULTS:

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The Item 2, 3, and 4 bullets were examined and microscopically compared with each other and with test bullets fired by the Item 1 pistol. Items 2, 3, and 4 were most consistent with bullets loaded into some 9mm Luger caliber cartridges. Matching individual characteristics were found on Items 2, 3, and 4. It was concluded that the Item 2, 3, and 4 bullets were fired by the same gun barrel. Differences noted on test bullets fired by Item 1 were sufficient to conclude that the Item 2, 3, and 4 bullets were not fired by the Item 1 pistol.

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Australian	Belgium	Beretta	Bergmann
Browning	Calico	C.Z.	Chinese
Colt	Daewoo	E.A.A.	English/British
Federal Eng.	Feg (KBI, Inc.)	F.M.	FMJ (Cobray)
F.N./Browning	Fox Carbine Co.	German	Heckler & Koch
Hi-Point	Hungary (Kassnar)	I.M.I.	Keltec
Luger	Masterpiece Arms	Mauser	Navy Arms Co.
Norinco	Pletter	Radom	Ruger
Sardius	Springfield Armory	Sten	Sterling
S.W.D/	Tanfoglio (Excam)	Walther	Wilkinson Arms
Witness (E.A.A.)	Zastava		

The Item 5, 7, and 8 cartridge cases were examined and microscopically compared with each other and with test cartridge cases fired by the Item 1 pistol. Matching breechface markings were found on Item 5, on both Item 7 cartridge cases, and on Item 8. It was concluded that the Item 5, 7, and 8 cartridge cases were all fired by the same firearm.

Differences noted on test cartridge cases fired by Item 1 were sufficient to conclude that the Item 5, 7, and 8 cartridge cases were not fired by the Item 1 pistol.

Items 2 through 5, 7, and 8 may be suitable for identification with the firearm(s) in which they were fired.

A selected bullet and a selected cartridge case from among Items 2 through 5, 7, and 8 and test specimens fired by Item 1 have been submitted for entry into the Integrated Ballistics Identification System (IBIS). Should any "hits" be developed against these entries, you will be notified. Please retain these items for a minimum of two years in order to maintain their availability for any future comparisons related to IBIS activity.

Debris consistent in appearance with dried blood and/or body tissue was noted on Item 2 but was not removed for preservation or analysis. Fabric-like debris was removed from the hollow point cavity of Item 2 and was separately packaged for return with Item 2. The debris was not analyzed.

The Item 6 unfired cartridge was somewhat blackened by oxidation and was abraded consistent with its having come into contact with pavement.

F. Dan DeFreese, Senior Agent

FDD

ATTACHMENT J

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Devon M. Ford, #312731, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT 2008-CP-42-0395 **AMENDED** **ORDER OF DISMISSAL WITH PREJUDICE**

I. PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 24, 2008, with a first amendment on July 30, 2008, and a second amendment on August 22, 2008. An evidentiary hearing into the matter was convened on September 18, 2008, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by David Alford, Esquire. Michelle J. Parsons of the South Carolina Attorney General's Office represented the State. This Court had before it the application, the respondent's return, the guilty plea transcript, the records of the Spartanburg County Clerk of Court, the Applicant's appellate records, and the Applicant's records from the South Carolina Department of Corrections.

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CLERK OF COURT
SPARTANBURG COUNTY
2010 MAR 12 A 9:27

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted during the August 2005 term of the Spartanburg Grand Jury for Murder (05-GS-42-3376) and Assault and Battery with Intent to Kill (05-GS-42-3377). J. Michael Bartosh, Esquire,

represented the Applicant. On December 5, 2005, the Applicant submitted an Alford plea to the indicted charges. The Honorable Doyet A. Early, III, sentenced him to a confinement for a period of thirty-seven (37) years for Murder and twenty (20) years for ABWIK. The sentences were to be served concurrently.

A timely notice of appeal was filed on the Applicant's and a brief pursuant to Anders v. California, 386 US 738 (1967). The Court of Appeals affirmed the conviction on September 17, 2007 (State v. Ford, 07-UP-365). The remittitur was issued on October 3, 2007.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

At the PCR evidentiary hearing, the Applicant testified his sentence of thirty-seven years was unconstitutional where the statute provided for thirty years or life. The Applicant also claimed the possible imposition of parole resulted in an unconstitutional "double-sentence." The Applicant also alleged his attorney failed to meet with him or do anything on his behalf. The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed he did not know his "pistol did not match the victim's body" and this evidence was withheld from him.

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SUPREME COURT
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The Applicant alleged his plea was involuntary. The Applicant stated his attorney mislead him into thinking he would only receive five years for involuntary manslaughter and five years for ABWIK. The Applicant testified he heard the judge mention the mandatory minimum of thirty years, but his attorney told him to just go along with it. The Applicant testified if his attorney had not misled him in regard to his plea, he would have opted for trial.

On cross-examination, the Applicant admitted he was at the scene of the crime and he was carrying a gun. The Applicant also confirmed he was identified as the shooter by both the surviving victim and the victim that died as a result of the shooting. The Applicant also recalled the driver of the Suburban identified him as the shooter.

The Applicant testified he submitted an Alford plea "because my codefendant and the victim that lived was all against me and that my attorney did not present any evidence to prove otherwise..." He further testified he figured the jury would find him guilty because of all the evidence the State had against him.

The Applicant also admitted he heard the guilty plea judge inform him he would receive a mandatory minimum of thirty years. Moreover, the Applicant admitted telling the plea judge he understood that. The Applicant also admitted waiving his right to trial and informing the court no one had promised him anything or threatened him in order to plea. The Applicant noted he told the court he was unsatisfied with his attorney prior to a recess. After the recess, the Applicant indicated he wanted to submit an Alford plea and informed the court he was satisfied with his attorney.

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SANTA ROSA COUNTY
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The Applicant claimed, however, the recess was not for the purpose of discussing an Alford plea. Rather, the Applicant asserts counsel used that time to tell him he would only receive five years.

The Applicant admitted he spoke up to the plea judge about his concerns. The transcript demonstrated the Applicant informed the court about his concerns regarding his child and his desire for an Alford plea. When asked why he did not also raise the issue of his purported five-

year deal, the Applicant testified the judge asked him for factors contributing to leniency and the five-year deal was not relevant to the question.

Avery Waddell, the Applicant's mother, also testified at the PCR hearing. Waddell testified the Applicant told her he was going to try to get an involuntary manslaughter charge with a five-year sentence. Waddell also testified the ballistic report had not come in prior to the plea.

As Mike Bartosh, the Applicant's attorney, is now deceased, Spartanburg Public Defender Clay Allen testified from Bartosh's file. Allen testified the file did not contain a great deal of notes, but there was an order from Indigent Defense authorizing the expenditure of a crime scene expert. Allen testified Bartosh was known for keeping track of things in his head and did not write many things down. Further, Allen testified Bartosh was known for not filing papers in his case such that a file did not reflect all available case materials Bartosh used.

III. APPLICABLE LAW

Ineffective Assistance of Counsel

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SPARTANBURG COUNTY
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In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made

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SPARTANBURG COUNTY
2010 MAR 22 AM 8:27

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds the Applicant was properly sentenced to thirty-seven years and the Applicant failed to demonstrate otherwise. The Applicant failed to demonstrate any ineffectiveness on the part of counsel for failing to object to sentence within the statutory sentencing range. As a result, this allegation is denied and dismissed.

This Court further finds the Applicant failed to demonstrate ineffectiveness of counsel relation to his double-sentence argument. The Applicant has failed to demonstrate he will be under the restrictions of community supervision when his sentence upon his release. Moreover, community supervision is a collateral consequence of a conviction. State v. McGrier, 378 S.C. 320, 663 S.E.2d 15 (2008). As a result, any failure on the part of counsel to discuss this with the Applicant does not amount to ineffective assistance of counsel.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 MAY 22 AM 9:21

The Applicant also claimed his attorney failed to meet with him or do anything on his behalf. This Court finds the Applicant lacks credibility. It is clear from the Applicant's PCR testimony he was well aware of the State's evidence against him at the time of his plea and pled due to the strength of the State's case. This knowledge indicates counsel reviewed discovery with the Applicant, contrary to the Applicant's claims. This Court finds the Applicant failed to prove counsel was ineffective and denies and dismisses these claims.

The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed ballistics revealed his gun did not match the shooter. Counsel's file reveals funds obtained for an expert, though this Court is unable to ascertain what steps were taken in the ballistics investigation. The Applicant failed to show prejudice, however, where he failed to demonstrate further ballistic evidence would have benefited his case. The Applicant failed to meet his burden and this Court denies and dismisses this claim.

The Applicant further alleged his attorney mislead him into thinking he would only receive five years for involuntary manslaughter and five years for ABWIK. This Court again finds the Applicant to lack credibility. The transcript clearly reflects the Applicant informing the plea judge he understood he would be sentenced to a minimum of thirty years. As a result, this Court denies and dismisses this allegation as well.

FILED
CLERK OF COURT
2011 MAR 22 AM 9:27
SPARTANBURG COUNTY

While this Court did not have the benefit of counsel's testimony in light of counsel's untimely death, this Court does have the benefit of the plea transcript. This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily

entered. The Applicant showed no reason why he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. This Court finds the Applicant's testimony at the PCR hearing lacked credibility. Therefore, this Court finds that Applicant's Alford plea was freely and voluntarily entered and denies and dismisses any allegations to the contrary.

The Applicant alleged a conflict of interest claim arising from his allegedly poor relationship with his previous public defender Chris Brough and the fact that another public defender, Mike Bartosh, took the case after Chris Brough. This Court finds the Applicant failed to demonstrate an actual conflict of interest existed. This Court denies and dismisses this allegation.

This Court finds that any and all other allegations raised at the hearing or in the application are without merit.

Therefore, this Court finds that the Applicant failed to carry his burden to show counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. The Court finds that the Applicant cannot satisfy either requirement of the Strickland test.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 MAR 22 AM 9:47

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that this application for post-conviction relief must be denied and dismissed with prejudice. All other allegations or claims that were raised or could have been raised in this application are hereby dismissed with prejudice.

This Court advises 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 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post conviction relief is denied and dismissed with prejudice.

2. The Applicant is remanded to the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

AND IT IS SO ORDERED this 18th day of March, 2010.

Honorable Roger L. Couch
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2010 MAR 22 AM 9:27

A CERTIFIED COPY
M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY: Sharon Whitehead D.C.
DATED: 3-22-10

ATTACHMENT K

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICAL CIRCUIT

INDICTMENT NOS:
WARRANT NOS:
MVROBR

THE STATE OF SOUTH CAROLINA)
)

AFFIDAVIT

VS.

Devon Ford)

FILED
CLERK OF COURT
SPARTANBURG, S.C.
2004 DEC -1 AM 9:28
MARC MITCHELL

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that he/she copied the following materials:

- ☐ Warrant or Ticket
- ☐ Investigation Report
- ☐ Voluntary Statement
- ☐ Sol. Rule 5 Request
- ☐ Sol. Rule 5 Request Mailed _____
- ☐ Incident Report
- ☐ Supplemental Reports
- ☐ Witnesses Written Statement
- ☐ Defendant's Rap Sheet (NCIC)
- ☐ Drug Report

Other: Discovery 107 pages of Photos

Copied Number of Pages: 107

I, _____, attorney for the defendant(s) or his/her designee, have reviewed copies of the above referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed / Accepted this _____ day of _____, 2004.

Kevin M. Tibble

Representative or designee for Attorney

Attorney-At -Law

Sworn to before me this
29 day of November 2004

Linda Burgess
Notary Public for South Carolina
My Commission Expires: 5/20/2015

©(05/01/12) : 00002

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2005 MAR 15 PM 3:48

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) MARC KITCHENS

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICAL CIRCUIT

INDICTMENT NOS:
WARRANT NOS: H683101

THE STATE OF SOUTH CAROLINA)
)

AFFIDAVIT

VS.

Devon Michael Ford)

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that he/she copied the following materials:

- ☐ Warrant or Ticket
- ☐ Investigation Report
- ☐ Voluntary Statement
- ☒ Sol. Rule 5 Request
- ☐ Sol. Rule 5 Request Mailed _____
- ☐ Incident Report
- ☐ Supplemental Reports
- ☐ Witnesses Written Statement
- ☐ Defendant's Rap Sheet (NCIC)
- ☐ Drug Report

Other: pages 1-315 dated 2.24.2005, 1 pages 1-19 dated 2.25.05

Copied Number of Pages:

I, Chris Brough, attorney for the defendant(s) or his/her designee, have reviewed copies of the above referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed / Accepted this 15th day of March, 2005.

Kevin N. Tinkler
Representative or designee for Attorney

Chris Brough
Attorney-At-Law

CD Ridgeway

Sworn to before me this
15 day of March 2005

Marsha E. Folk
Notary Public for South Carolina

@(05/01/12) : @@@@3

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICAL CIRCUIT

INDICTMENT NOS:
WARRANT NOS:

THE STATE OF SOUTH CAROLINA)

AFFIDAVIT

VS.

Devin Gold

PERSONALLY APPEARED BEFORE ME the undersigned deponent who being duly sworn, says that he/she copied the following materials:

- ☐ Warrant or Ticket
- ☐ Investigation Report
- ☐ Voluntary Statement
- ☐ Sol. Rule 5 Request
- ☐ Sol. Rule 5 Request Mailed _____
- ☐ Incident Report
- ☐ Supplemental Reports
- ☐ Witnesses Written Statement
- ☐ Defendant's Rap Sheet (NCIC)
- ☐ Drug Report

Other: Pages 1-10 dated 12/2/05

Copied Number of Pages: _____

I, _____, attorney for the defendant(s) or his/her designee, have reviewed copies of the above referenced documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed / Accepted this _____ day of _____, 2005.

Representative or designee for Attorney

Mike Dantos

Attorney-At-Law

Sworn to before me this
6 day of Dec, 2005

Notary Public for South Carolina
My Commission Expires: 5/2/2011

ATTACHMENT L

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

DEVON FORD, #312731, Petitioner, v. MICHAEL MCCALL, WARDEN, LEE CORRECTIONAL INSTITUTION, Respondent.	CIVIL NO.: 8:12-CV-02266-GRA-JDA AFFIDAVIT OF ROBERT COLER

PERSONALLY appeared before me, **Robert Coler**, who being duly sworn, deposes and says:

1. I am an attorney licensed to practice law in South Carolina. I am currently employed with the Greenville City Attorney's Office.
2. In 2005, I was employed as an assistant solicitor with the Seventh Circuit Solicitor's Office.
3. In connection with my employment, I was assigned to prosecute the Petitioner's Murder and Assault and Battery with the Intent to Kill charges in this matter. The Petitioner was charged with the murder of Iketha Davis and with the assault and battery with the intent to kill Jonathan Martin. Iketha Davis was seated in the front passenger's seat of a Nissan Maxima when she was shot and killed by one bullet that entered just above her right breast, exited her right breast and re-entered her abdomen traveling generally from her right to left in a downward fashion. Her gunshot wound was consistent with being shot by someone on the passenger's side of the vehicle. Ms. Davis made a dying declaration that Petitioner shot her. Mr. Martin was seated in the driver's seat of the Nissan Maxima

and was struck several times by bullets in the groin and shoulder and survived. Mr. Martin gave a statement to investigators that Petitioner shot him. Petitioner gave a statement to investigators after his arrest that he fired his gun from the passenger's side of the vehicle. Petitioner claimed he was firing at Johnathan Martin who was seated in the driver's seat. Petitioner's case was scheduled for jury trial the week of December 5, 2005. On, Monday, December 5, 2005, the morning of trial, Petitioner indicated he wished to plead guilty. The process of a guilty plea was begun before the Honorable Judge Doyet A. Early. Shortly after beginning, Judge Early stood the plea down and instructed Petitioner to consult further with his attorney, Michael Bartosh. After a break, Petitioner and his attorney appeared back before Judge Early to proceed with Petitioner's guilty plea. Petitioner pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), on December 5, 2005.

4. I have recently reviewed the Seventh Circuit Solicitor's Office's file in this matter. I received a SLED ballistics report dated November 9, 2005 pertaining to this case via facsimile on November 22, 2005.

5. It was the Solicitor's Office's policy to make available for review all relevant discovery materials, including ballistics reports, to the defense prior to trial. In this case, my paralegal sequentially number stamped each page of discovery that was copied and given to defense counsel. An accompanying Affidavit of Discovery was prepared and signed by defense counsel (or someone in his office such as an investigator or paralegal) upon delivery. There were three different packages of discovery copied and provided to Petitioner's defense counsel. It was also my practice to always meet with the defense counsel prior to all murder trials and allow defense counsel to review all discoverable

materials and take a copy of any document he/she did not have in their file. Occasionally, documents provided at this last pre-trial meeting were not number stamped or accompanied by an Affidavit of Discovery.

6. I have no independent recollection of providing defense counsel, Michael Bartosh, with a copy of the SLED ballistics report prior to the Petitioner's guilty plea. Additionally, there is no documentation in the Solicitor's Office's file that shows that anyone with the Solicitor's Office provided defense counsel with the ballistics report prior to the Petitioner's guilty plea. However, upon close review of the entire file maintained by the Seventh Circuit Solicitor's Office since Petitioner's guilty plea on December 5, 2005 and since my departure from the Solicitor's Office in March of 2009, I am of the opinion that defense counsel was made aware of the existence of the SLED ballistics report mentioned above. I am led to this conclusion by the fact that my handwritten opening statement notes maintained in the file since December 5, 2005 directed me to mention to the jury that they would hear from an expert that the gun Petitioner turned over to the police did not match the projectile or shell casings located at the scene. This gun was produced by the Petitioner after his arrest and after he initially claimed he threw his gun in a pond. It was to be the State's theory at jury trial that the gun produced by Petitioner was not the gun he used to shoot at Mr. Martin and Ms. Davis. Furthermore, I note that my prepared witness list included SLED ballistics and tool mark expert Dan Defreese, that my trial notebook included prepared questions for Agent Defreese and that Agent Defreese was faxed a subpoena to appear in Generals Sessions court for this trial the week of December 5, 2005. It was clearly my intent to deal with the ballistics report during trial and I would have no reason to do so if Petitioner's counsel was not made aware of its existence

prior to trial. While I have no evidence whether or not Mr. Bartosh discussed with his client the ballistics report, I am of the opinion and conclude that he was made aware of the ballistics report. Otherwise, it would have made no sense to prepare my opening statement as I did, to subpoena Agent Defreese, to prepare the questions that I did for him, or to list him on my witness list.

FURTHER, AFFIANT SAYETH NOT.

Robert Coler, Esquire

SWORN TO BEFORE me this 17 day
of January, 2013.

Notary Public for South Carolina
My Commission Expires: Feb 10, 2015

ATTACHMENT M

Due August 5th

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

DEVON M. FORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

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ISSUE PRESENTED

Did trial counsel render ineffective assistance of counsel when he did not secure the results of a ballistics test prior to petitioner's plea which would have revealed that the state's version of events was inaccurate?

STATEMENT

Devon Michael Ford was indicted by the Spartanburg county Grand jury for murder and assault and battery with intent to kill. He pleaded guilty before the Honorable Doyet A. Early, III on December 5, 2005. He was represented by Michael Bartosh, Esquire, who is now deceased. He received 37 and 20 years, respectively, to be served concurrently.

He appealed his convictions and sentence and the South Carolina Court of Appeals affirmed. State v. Ford, Op. No. 2007-UP-365 (filed September 17, 2007).

He then filed an application for post-conviction relief on January 24, 2008. An evidentiary hearing was held on September 18, 2008 before the Honorable Roger L. Couch. He was represented by David Alford, Esquire. The order of dismissal was filed March 22, 2010.

This petition for writ of certiorari timely follows.

ARGUMENT

Trial counsel rendered ineffective assistance of counsel when he did not secure the results of a ballistics test prior to petitioner's plea which would have revealed that the state's version of events was inaccurate.

Petitioner pleaded guilty to murder and ABWIK with a recommendation from the state that the charges run concurrently. Petitioner's plea counsel is now deceased. Petitioner pleaded guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).

At petitioner's plea hearing, the state recited its version of the facts:

> "[T]he defendant, Devon Ford, got out of the passenger's side of the red Chevy Suburban, came around, and came up to the passenger window of the Maxima, and fired at least four, perhaps as many as seven shots, into the Maxima. Several of those shots hit Jonathan Martin, and – but he survived the gunshot wounds.
>
> One of those shots hit Victim, struck her in the right chest."

App. 17-18.

At the PCR hearing, upon questioning by the judge, he explained where the gun came from:

> "I had stashed my gun there at Flint Rim's house. I put my gun up there at Flint Rim's house. Somehow, some way, besides me, you know what I'm saying, also aware my codefendnant was telling them as well that my gun was there at Flint Rim's house, and also like two days after I got arrested I told them, I said, man, ya'll go ahead and get my gun, go ahead and get my gun from over there. So, Flint Rim say the police went and raided Flint Rim's house and they got my gun from them."

App. 121, ll. 8-17.

At the PCR hearing, petitioner testified that he did not have a copy of the ballistics test until he requested it from SLED pursuant to a FOIA request. The FOIA request and the ballistics test were entered into evidence at the PCR hearing. App. 150, 153-154. As the ballistics test shows, petitioner's gun did not fire the bullets that were found inside the car, or in the victim's body. In

short, the gun that petitioner hid at Flint Rim's house was not the murder weapon. Counsel did not secure this report prior to petitioner's plea, although it was in existence at the time. The date of the SLED report is approximately one month before petitioner's plea date. The ballistics report is not referenced during the guilty plea.

Petitioner testified at the PCR hearing that he requested the ballistics report:

> "Now, the whole time I kept asking Mr. Bartosh can he get my ballistic test for me. He kept telling me they did not have them, they did not have them, they were not ready."

App. 86, ll. 1-4.

Petitioner further testified that he would not have pleaded guilty had he known what the ballistics report would have shown. App. 86-89. Hill v. Lockhart, 474 U.S. 52 (1985).

The order of dismissal is inaccurate when it states:

> The Applicant also claimed his attorney neglected to properly investigate ballistic evidence. The Applicant claimed ballistics revealed his gun did not match the shooter. Counsel's file reveals funds obtained for an expert, though this Court is unable to ascertain what steps were taken in the ballistics investigation. The Applicant failed to show prejudice, however, where he failed to demonstrate further ballistic evidence would have benefited his case. The Applicant failed to meet his burden and this Court denies and dismisses this claim.

App. 138.

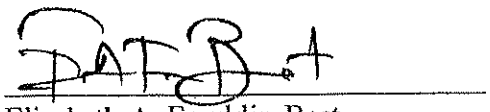
The order is inaccurate for two reasons: first, petitioner is not claiming that additional, or "further" ballistics testing should have been done—his claim is that he was entitled to the evidence that was in existence. Having the ballistics test which was in existence would have benefited his case since it tended to show that he was not the shooter. And secondly, petitioner has shown prejudice because he testified that he would have proceeded to trial but for counsel's substandard performance. Petitioner entered an Alford plea—he denied the factual basis of the plea. Had he

been in possession of a report that supported his claim of innocence, he would not have pleaded guilty. Petitioner was clearly prejudiced by his counsel's failure to secure a report that was in existence, and which benefited him. Petitioner was denied effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). U.S.C.A. 6,14. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of June, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Roger L. Couch, Special Circuit Court Judge

DEVON M. FORD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire this 21st day of June, 2010.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of June, 2010.

(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

ATTACHMENT N

157

WITNESSES

R. Strawn

Spartanburg County Sheriff's Department

1. [illegible]
2. Computer
3. [illegible]
4. [illegible]
5. [illegible]
6. [illegible]
7. [illegible]
8. [illegible]

ARREST WARRANT NUMBER

H683101

ACTION OF GRAND JURY

[redacted]

Foreperson of Grand Jury
Date: 8-25-05

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 05-GS-42 3376

The State of South Carolina

County of Spartanburg

TREY GOWDY, *SOLICITOR*

COURT OF GENERAL SESSIONS

AUG 29 2005

TERM

THE STATE
vs.

Devon Michael Ford

Indictment for

MURDER

SC Code 16-03-0010, 0020
CDR Code 116
Class FEL-EXM

FILED
CLERK OF COURT
2005 AUG 31 PM 3:16
MARC MITCHELL

500

158

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

AUG 25 2005

At a Court of General Sessions, convened on _____, the Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Devon Michael Ford did in Spartanburg County on or about December 7, 2004, feloniously, willfully, and with malice aforethought, kill one Ikethia Davis by shooting her, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *THE South Carolina 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.

ASSISTANT SOLICITOR

159

WITNESSES

R. Strawn

Spartanburg County Sheriff's Office

1. SENTENCE MADE ☐
2. REPORT PENNED ☒
3. CARD PULLED ☒
4. INDEXED ☒
5. CHECKED WARRANTS ☒
6. CHECKED SIGNATURE ☐
7. ASSESSMENT AND FINE CARD MADE ☐
8. TRAFFIC VIOLATIONS COPY ☐

ARREST WARRANT NUMBER

H683102

ACTION OF GRAND JURY

True Bill

[redacted]

Date: 8-25-05

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 05-GS-42-3377

The State of South Carolina

County of Spartanburg

Trey Gowdy, *Solicitor*

COURT OF GENERAL SESSIONS

AUG 29 2005 TERM

THE STATE
vs.

Devon Michael Ford

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILL

SC Code: 16-3-620
CDR Code: 014
Class FEL-C(V)

FILED
CLERK OF COURT
2005 AUG 31 PM 3:16
MARC RITCHIE

502

160

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

AUG 25 2005

At a Court of General Sessions, convened on _____, the Grand Jurors of Spartanburg County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Devon Michael Ford did in Spartanburg County on or about December 7, 2004, commit an unlawful act of violent injury upon the victim, Johnathan Martin, by shooting the victim, and with malice aforethought, all in violation of the laws of the State of South Carolina and Section 16-3-620 of the *Code of Laws of South Carolina*, 1976, as amended.

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

ASSISTANT SOLICITOR

1 504

STATE OF SOUTH CAROLINA)
COUNTY OF Spartanburg)
STATE VS.)
Devon Michael Ford)
AKA:)
Race: B Sex: M Age:)
DOB: [redacted] SS#: [redacted])
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 05 -GS- 48 - 33716
A/W#: H683101
Date of Offense: 12-7-04
S.C. Code §: 16-3-10
CDR Code #: 0 1 0 1 1 6
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS
TO: MURDER,
in violation of S 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 1 0 1 1 6
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | Devon Ford, Defendant | Michael Burke, Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 37 days/~~months~~/~~years~~ or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of ____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:_____

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS

Recipient:		
*Fine		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$128.75

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $_____ beginning _____
$_____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

R Harvey DC
Clerk of Court/ Deputy Clerk
Court Reporter: Ann Shaw

PRESIDING JUDGE: M Easterling
Judge Code: 0 1 1 0 3 1 6
Sentence Date: December 5, 2005

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

Corrected

STATE OF SOUTH CAROLINA)
COUNTY OF Spartanburg)
STATE vs.)
Devon Michael Ford)
AKA:)
Race: B Sex: M Age:)
DOB: [redacted] SS#: [redacted])
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 05 -GS- 42 - 3377
A/W#: HLK3102
Date of Offense: 12/17/04
S.C. Code §: 16-3-620
CDR Code #: 0 1 0 1 1 4
☐ CASE RESTORED
SENTENCE
☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Assault & Battery With Intent to Kill
in violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0 1 0 1 1 4
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.
ATTEST:

Solicitor — Devon Ford, Defendant — Michael Bouknight, Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of 20 ~~days/months~~/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of ____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 05-GS-42-3376
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $ _____ plus 20% fee: $ _____
Payment Terms:
☐ set by SCDPPPS _____
Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 8.75
TOTAL		$128.75

PTUP _____
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

R Hanvey DC
Clerk of Court/ Deputy Clerk
Court Reporter: Pam Green

PRESIDING JUDGE: J. P. Easterling
Judge Code: 0 1 1 1 0 3 1 6
Sentence Date: December 5, 2005

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)