

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Appeal from Clarendon County

William Jeffrey Young, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**

APR -9 2013

**S.C. Supreme Court**

MONTAG WEBB,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212556

\_\_\_\_\_  
APPENDIX  
\_\_\_\_\_

BREEN RICHARD STEVENS  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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State of South Carolina )  
 )  
County of Clarendon )  
 )

State of South Carolina,  
Plaintiffis

vs.

Montag Webb,  
Defendant

General Sessions  
2009-GS-14-583  
2009-GS-14-584  
2009-GS-14-334

December 15, 2009  
Manning, S.C.

Before The Honorable R. Ferrell Cothran, Judge.

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

Ms. Amy A. Land,  
Assistant Solicitor

Mr. Harry Devoe,  
Attorney for Defendant

Margaret T. Sullivan,  
Court Reporter

1 MR. CORBETT: Your Honor, May it Please  
2 the Court.

3 THE COURT: Yes, sir.

4 MR. CORBETT: Your Honor, the State of  
5 South Carolina versus Montag Webb. And, Your  
6 Honor, Mr. Webb is before the court on three  
7 separate indictments. And, Your Honor, these are  
8 Clarendon County Cases. 2009-GS-14-334.  
9 2009-GS-14-583. And 2009-GS-14-584.

10 Under indictment 334, a single count  
11 indictment alleging unlawful carrying of a pistol.  
12 That case is indicted. Under indictment 09-583,  
13 a single count indictment alleging burglary in the  
14 second degree. That is a waiver plea. And  
15 indictment 09-584, malicious injury to property.  
16 That's also a waiver indictment. Mr. Webb is  
17 represented by attorney Harry Devoe. Indicates he  
18 wishes to plead guilty. And there is a  
19 recommendation from the State.

20 THE COURT: Is that right, Mr. Devoe?

21 MR. DEVOE: That's correct, Your Honor.

22 THE COURT: Have you explained the nature  
23 of the charges against Mr. Webb; as well as, his  
24 constitutional rights?

25 MR. DEVOE: I have.

1 THE COURT: Does he understand those?

2 MR. DEVOE: He does.

3 THE COURT: He wants to plead guilty?

4 Mr. Devoe: He does.

5 THE COURT: Mr. Webb, your lawyer tells me  
6 you want to plead guilty, is that right, sir?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Have you had enough time to  
9 talk to him about this decision?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you satisfied with his  
12 representation?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you realize that the  
15 malicious injury to property and burglary has not  
16 been to the Grand Jury in Clarendon County? Do  
17 you want it to go, or do you want to waive it?

18 THE DEFENDANT: Waive it.

19 THE COURT: Anybody promised you anything  
20 or threatened you to get you to plead guilty?

21 THE DEFENDANT: No, sir.

22 THE COURT: So you pleading guilty freely  
23 and voluntarily?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that

1 unlawful carrying of a pistol carries up to a  
2 year?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And that burglary second  
5 degree is up to 15 years?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And malicious injury to  
8 property is it under 1,000? I mean, over 1,000?

9 MR. CORBETT: It's 1 to 5, Your Honor.

10 THE COURT: Okay. And 5 years in prison.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: So you are looking at 21  
13 years. Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you still want to plead  
16 guilty?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And the fact that you are  
19 pleading to this burglary, if you commit other  
20 burglaries in the future, they could use this to  
21 enhance the possible punishment you could receive;  
22 is they, could bump it up. You get two prior  
23 burglaries for the first offense. You understand  
24 that? Which is 15 to life.

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Are you under the influence of  
2 alcohol or drugs today?

3 THE DEFENDANT: No, sir.

4 THE COURT: Do you have any mental disease  
5 that would keep you from understanding what you  
6 are doing?

7 THE DEFENDANT: No, sir.

8 THE COURT: By pleading guilty, you are  
9 giving up your constitutional right to remain  
10 silent because you are telling me you are guilty.  
11 Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You are also giving up your  
14 right to a jury trial on each one of these  
15 indictments. In that jury trial, the State would  
16 have to prove you guilty on each indictment beyond  
17 a reasonable doubt to all 12 jurors. Do you  
18 understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: You will be able to confront  
21 the witnesses in that trial. Mr. Devoe can cross  
22 examine those witnesses. He can subpoena  
23 witnesses to testify in your behalf. He can put  
24 up any defenses you may have to this crime. When  
25 you plead guilty, you give all that up. Do you

1 understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You're also giving up any  
4 appeal that may come out of those trials or this  
5 guilty plea, do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you understand that you  
8 have a right for this case to be heard in  
9 Clarendon County. Do you want to give that up and  
10 me hear it here today in Williamsburg County?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: If you want to appeal this  
13 guilty plea and sentence today, you must do so  
14 within 10 days by filing it with the Clerk's  
15 Office in Clarendon County. Do you understand  
16 that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: The Solicitor is going to tell  
19 me about the facts. I am going to come back and  
20 ask you about them.

21 MR. CORBETT: Your Honor, with regard  
22 09-334 unlawful carrying of a pistol, Mr. Webb,  
23 the defendant before you, was a passenger in a  
24 vehicle stopped for reckless driving in Clarendon  
25 County by officers Stone and Jenkinson. As a

1 result of the traffic stop, the vehicle was  
2 searched. And a 22 caliber pistol wrapped in a  
3 bandanna was under the seat where Mr. Webb was  
4 sitting. And Mr. Webb admitted to deputies that  
5 the gun belonged to him.

6 And with regard to indictment 09-583,  
7 Mr. Webb along with his co-defendants broke into  
8 the business of Truck Service, Inc. Located at  
9 3908 Clarence Cooper Highway, Turbeville. Which  
10 is in Clarendon County. And Mr. Webb and  
11 Co-defendants were caught on videotape stealing a  
12 number of items from Truck Service, Inc. valued at  
13 \$13,319. The case is still pending against the  
14 two co-defendants.

15 With regard to Indictment 09-584. That's  
16 malicious damage to property. Mr. Webb along with  
17 a co-defendant went to the New Harmony Church and  
18 broke open an air-conditioning unit for the  
19 purposes of stealing the coils out of the unit.  
20 Doing \$3,500 damages to the air-conditioner unit.  
21 They took the coils away and sold them for scrap.

22 THE COURT: Are those facts correct,  
23 Mr. Webb?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You had a pistol in the car.

1 You broke into this business, committed the  
2 burglary second. And you tore up the  
3 air-conditioner in the church. Is that right?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: I find that there is a  
6 substantial factual basis for the plea. It is  
7 freely and voluntarily entered into. You have had  
8 the advice of competent counsel with whom you tell  
9 me you are satisfied. And I will accept the plea.  
10 Mr. Devoe.

11 MR. DEVOE: Thank you, Your Honor.  
12 Mr. Webb is 18-years-old. He was born and raised  
13 in Clarendon County. I think we all know his  
14 family. His father and his sisters. And it is a  
15 pretty decent family. I think that Montag has  
16 been a little bit out of control from time to  
17 time. And he finished the 9th grade at Manning  
18 High School. And he went to South Carolina Youth  
19 Child Center and Academy and didn't quite finish  
20 there. He is a nice person, but he just seems to  
21 have a little streak of not paying attention to  
22 good advice given to by his sister Midge, or by  
23 others around him.

24 I think, Your Honor, that the  
25 recommendation is boot camp. YOA boot camp.

1 MR. CORBETT: No, we are going to  
2 recommend a sentence pursuant to youthful offender  
3 act. And that that sentence be referred to the  
4 shock incarceration program. And followed by a  
5 period of probation with an order of restitution.

6 MR. DEVOE: Joint and several restitution.

7 THE COURT: All right, on 2009-GS-14-334,  
8 unlawful carrying of a pistol, the Sentence of the  
9 Court is you are committed to the State Department  
10 of Corrections under the youthful offender act not  
11 to exceed one year. On indictment, and I am  
12 recommending shock incarceration. On indictment  
13 2009-GS-14-583 burglary in the second degree. The  
14 defendant is committed to State Department of  
15 Corrections under the youthful offender act not to  
16 exceed 6 years. That's to run concurrent with all  
17 other charges and recommending shock.

18 And malicious injury to property, the  
19 sentence is under the Department of Corrections  
20 under the youthful offender act not to exceed 5  
21 years. To run concurrent. And recommend shock as  
22 well. All charges to run concurrent with each  
23 other.

24 MR. CORBETT: Judge, may we address to  
25 restitution issue?

1 THE COURT: You didn't ask anything about  
2 the restitution.

3 MR. CORBETT: I am sorry, Judge, if I  
4 didn't say it clearly, I thought I had said.

5 THE COURT: You said that they did that  
6 much damage, but you never mentioned to me  
7 restitution. I mean, I can put it in here.

8 MR. CORBETT: Yes, sir, Judge.

9 THE COURT: But it's going to be one of  
10 those scenarios since he does not have probation,  
11 they may or may not collect. So what's the  
12 restitution?

13 MR. CORBETT: Judge, at the New Harmony  
14 Church on indictment 09-584.

15 THE COURT: Right.

16 MR. CORBETT: It's joint and several of  
17 the \$3,500.

18 THE COURT: This was the same defendant I  
19 finished last week?

20 MR. CORBETT: That is correct, Judge.

21 THE COURT: Okay.

22 MR. CORBETT: And, judge, under indictment  
23 09-583 it is joint and several of \$13,319.

24 THE COURT: Do you have any disagreement  
25 with that, Mr. Devoe?

1 MR. DEVOE: Not the second one. I didn't  
2 hear the first one until just now. So how much?

3 MR. CORBETT: \$3,500.

4 THE COURT: At the church.

5 MR. DEVOE: I believe it's the heat pump  
6 at the church.

7 THE COURT: Sir?

8 MR. DEVOE: I believe it is the heat pump  
9 at New Harmony Church.

10 THE COURT: That they tore up.

11 MR. DEVOE: The air-conditioner, I am  
12 sorry.

13 THE COURT: They tore up the  
14 air-conditioner. They took the copper out of it,  
15 and got about \$100 worth of -- \$3500 worth of  
16 damage. And it's bad if they bother a church.

17 MR. DEVOE: I think he released it  
18 belatedly. He has been in jail, Your Honor, since  
19 the 29th of September.

20 THE COURT: Okay. I give him credit for  
21 time served.

22 MR. DEVOE: He has been in jail earlier on  
23 the pistol warrant earlier than that.

24 THE COURT: Okay. Well I mean that really  
25 doesn't make -- I mean they can figure his max out

1 time when he goes through shock.

2 MR. CORBETT: Judge, thank you hearing for  
3 this over here. Your Honor, would it be  
4 permissible for me to return those documents?

5 THE COURT: Yes.

6 End of Requested Transcript of Record

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CERTIFICATE

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I, Margaret T. Sullivan, Court Reporter, for the Third 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 above captioned case, relative to appeal, in General Sessions Court, on December 15, 2009, for Clarendon County, Manning, South Carolina.

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

4-27-10  
DATE

*Margaret T. Sullivan*  
-----  
COURT REPORTER  
My Commission expires: 10-03-11

FORM 5

STATE OF SOUTH CAROLINA )

County of Clarendon )

Montag Webb #338449 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

2010-CR-14-0008  
IN THE COURT OF COMMON PLEAS

2010 FEB 15 PM 1:56

APPLICATION FOR  
POST-CONVICTION RELIEF

CERTIFIED TRUE COPY  
OF ORIGINAL FILED IN THIS OFFICE

DATE 2/16/10

Beverly S. Roberts  
CLERK OF COURT  
CLARENDON COUNTY, SC

**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 Turkeyville Correctional Institution
2. Name and location of Court which imposed sentence Clarendon County Court of General Session
3. Name(s) of co-defendant(s) (if any) Michael McDowell, Raymond Tate
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2009-GS-14-0583 (mandatory (4) year sentence)
  - (b) 2009-GS-14-0584 (malicious injury to real property)

(c) \_\_\_\_\_

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

(a) 12-15-09

(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?  
no

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

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

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) the date of each such result:

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. none

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

(a) attorney fail to direct correct appeal

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

- (a) (1) Ineffective assistance of Counsel
- (b) (2) Involuntary Guilty Plea (3) Subject-Matter
- (c) Jurisdiction (See Attached)

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

- (a) Judge sentenced me to shock soe changed
- (b) my sentence to a mandatory fine
- (c) (See Attached)

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

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? \_\_\_\_\_

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. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. N/A
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

(c) the disposition thereof:  
 i.       N/A        
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

(d) the date of each such disposition:  
 i.       N/A        
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_  
 iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:  
 i.       none        
 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.       N/A        
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:  
 i.       N/A        
 ii. \_\_\_\_\_  
 iii. \_\_\_\_\_

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

- (a) attorney fail to file direct appeal
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) your arraignment and plea? ✓
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? ✓
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no appeal
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
\_\_\_\_\_

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

- (a) the name and address of each attorney who represented you:
  - i. Harry Devoe (Clarendon Co. Public Defender)
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Plea
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:  
~~To have the mandatory four changed to 10 months~~  
~~shock Probation + Have my sentence vacated,~~

20. Are you now under sentence from any other court that you have not challenged?  
NO

STATE OF SOUTH CAROLINA )  
County of Clarendon )

VERIFICATION

#1. Montag Webb #338449, 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.

Montag Webb

SWORN to and subscribed before me this 10 day of February, 2010.

Suzanne H. Hively (L.S.)  
Notary Public

My Commission Expires: 09-29-2018

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

\* I, Montag Webb #338489, 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.

Montag Webb  
Applicant

SWORN or affirmed to and subscribed before me this  
10 day of February, 2010.

Suzanne H. Swiby  
Notary Public

My Commission Expires: 09-29-2018

### (1) Ineffect Assistance of Counsel:

My lawyer was ineffective for allowing me to plead guilty to an indictment that the Grand Jury never "convened on", nor does the indictment contain any "action" the grand Jury took, pursuant to Strickland v. Washington, S. Ct. 104, 2052 (1984).

### (2) Involuntary Guilty Plea:

My Guilty Plea was involuntary pursuant to Boykin v. Alabama, 89 S. Ct. 1709 (1969) because the Judge did not sentence me to a mandatory (A) year sentence.

### (3) Subject Matter Jurisdiction:

my indictment for burglary 2nd has (2) separate offenses on it and does not show when the indictment was convened on. My indictment for Malicious injury to property says the same thing.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
	)	
	)	2010-CP-14-0088
	)	
Montag Webb. #338449,	)	
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN</b>
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	

---

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 16, 2010, 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 Clarendon County Clerk of Court. The Applicant was indicted for Unlawful Carrying of a Pistol (2009-GS-GS-14-0334), and Applicant waived presentment on indictments for Burglary – 2<sup>nd</sup> Degree (2009-GS-14-0583) and Malicious Injury to Property (2009-GS-14-0584). He was represented by Harry Devoe, Esquire. On December 15, 2009, the Applicant pled guilty before the Honorable R. Ferrell Cothran, Jr. Applicant was sentenced to one (1) year under the Youthful Offender Act (YOA) for Unlawful Carrying of a Pistol, to five (5) years under the YOA for Malicious Injury to Personal Property, and to six (6) years under the YOA for Burglary – 2<sup>nd</sup> Degree. All sentences were to be served concurrently, and all carried a recommendation for shock incarceration. Applicant did not appeal his convictions.

Attached herewith and incorporated herein are the records of the Clarendon County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## 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.
  - a. Allowed Applicant to waive presentment to Grand Jury.
2. Involuntary guilty plea.
  - a. "My guilty plea was involuntary pursuant to *Boykin v. Alabama*, 89 S.Ct. 1709 (1969) because the judge did not sentence me to a mandatory (4) year sentence."
3. Subject matter jurisdiction.
  - a. "My indictment for burglary 2<sup>nd</sup> has (2) separate offenses on it and does not show when the indictment was convened on. My indictment for Malicious injury to property says the same thing."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

## III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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.

Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45, -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant’s

conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

V.

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 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> 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.

## VI.

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

## VII.

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

MARY S. WILLIAMS  
Assistant Attorney General

By:   
ATTORNEYS FOR RESPONDENT

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

Sept 30, 2010.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON )  
 )  
 )  
 )  
 MONTAG WEBB, 338449 )  
 )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

2010-CP-14-0088

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 in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Charles T. Brooks, III, Esquire**  
**The Brooks Law Firm**  
**309 Broad Street**  
**Sumter SC 29150**

DATED this 30th day of September, 2010.

*Lauren Meara*  
 Lauren Meara, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA )  
 COUNTY OF LEE )

COURT OF COMMON PLEAS

Montag Webb, )

PLAINTIFF, )

TRANSCRIPT OF RECORD  
 Indictment #: 2010-CP-14-0088

State of South Carolina, )

DEFENDANT. )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ )

March 19, 2012  
 Clarendon County Courthouse  
 Manning, South Carolina

BEFORE:

HONORABLE W. JEFFREY YOUNG, PRESIDING JUDGE.

**APPEARANCES:**

Assistant Attorney General Andrew Johnson  
 Attorney for State of South Carolina

Charles Brooks, Esquire  
 Attorney for Montag Webb

TAKEN BY MELISSA R. SINGLETARY  
 CERTIFIED VERBATIM REPORTER

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EXHIBITS

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The Court: Yes, sir.

Mr. Johnson: May it please the Court?

The Court: Yes, sir.

Mr. Johnson: Your Honor, Andrew Johnson on behalf of the Attorney General's Office. This next case is Montag Webb vs. State of South Carolina. This is 2010-CP-14-88. Just to give you a brief procedural history. Mr. Webb was indicted for unlawfully carrying a pistol, he waived presentment on the indictment for burglary second and malicious injury to property. He was represented by Harry Devoe. He pled guilty before the Honorable Ferrall Cothran where he received 10 years for each charge. He was facing a total of 21 years. He filed his PCR February 16, 2010. He's represented today by Charles T. Brooks. At this point, I would just ask Mr. Brooks to give us an idea of the applicant's claim.

The Court: Mr. Brooks:

Mr. Brooks: May it please the Court, Judge. Basically one thing I do want to put on the record is everything that I got from the Attorney General's Office about my client's sentence as well as what I looked up on the SCDC website indicates that my client gets out, their information says he gets out October of next year, 2013. I relayed that to my client and showed it to him. He says that SCDC has indicated that he gets out 2016.

1 The Court: Do you have any updated information on him,  
2 Mr. Johnson?

3 Mr. Johnson: Our information confirms what Mr. Brooks has  
4 just indicated that max out is 10-28-2013.

5 Mr. Brooks: Judge, I call Mr. Webb to the stand.

6 The Court: All right.

7 Bailiff: Place your left hand on the Bible. State your  
8 name, please.

9 Witness: Montag Webb.

10 Bailiff: Do you swear that the testimony to the court  
11 shall be the truth the whole truth and nothing but the  
12 truth so help you God?

13 A: Yes I do.

14 Bailiff: Have a seat, please. Watch your step.

15 (Witness complies)

16 Bailiff: State your full name, please.

17 A: Montag Webb.

18 Mr. Brooks: Are you ready, Judge?

19 The Court: I'm ready, go forward.

20 Mr. Webb - Examination by Mr. Brooks:

21 Q: Mr. Webb, how old are you?

22 A: 20.

23 Q: All right. Now I want to get some more background  
24 stuff on the record. I don't want you to think I'm  
25 trying to talk you in to anything. I want to get

1           some background stuff on the record. You've heard  
2           that all the parties here, the Judge, the Attorney  
3           General's Office ...

4           The Court: My paperwork also says that.

5           Q:    The courts paperwork is that you come out in about  
6           eighteen months.

7           A:    Yeah.

8           Q:    Do you understand that?

9           A:    Yeah.

10          Q:    You understand that if you go forward today and  
11          Judge Young, we talked about the computer game press  
12          the reset button do you remember that?

13          A:    Yeah.

14          Q:    And Judge Young agrees to press the reset button for  
15          you, you could go back and face, I think Mr. Johnson  
16          said about 20 years. Do you understand that?

17          A:    Yeah.

18          Q:    And you understand how long it will take, it will  
19          take a couple of years for you to get your new trial  
20          assuming that these people will appeal it like they  
21          normally do. And that by the time that you get that  
22          new trial more than likely you will be home.

23          A:    Yeah.

24          Q:    And you know all of that, right.

25          A:    Yes.

1 Q: And knowing all of that you still want to go  
2 forward?

3 A: Yes sir.

4 Q: All right. Now, you pled guilty to this charge, is  
5 that correct?

6 A: Yeah.

7 Q: You had Harry Devoe as your lawyer, is that correct?

8 A: Yeah.

9 Q: Why did you plead guilty, Mr. Webb?

10 A: Why did I plead guilty?

11 Q: Well, what caused you to plead guilty?

12 A: Because I was going on probation but when I plead  
13 the Judge sentenced me to ninety days shock. But  
14 when I get to SCDC they changed it up and told me I  
15 had to go back to where I had to do four years  
16 before I could get out. He said ninety days shock,  
17 so I plead to the shock instead of the mandatory  
18 four years.

19 Q: So, that's what got you upset and caused you to file  
20 your PCR?

21 A: Yeah, also when this happened, I ain't supposed to  
22 have a second-degree burglary it was supposed to be  
23 third degree but they got second-degree, well, they  
24 got two separate offenses on me they got "A" and  
25 they got "B". It's supposed to be the title 16 but

MONTAG WEBB VS. THE STATE OF SOUTH CAROLINA

1 Title 16, on the indictment they got me entering  
 2 into a container, a shed, you know what I'm saying  
 3 but the indictment number, the offenses on it got me  
 4 like entering into the dwelling.

5 Q: Okay so you think that is something that Mr. Devoe  
 6 should not have gotten you to plead to, is that  
 7 right?

8 A: Yeah that's what I'm saying.

9 Q: And you want Judge Young to set that aside, is that  
 10 correct?

11 A: Yes sir.

12 Q: You understand that's the only thing he can do? He  
 13 can't make you get out of jail faster.

14 A: Yeah.

15 Q: That is the only thing he can do is give you a new  
 16 trial. Press that reset button.

17 A: Press that reset yeah.

18 Q: And you said that, Mr. Devoe, did he trick you into  
 19 pleading guilty to that?

20 A: No he ain't tricked me into it but he told me that I  
 21 could have get probation if I take the guilty plea  
 22 but when we came in front of Judge Cothran, Jason  
 23 Corbett the solicitor during the time said he had  
 24 changed his mind he wanted to give me a little time  
 25 he want to give me the boot camp ninety day shock.

1 That's fine, so I take that. I would take the  
2 ninety day shock but when I went to SCDC they say I  
3 got to max out four years, I get out in 2013 and  
4 that's my mandatory four years.

5 Q: You were not satisfied with that, is that right Mr.  
6 Webb?

7 A: Yeah.

8 Q: Okay. Is there anything else you want to say about  
9 Mr. Devoe's representation of you that I haven't  
10 asked you?

11 A: He let me plea to a case that wasn't even convened  
12 on or nothing like that.

13 Q: Do you know what that means?

14 A: To let the grand jury look over it.

15 Q: Okay. So your case had not been submitted to the  
16 grand jury?

17 A: Yeah.

18 Q: Do you remember whether or not you had waived  
19 presentment to the Grand Jury?

20 A: You talking about sign the papers?

21 Q: Yes sir.

22 A: Yeah I signed the papers.

23 Q: Did you know what that meant when you signed the  
24 papers?

25 A: No he didn't explain to me about it.

MONTAG WEBB VS. THE STATE OF SOUTH CAROLINA

9

1 Q: Okay. You don't remember the judge going over that  
2 with you?

3 A: When I signed it?

4 Q: During the plea?

5 A: I remember he said something about it.

6 Q: You remember he said something about it you waiving  
7 presentment to the Grand Jury?

8 A: Yeah.

9 Q: Okay. Anything else you want to say about Mr.  
10 DeVoe's representation?

11 A: No.

12 Q: Are you sure?

13 A: I ...

14 Q: Take your time and look.

15 A: He could have like instead of my second-degree  
16 burglary he could have like look over my charges and  
17 like this ain't second-degree burglary this is  
18 third-degree burglary but I didn't even deserve no  
19 one to six. It was supposed to be at least a 1 to 5  
20 for my charge it wasn't but a one to five charge.

21 Q: Okay. And as a result of that you want your PCR is  
22 that right?

23 A: Yeah.

24 Q: Now I got to ask you this last question, Mr. Webb.  
25 Well, the next-to-last question. If you were home

1 now ...

2 A: I would still go forward.

3 Q: ... you would still go forward?

4 A: I would still go forward.

5 Q: That's right we talked about that, didn't we?

6 A: Yeah.

7 Q: All right. Is there anything else that you want to  
8 tell this court that we have not covered about your  
9 PCR?

10 A: Ineffective assistance of counsel we have discussed  
11 that. The voluntary guilty plea we discussed that.  
12 Subject to jurisdiction we already discussed that.  
13 That's it.

14 Q: All right.

15 Mr. Brooks: Answer any questions of the attorney general.

16 The Court: Mr. Johnson.

17 **Mr. Webb - Cross examination by Mr. Johnson:**

18 Q: Mr. Webb, you are telling the Court this morning  
19 that you want a trial in this matter, is that right?

20 A: A trial or light press the reset button?

21 Q: No, sir. You're telling the court that you want a  
22 trial, isn't that right?

23 A: You can say that.

24 Q: As a result of winning today, if you win, you  
25 understand that you are going to get a trial?

1 A: A trial?

2 Q: Do you not want a trial?

3 A: I'm not saying I'm not guilty for these charges, I'm  
4 just saying that I've been charged with something  
5 that I ain't supposed to be charged with.

6 Q: Okay, well let me ask you this. If the judge  
7 decides to hit that reset button you understand that  
8 what that means is that you get a trial?

9 A: So everything will start over with? I could get  
10 more time or I could get less time? I understand  
11 all that.

12 Q: Yes sir you understand all of that?

13 A: I accept it.

14 Q: My question to you is, I've got your transcript from  
15 your plea, when did you tell Judge Cothran that you  
16 wanted a trial?

17 A: I ain't never tell him I want a trial.

18 Q: You told Judge Cothran that you wanted to plea,  
19 didn't you?

20 A: Yeah I wanted to plea.

21 Q: Why did you take the plea?

22 A: Because like I said Harry Devoe had told me that if  
23 I would have plea, you know plea he would get me  
24 five years probation and when we got in front of the  
25 Judge, Judge Cothran, Jason Corbett had a change of

1 mind and said he wanted me to do a little bit of  
2 time, do a 90 day shock.

3 Q: All right so you understood that you were going to  
4 get either probation or ninety days shock?

5 A: Yeah. I done max out four years.

6 Q: You took that into consideration?

7 A: Took that into consideration.

8 Q: Then you decided to plead guilty.

9 A: Yeah.

10 Q: What could Mr. Devoe of done to change your charge  
11 from Burglary second to burglary third.

12 A: What could he have done?

13 Q: What could he have done?

14 A: He could have look over it and see the mistakes. He  
15 ain't took time to look over it and see the mistakes  
16 because two different offenses on it. Second degree  
17 violent. You ain't going to find no second degree  
18 going into a shed violent.

19 Q: Yes sir, but you understand that Mr. Devoe doesn't  
20 bring the charges, he represents you. He doesn't  
21 decide what the charges are going to be.

22 A: Yeah but he supposed to represent me. He supposed  
23 to look over my case.

24 Q: Now at the time you agreed to plead you agree that  
25 was better than rolling the dice at trial, didn't

MONTAG WEBB VS. THE STATE OF SOUTH CAROLINA

13

1           you?

2           A:    Yeah that was better than rolling the dice.

3           Q:    And you plead guilty because that was the best way  
4           to get the least sentence possible at that time.

5           A:    Yes, sir.

6           Q:    All right. Also during your plea, you told the  
7           judge that you were pleading guilty because you were  
8           guilty?

9           A:    Yes sir I'm guilty.

10          Q:    All right. So you are saying today you're not  
11          disagreeing with that are you.

12          A:    That second-degree burglary, my attorney during the  
13          period of time didn't show it to me. I had to figure  
14          it out myself. The clerk looking over it they say  
15          they got two separate offenses on me. Like Title  
16          16. They got the offenses on me. They supposed to  
17          be third degree, they second degree. So, I'm not  
18          guilty of second, I'm guilty of third degree. That  
19          what I said.

20          Q:    So you're saying you're guilty of burglary?

21          A:    Yeah, I'm guilty of burglary.

22          Q:    You just disagree with what degree?

23          A:    Yeah

24          Q:    It's fair to say that you understood the potential  
25          sentence for that but you were hoping for less?

1 A: Yeah for less.

2 Q: Would you say that was wishful thinking on your  
3 part?

4 A: Say what?

5 Q: Would you say that was wishful thinking on your  
6 part?

7 A: At the period of time. I didn't know no better I  
8 was just going by my attorney. He's my attorney.  
9 He's supposed to know everything.

10 Q: Thank you.

11 The Court: Any further questions Mr. Brooks?

12 Mr. Brooks: No other questions, judge. Thank you.

13 The Court: You may step down. I will take this under  
14 advisement. I will let you know what I have decided.

15 Mr. Brooks: Judge, I think I've still got to call Mr.  
16 Devoe.

17 The Court: Oh, okay.

18 Mr. Brooks: Judge, I want if you're going to grant his  
19 PCR, then maybe I don't have to call Mr. Devoe.

20 The Court: Go ahead and call Mr. Devoe.

21 Bailiff: Place your left hand on the Bible raise your  
22 right hand.

23 (Witness complies)

24 Bailiff: State your full name for the record and spell  
25 your last name.

MONTAG WEBB VS. THE STATE OF SOUTH CAROLINA

15

1 A: Harry Leslie Devoe Junior.

2 Bailiff: Do you solemnly swear that the testimony you  
3 give will be the truth and nothing but the truth so help  
4 you God?

5 A: I do.

6 Bailiff: Have a seat, please, sir. Please state your  
7 full name and spell your last for the record.

8 A: Harry Leslie Devoe, Jr. D-e-v-o-e.

9 Mr. Devoe - Examination by Mr. Brooks:

10 Q: How are you doing today, Harry?

11 A: All right.

12 Q: You represented Mr. Webb?

13 A: I did.

14 Q: Do you remember talking to him about plea  
15 negotiations?

16 A: I did.

17 Q: Could you tell us what those plea negotiations were?

18 A: Way back in this case with Mr. Webb there were some  
19 charges I thought we had a PTI situation that he had  
20 applied for. He got arrested for more charges and  
21 the PTI was not available. So he got a total of  
22 three charges facing him, one was for possession of  
23 a gun, one was a burglary second and third was  
24 malicious injury to personal property.

25 Q: Did you tell him that he you were going to get

1 probation?

2 A: No.

3 Q: Do you remember what you told him?

4 A: Once the PTI was off the table no probation was  
5 available and any negotiations with the solicitor. I  
6 always tell them what the range is for various  
7 charges.

8 Q: So you're saying you never told him he could get  
9 probation?

10 A: No.

11 Q: Did the State give a recommendation?

12 A: In the trial itself, in the plea itself the state  
13 asked for exactly what Judge Cothran gave him.

14 Q: And you advised him to take this plea?

15 A: I advised him of the fact there is no real defense.  
16 He admitted apparently to the police that he had  
17 done what he was charged with and the only hope he  
18 had was to get as good a deal for him as I could.

19 Mr. Brooks: I begged the court's indulgence. No other  
20 questions, Judge.

21 The Court: Mr. Johnson

22 Mr. Devoe - Cross examination by Mr. Johnson:

23 Q: Mr. Devoe, would you have proceeded to trial if Mr.  
24 Webb had insisted on going to trial?

25 A: Yes.

MONTAG WEBB VS. THE STATE OF SOUTH CAROLINA

17

1 Q: Who's decision was it for Mr. Webb to plead guilty?

2 A: Sir?

3 Q: Who's decision was it for Mr. Webb to plead guilty?

4 A: He decided once I told him what the offer was to  
5 take the offer.

6 Mr. Johnson: That's all I have.

7 The Court: Do you have any redirect?

8 Mr. Devoe - Redirect Examination by Mr. Brooks:

9 Q: You said that the State gave him an offer?

10 A: A recommendation not a offer. A recommendation.

11 Q: And that's the offer that he took?

12 A: As far as I know, that is correct.

13 Mr. Brooks: No other questions.

14 The Court: You may step down. Anything further Mr.  
15 Brooks?

16 Mr. Brooks: That's the applicant's case, Your Honor.

17 Mr. Johnson: Nothing further, Your Honor to

18 The Court: All right. I will now take this under  
19 further consideration and I will let you know.

20 Mr. Brooks: Thank you, Judge.

21 **(This hearing was adjourned)**

22

23

24

25

**CERTIFICATE**

This is to certify that the hearing in the matter of Montag Webb vs. State of South Carolina, consisting of Eighteen (18) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 19<sup>th</sup> day of November, 2012.

*Melissa R. Singletary*

Melissa R. Singletary  
Certified Court Reporter

Notary Public for South Carolina  
My Commission Expires: 3-5-2014

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON )  
 )  
 Montag Webb 338449, )  
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 )  
 Applicant, )  
 )  
 VS. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 2010-CP-14-0088

**ORDER OF DISMISSAL**

CERTIFIED TRUE COPY  
 OF ORIGINAL FILED IN THIS OFFICE  
 DATE 7/2/12  
Brenda H. Roberts  
 CLERK OF COURT  
 CLARENDON COUNTY, SC

This matter is before this Court by way of an application for post-conviction relief (PCR) filed February 16, 2010. The State made its return on September 30, 2010. A hearing on the matter was convened at the Sumter County Courthouse on March 19, 2012. Applicant was present and represented by Charles T. Brooks, III, Esquire. The State was represented by Tyson Andrew Johnson, Sr. of the South Carolina Office of the Attorney General.

Applicant testified on his own behalf at the hearing. His plea counsel, Harry Devoe, Esquire, also testified. In addition, this Court had before it the transcript of Applicant's guilty plea proceeding, the Clerk of Court's records regarding the subject convictions, the Applicant's records from the Department of Corrections, the PCR application and the State's return.

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Clarendon County Clerk of Court's orders of commitment. Applicant was indicted for unlawful carrying of a pistol, (2009-GS-14-0334), and Applicant waived presentment on indictments for Burglary second degree (2009-GS-14-0583), and malicious injury to property. (2009-GS-14-0584). Applicant was represented at his plea by Harry Devoe, Esquire. On

December 15, 2009, Applicant pled guilty before the Honorable R. Ferrell Cothran, Jr. and was sentenced to one year under the Youthful Offender Act (YOA) for unlawful carrying of a pistol, to five years under the YOA for malicious injury to personal property, and to six years under the YOA for burglary second degree. All sentences were to be served concurrently and all carried a recommendation for shock incarceration. Applicant did not appeal his convictions.

### ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully because he received ineffective assistance of counsel rendering his plea involuntary, that his plea counsel allowed him to waive presentment to the Grand Jury, that his "guilty plea was involuntary pursuant to *Boykin v. Alabama*, 89 S.Ct. 1709 (1969) because the judge did not sentence me to a mandatory (4) year sentence" and that "My indictment for burglary 2<sup>nd</sup> has (2) separate offenses on it and does not show when the indictment was convened on. My indictment for Malicious injury to property says the same thing."

At the PCR hearing, the only issues raised were that he felt he should not have been indicted for burglary second, and that instead he felt he should have been indicted for burglary third. He testified he wanted to hit the "reset button" and go back to the point where he was facing a plea. No evidence or argument was presented as to the issues originally raised in the PCR application. Therefore, Applicant has abandoned these claims and they are denied and dismissed.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the

opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1985).

### **Ineffective Assistance of Counsel and Involuntary Plea**

Applicant alleges his plea was rendered involuntary by ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). 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); Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009); Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001).

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).

This Court will now address each allegation of ineffective assistance of counsel:

**Applicant's desire for an indictment for burglary third instead of burglary second**

Applicant testified on direct examination that he should have been indicted for burglary third, not burglary second. He further testified that he wanted to "hit the reset button" and go back to a place where could enter a plea for burglary third degree. On cross examination, counsel for the Attorney General asked Applicant whether he understood that Mr. Devoe, Applicant's plea lawyer, had no power to change the indictments, to which Applicant indicated he understood. Applicant also admitted that when he pled guilty, he understood the potential sentence but hoped for less.

Mr. Devoe testified that he and the solicitor had arranged for Pre-Trial Intervention for Applicant but additional charges were brought which prevented that from going through. Mr. Devoe further testified that it was Applicant's decision to plead guilty, and that he was prepared to try the case if Applicant had insisted on going to trial.

This Court finds that applicant was aware of the charges, elements of the offense, and potential defenses. Further, this Court finds that Applicant was not coerced, pressured, or promised anything in return for his guilty plea. Applicant admitted his guilt at the plea hearing and acknowledged his involvement at the PCR hearing. Under these circumstances, Counsel's advice to Applicant to plead guilty was well within the professional norms of competent

representation. This Court further finds Counsel's testimony credible and gives it great weight, finding in particular that Counsel did not promise Applicant a lighter sentence. Further, the plea court advised Applicant of the maximum and minimum sentences he could receive. Tr. pp. 4, LL 12-14. This Court finds Applicant's testimony to the contrary lacks credibility. Further, Applicant's hopes for a lighter sentence does not render his plea involuntary where he was advised of the possible sentences he could receive and chose to plead guilty. See Wolfe v. State, 326 S.C. 158, 164-165, 485 S.E.2d 367, 370 (1997) (finding "wishful thinking" does not equal misapprehension as to the possible sentence the applicant would receive). This Court denies this allegation.

#### CONCLUSION

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

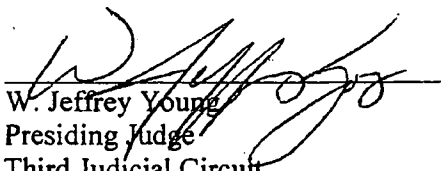
This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate

review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 16 day of May, 2012.

  
W. Jeffrey Young  
Presiding Judge  
Third Judicial Circuit

Sumter, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CLARENDON COUNTY  
Court of Common Pleas  
Honorable W. Jeffrey Young, Circuit Court Judge

Case No: 2010-CP-14-0088

Montag Webb.....Appellant  
S.C.D.C. No.: 338449

v.

The State.....Respondent

PROOF OF SERVICE

I, the undersigned, do hereby certify that on this 12<sup>th</sup> day of July, 2012, I served the foregoing Notice of Appeal, Order of Dismissal, as well as Proof of Service in this matter by depositing a true copy of it in the United States Mail, postage prepaid, on July 12, 2012 addressed to the following as indicated below:

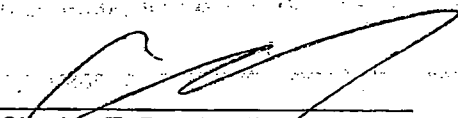
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

South Carolina Office of Appellate Defense  
1330 Lady Street, Suite 401  
PO Box 11589  
Columbia, SC 29211-1589

Office of Attorney's General  
Attn: T. Andrew Johnson, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

Montag Webb, 338449  
Turbeville Correctional Institution  
Post Office Box 252  
Turbeville, S. C. 29162

Dated: July 12, 2012

  
Charles T. Brooks, III  
Attorney for the Appellant  
309 Broad Street  
Sumter, South Carolina 29150  
(803) 418-5708

WITNESSES

Kipp Coker - CCSO

DOCKET NO. 2009-GS-14- 0583

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

DECEMBER TERM 2009

THE STATE

vs.

MONTAG LAMALL WEBB

ARREST WARRANT NUMBER

M083254

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

BURGLARY 2ND (VIOLENT)

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CLARENDON )

INDICTMENT FOR  
BURGLARY 2<sup>ND</sup> (VIOLENT)

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of  
CLARENDON COUNTY present upon their oath:

That MONTAG LAMALL WEBB did in Clarendon County on or about August 31,  
2009, enter the building, to-wit: the business of Tire Service, Inc., without consent and  
with the intent to commit a crime therein and said defendant entered or remained in said  
building in the nighttime, in violation of Section 16-11-312(A), South Carolina 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.

*C. Kelly Jackson*  
\_\_\_\_\_  
SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

STATE VS.

MONTAG L. WEBB

AKA:

Race: Black

Sex: Male

Age:

DOB:

SS#:

Address: 1180 Lockwood Circle Alcolu, SC 29001

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009-GS-14-0583

AW#: M083254

Date of Offense: August 31, 2009

S.C. Code §: 16-11-0312(B)

CDR Code #: 0086

SENTENCE SHEET

DL# SID# \*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Burglary 2nd degree

in violation of § 16-11-312 of the S.C. Code of Laws, bearing CDR Code # 010186

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45 (CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, Defendant initial

The pleas is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State. ATTEST: Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of days/months/years or under the Youthful Offender Act not to exceed 6 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: all other charges

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.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

PURSUANT TO 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred, Defendant Waives Hearing, Ordered

Total: \$13319.00 plus 20% fee: \$

Payment Terms:

Set by SCDPPPS

Recipient:

\*Fine:

Table with 2 columns: Description and Amount. Rows include assessments, surcharges, and fees totaling \$133.90.

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: Rec. Shock

Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Court Reporter:

PRESIDING JUDGE Judge Code: Sentence Date:

WITNESSES

T. O. Ham - CCSO

DOCKET NO. 2009-GS-14- 0584

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

DECEMBER TERM 2009

THE STATE  
vs.

MONTAG LAMALL WEBB

ARREST WARRANT NUMBER

M083499

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

MALICIOUS INJURY TO REAL PROPERTY

C. KELLY JACKSON, SOLICITOR

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CLARENDON )

INDICTMENT FOR  
 MALICIOUS INJURY TO REAL PROPERTY

At a Court of General Sessions, convened on \_\_\_\_\_, the Grand Jurors of  
 CLARENDON COUNTY present upon their oath:

That MONTAG LAMALL WEBB did in Clarendon County on or about September 29, 2009, violate Section 16-11-520 of the Code of Laws of South Carolina (1976), as amended, in that the said Montag Lamall Webb did willfully, unlawfully and maliciously cut, mutilate, deface, or otherwise injure a tree, house, outside fence, or fixture of another or commit any other trespass upon real property of another, to-wit: New Harmony Presbyterian Church, thereby damaging same in an amount in excess of one thousand dollars, but less than five thousand dollars.

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

*E. Kelly Jacobson*  
 \_\_\_\_\_  
 SOLICITOR

COUNTY OF CLARENDON

INDICTMENT/CASE#: 2009-GS-14-0334

STATE VS.

MONTAG L. WEBB

AW#: M089099

AKA:

Date of Offense: May 07, 2009

Race: Black

Sex: Male

Age:

S.C. Code §: 16-23-0020, 0050(A)(2)

DOB:

SS#

CDR Code #: 0044

Address: 1180 Lockwood Circle Alcolu, SC 29001

SENTENCE SHEET

DL#

SID#

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS

TO: Unlawful Carrying of Pistol

in violation of § 16-23-20 of the S.C. Code of Laws, bearing CDR Code # 0101414

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS  \$17-25-45 (CSC w/minor 1<sup>st</sup> or Lewd Act)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentation to Grand Jury. (Defendant initial)

The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST:

W. J. ... 065380  
Solicitor SC Bar #

Montag L. Webb  
Defendant

Henry ... 64304  
Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,

for a determinate term of \_\_\_\_\_ days/months/years or  under the Youthful Offender Act not to exceed 1 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.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

PURSUANT TO 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION:  Deferred,  Defendant Waives Hearing,  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	\$
\$56-1-286 (DUI Breath Test)	\$25	\$
\$47.12 (Public Def/Prob)	\$500	\$
\$14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
\$14/1/213 (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
\$90.7 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 2.50
TOTAL	\$	\$ 133.98

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

prmts. of \$ \_\_\_\_\_ beginning

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: Shovel

Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.

Carol J. Williams  
Clerk of Court/ Deputy Clerk for Williams Co

Court Reporter: Margaret Sullivan

PRESIDING JUDGE

Judge Code: 2144

Sentence Date: 12 1 15 1 09 1



WITNESSES

Matthew Stone - CCSO

DOCKET NO. 2009-GS-14- 0334

The State of South Carolina

County of CLARENDON

COURT OF GENERAL SESSIONS

JULY TERM 2009

THE STATE

vs.

MONTAG LAMALL WEBB

ARREST WARRANT NUMBER

M089099

ACTION OF GRAND JURY

*True Bill*  
*[Signature]*  
Foreperson of Grand Jury  
Date: *7-2-09*

VERDICT

Indictment for

UNLAWFUL CARRYING OF A PISTOL

C. KELLY JACKSON, SOLICITOR

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA )  
COUNTY OF CLARENDON )  
STATE VS. )  
MONTAG L. WEBB )  
AKA: )  
Race: Black Sex: Male Age: )  
DOB SS# )  
Address: 1180 Lockwood Circle Alcolu, SC 29001 )

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009-GS-14-0584

AW#: M083499

Date of Offense: September 29, 2009

S.C. Code §: 16-11-0510(B)(1)

CDR Code #: 0494

SENTENCE SHEET

DL# SID#  
\*CDL Yes  No  CMV Yes  No  Hazmat Yes  No   
In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS

TO: MALICIOUS INJURY TO PROPERTY  
in violation of § 16-11-510 of the S.C. Code of Laws, bearing CDR Code # 0141914

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS  \$17-25-45  
(CSC w/minor 1<sup>st</sup> or Lewd Act)

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury. MW (Defendant initial)  
The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTORNEY: [Signature] 065340 [Signature] [Signature] 64304  
Solicitor SC Bar # Defendant Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center,  
for a determinate term of \_\_\_\_\_ days/months/years or  under the Youthful Offender Act not to exceed 5 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: all other charges  
 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.  
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

PURSUANT TO 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal  
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:  
 RESTITUTION:  Deferred,  Defendant Waives Hearing,  Ordered  
Total: \$350.00 plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: cash  
 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 \$ \_\_\_\_\_  
\$56-1-286 (DUI Breath Test) \$25 \$ \_\_\_\_\_  
\$47.12 (Public Def/Prob) \$500 \$ \_\_\_\_\_  
\$14-1-212 (Law Enforce. Funding) \$25 \$ 25.00  
\$14/1/213 (Drug Court Surcharge) \$100 \$ \_\_\_\_\_  
\$50-21-114(BUI Breath Test Fee) \$50 \$ \_\_\_\_\_  
\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ \_\_\_\_\_  
\$90.7 (SCCJA Surcharge) \$5 \$ 5.00  
3% to County (if paid in installments) \$ 2.50  
TOTAL \$ 133.90

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: Res. Shovel

Appointed PD or appointed other counsel, §47.12  
requires \$500 be paid to Clerk during probation.

[Signature]  
Clerk of Court/ Deputy Clerk Wm King Co.  
Court Reporter: Margaret Sullivan

PRESIDING JUDGE [Signature]  
Judge Code: 2144  
Sentence Date: 12-13-10 914