

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

**S.C. SUPREME COURT**

Honorable Diane Schafer Goodstein, Circuit Court Judge  
\_\_\_\_\_

JASON FORDE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000658  
\_\_\_\_\_

APPENDIX  
\_\_\_\_\_

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INDEX

INDEX ..... i

TRANSCRIPT OF PLEA [SIC] DATED APRIL 12-15, 2010  
(TRIAL TRANSCRIPT)..... 1

TRANSCRIPT OF MOTIONS DATED APRIL 14-15, 2010 .....297

TRANSCRIPT OF RECORD DATED APRIL 15, 2010  
(PLEA TRANSCRIPT) .....325

INDICTMENT AND SENTENCE SHEETS.....370

APPLICATION FOR POST-CONVICTION RELIEF DATED APRIL 14, 2011 .....391

AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF  
DATED NOVEMBER 4, 2013.....406

SECOND AMENDED POST-CONVICTION RELIEF  
APPLICATION DATED NOVEMBER 5, 2021 .....409

THIRD AMENDED POST-CONVICTION RELIEF  
APPLICATION DATED NOVEMBER 15, 2021 .....411

RETURN DATED AUGUST 3, 2011 .....430

POST-CONVICTION RELIEF HEARING TRANSCRIPT  
DATED NOVEMBER 19, 2021.....435

ORDER OF DISMISSAL DATED MARCH 2, 2023 .....568

Jason Forde - Direct examination  
By Ms. McMahan

1 Q. Do you remember saying no?

2 A. And, yes, he used the circumstances of the trial where  
3 it, where it went and it was, it was something that I didn't  
4 understand and it was overwhelming and, and it seemed to be  
5 going in a point -- in a bad direction and he used that --  
6 he used them circumstances in -- for -- to, to cause to --  
7 for me to plead. He said this is the best time. If you  
8 want to get any type of, you know, that I do (indiscernible)  
9 just do it now and I'm telling you that.

10 So he never advised me that -- he never advised me that  
11 the petitioners that he made were preserved for direct  
12 appeal. He never advised me that those issues would not be  
13 addressed ever -- can, can not be raised again.

14 He never, he never, he never advised me to a, a bunch  
15 of stuff that I could of had rights to. He never advised  
16 me this -- I know you read -- gonna read the transcript and  
17 it say what's there right there. But he never advised me to  
18 the, to the (indiscernible). Had I known these things, we  
19 would not be here today. We could be having a different  
20 discussion today.

21 It, it would not, it would not have been me, me, me  
22 (indiscernible) Mr. Murphy. It would of been me if I would  
23 of raised those issues on a separate -- instead it was  
24 approached. If he said that this -- these things would be  
25 (indiscernible) if he said that these rights are going away,

Jason Forde - Direct examination  
By Ms. McMahan

1 if you, if you do, if you do -- Mr. Murphy -- I didn't  
2 understand what the judge said meant that I shouldn't raise  
3 those issues.

4 I didn't even think they should raise the issue after  
5 you plead. I didn't even think so until I got to prison and  
6 I found out oh, you can still do all this and not -- and  
7 that's why -- that's what -- this is why I do it because I  
8 didn't know. Had I know, I would not have took a plea. I  
9 would of went forward with my trial and never gone to trial  
10 after that.

11 Q. Do you remember telling the judge at your plea that it  
12 was your decision to plead guilty based on your own free  
13 will?

14 A. And that's, that's based on the questions that, that he  
15 asked. Mr. Murphy advised me they gonna ask you these  
16 (indiscernible) and you would have to say it because it  
17 falls back on you after -- it falls back on you. And if you  
18 need not -- the odds of it, this is, this is what makes it  
19 not my responsibility because I was being advised by an  
20 attorney who was ill advising me.

21 He was, he was advising me to do things that I would  
22 not -- I didn't want to do, that I didn't -- that would not  
23 have benefited me. It would of only had benefited him  
24 because he would of been done with the issue. It doesn't  
25 benefit me at all. I know that.

Jason Forde - Direct examination  
By Ms. McMahan

1 I have issues and rights that I, that I seriously want  
2 to argue. That's why I wrote -- that's why I filed the PCR.  
3 That's why I believe that I did not, I, I did not want to  
4 do. I didn't want to. That was the -- and it took me a  
5 while cause I had to learn the law. It took me almost a  
6 year to find it because I honestly didn't know. I, I  
7 (indiscernible). But had I known, none of this would of  
8 happened. I would not have done it.

9 Q. Do you remember saying that you were satisfied with  
10 Mr. Murphy's service at your guilty plea?

11 A. I told -- I, I, I re -- I think I, I think I said that.  
12 I think I did.

13 Q. Do you remember saying that he did everything within  
14 reason to represent you properly?

15 A. At the time, at the time, that's what I thought that I,  
16 that I -- and that was a mistake. He told me, he told me --  
17 he told me his best that he---

18 Q. But do you remember---

19 A. If I had him -- know better I wouldn't of done it.

20 Q. Do you remember being asked if you had enough time to  
21 talk with Mr. Murphy prior to pleading guilty?

22 A. I remember those things, yes.

23 Q. Do you remember saying that you understood all of your  
24 conversations with Mr. Murphy regarding this case?

25 A. And I'm still telling you that I, I -- had I known what

Jason Forde - Direct examination  
By Ms. McMahan

1 I know now, had I known that the officers committed perjury  
2 (indiscernible), had I known that they couldn't read from  
3 notes and say that it's a statement, had I known that  
4 Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment  
5 rights were violated, had I known that what I was doing was  
6 causing major harm and I wasn't helping myself, it was only  
7 gonna cause me to be irre -- irreparable harm and it's, and  
8 it's, and it's actually shocking through -- Mr.  
9 (indiscernible) this whole situation because keeping the  
10 (indiscernible) issues, the prosecution was, was malicious  
11 and, and, and, and, and they also conducted, conducted  
12 misconduct and Mr. Murphy advised me to go just ahead and  
13 accept a sentence because this was -- cause it might be  
14 worse.

15 It's nothing worse than being incarcerated. It's  
16 nothing worse than going out and watching your family in  
17 tears. There's nothing worse than, than, than, than  
18 (indiscernible) knowing that, after that, he didn't help me.  
19 That's a -- that's just fact. It's nothing worse than that  
20 and that's why I'm here today.

21 Q. so you recall the Court informing you of your right,  
22 your right to a jury trial, your right to remain silent,  
23 your right to confront witnesses at your---

24 A. (Indiscernible).

25 Q. ---at your (indiscernible)---

Jason Forde - Direct examination  
By MS. McMahan

1 A. No, I just told you I didn't -- I don't recall  
2 everything like that. I, I don't recall it.

3 Q. Do you remember, at your guilty plea, telling the Court  
4 that you understood all of their questions regarding your  
5 rights?

6 A. Yeah, I told -- I just told you all -- I just told you  
7 that at that time I (indiscernible)---

8 Q. (Indiscernible) you lied?

9 A. I, I followed Mr., Mr. Murphy's advice. That's -- I  
10 followed Mr. Murphy's advice and he, he says everything --  
11 his advice was everything that's gonna happen is a  
12 formality. These are the things that you're gonna have to  
13 do, these are the things that you're gonna have to say in  
14 order to do this. Had I known that there, there was an,  
15 an -- another way, that it was -- more information -- it was  
16 more evidence, there was more outcome -- additional outcome  
17 I would not have done it. I did not want to do  
18 (indiscernible)---

19 MR. NEUBAUER: I have no further questions at this  
20 time.

21 THE COURT: All right. Redirect?

22 MS. MCMAHAN: Just briefly, Your Honor.

23 THE COURT: Sure.

24 REDIRECT EXAMINATION

25 BY MS. MCMAHAN:

Jason Forde - Redirect examination  
By MS. McMahan

1 Q. Earlier Mr. Neubauer referenced the fact that  
2 Mr. Murphy did finally file a speedy trial motion for you  
3 later in 2009.

4 Didn't you ask for that to be filed some time in 2008?

5 A. Yes, ma'am.

6 Q. And---

7 A. I believe it was in 2008 and I believe either again --  
8 again in 2009 which, which he did file. I didn't read -- I  
9 filed the motion and Mr. Murphy just went ahead and I, and I  
10 actually wrote it to the Court myself and Mr. Murphy filed,  
11 I believe if I'm not mistaken, I guess he did it however you  
12 do it. But I believe I, I wrote it to the -- I, I  
13 learned -- figured out how to do it and did it on my own and  
14 then he, he just approved it I guess (indiscernible) that  
15 goes.

16 Q. And did you---

17 A. (Indiscernible) I believe -- I know it will be on the  
18 record if it is.

19 Q. Okay. Did you expect Mr. Murphy to know about the  
20 issues regarding hearsay and admissible statements and all  
21 that?

22 A. Yes, that's his profession. He's, he's -- he was very  
23 serious to me about how long he's been doing this. He  
24 worked in the military. I know he was in the military JAG  
25 and then he got out. He was in -- he was actually a

Jason Forde - Redirect examination  
By Ms. McMahan

1 prosecutor in the military and then he got out. He was  
2 doing this like, like I -- like me and Mr. Murphy got out.  
3 I remember it because we use to speak. Like he never, he  
4 never spoke to me as like a child, like, like most -- some  
5 attorneys do. He always spoke to me like (indiscernible)  
6 he's very articulate.

7 So I, I -- and he's (indiscernible) when I'm speaking.  
8 So he's, so he's very -- he's able to, he's able to -- was  
9 able to sooth me. He was able to (indiscernible) and I  
10 believe that he was honestly doing the best that he can  
11 because he was (indiscernible). He -- typically he yells,  
12 gets loud, (indiscernible) might repeat things like this.  
13 So, this is it.

14 So I got here -- this is something, when I see that  
15 like okay, well, this person would (indiscernible) and their  
16 advice would be sound. It would do something. After doing  
17 research, I realize that it was altered.

18 Q. Okay. And just---

19 A. (Indiscernible).

20 Q. Just let us (indiscernible), Mr. Forde. You had  
21 indicated that you were following Mr. Murphy's advice in  
22 regards to the guilty plea.

23 So, were you -- you and Mr. Murphy had a discussion  
24 about what was gonna be said at the guilty plea or just kind  
25 of followed along as to what he told you you needed to do?

Jason Forde - Redirect examination  
By MS. McMahan

1           How did, how did that work?

2   A.   Yeah, we sat down. We discussed it. We discussed that  
3 everything that's gonna come is pretty much a formality. He  
4 would have to (indiscernible) to try (indiscernible)  
5 transcript, I would stop and -- I would stop and ask him  
6 cause like, like I didn't, I didn't want to. Like I, I  
7 really didn't want to.

8           I almost -- I was, I was like he was advising me that  
9 he was only gonna, like I said, it was gonna be words. I'm  
10 gonna end up with a light sentence (indiscernible) and you  
11 know it. Like I see -- I just -- all this occurred a week  
12 after I had my daughter and I mean that -- and, and going to  
13 trial during the week where there was nobody there for me.

14           So, it wasn't, it wasn't a situation where I can be --  
15 I, I can be strong for myself. At the, the last day when I  
16 came, Mr. Murphy came in that morning was like my family's  
17 here. I -- my family's here and this was the last day of  
18 trial. So he was like -- and this was, this was the last  
19 day -- they was (indiscernible) that morning is when they  
20 ruled on, on the, the motion to dismiss. They heard it that  
21 Thursday evening. That Friday they ruled on it.

22           So, at that point it was real (indiscernible) because,  
23 because it was, it was like it's a possibility it could be a  
24 dismissal or a mistrial (indiscernible) and my  
25 (indiscernible) after a long week at trial and Mr. Murphy's

Jason Forde - Redirect examination  
By MS. McMahan

1 like man, you don't want to see this happen in front of your  
2 family. You don't want to see them cry or anything and all  
3 like that.

4 So I'll give you a chance to talk to them and you got  
5 me -- you might as well just go ahead and do it now and, and  
6 I just -- I took his advice on that, which, at this time  
7 right now, I believe I shouldn't of did.

8 MS. MCMAHAN: Okay. I have nothing further, Your  
9 Honor.

10 THE COURT: All right. Very well. Thank you.  
11 All right. Now, recross, Mr. Neubauer?

12 MR. NEUBAUER: No, Your Honor. Thank you. I  
13 appreciate it.

14 THE COURT: Very well.

15 All right. Ms. McMahan, call your next witness.

16 MS. MCMAHAN: Your Honor, the applicant rests at this  
17 point.

18 THE COURT: Thank you very much.

19 All right. Mr. Neubauer, call your first witness.

20 MR. NEUBAUER: Yes, Your Honor.

21 The State would call Timothy Murphy.

22 THE COURT: All right. Mr. Murphy, if you'd please  
23 raise your right-hand.

24 TIMOTHY MURPHY, being first duly  
25 sworn, testified as follows:

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 THE COURT: Thank you.

2 All right. Your witness.

3 MR. NEUBAUER: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. NEUBAUER:

6 Q. Good afternoon, Mr. Murphy.

7 A. Good afternoon.

8 Q. How long have you been practicing law, sir?

9 A. I've been -- in January it will be 35 years.

10 Q. And what percentage of that practice is criminal law?

11 A. I would say -- well, in the military, it would of  
12 been -- probably about 10 of the 20 years had some relation  
13 to criminal law. So -- and then I was a public defender in  
14 Sumter County for -- and then the chief county public  
15 defender for 13 years and then I hit a very brief period of  
16 time, a couple of months, as a solicitor.

17 And since I rejoined the Air Force in a civilian  
18 capacity, I, I, I do misdemeanor work in Federal Court. But  
19 I, I don't know if you want to count that. But -- so  
20 that's -- that should -- that's generally my experience in  
21 criminal law.

22 Q. So would it be safe to say that you a (indiscernible)  
23 experience in the criminal court?

24 A. I think that's a fair statement.

25 Q. And do you remember if you were appointed or retained

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 by Mr. Forde?

2 A. Yeah, I was appointed in my capacity as a -- then an  
3 assistant public defender on 25 June, 2008.

4 Q. All right. So about a month after he was arrested on  
5 these charges, correct?

6 A. Yes. Yes, sir.

7 Q. And did you represent him on all of the robbery charges  
8 that he was facing in Sumter?

9 A. Yes, sir.

10 Q. So you would of had familiarity with all of the facts  
11 regarding all of the charges that he pled guilty to?

12 A. Yes, some more than others but yes.

13 Q. Yes, sir.

14 And do you recall how these charges arose and how  
15 Mr. Forde was ultimately arrested?

16 A. Yes, there was an incident, and I think he mentioned it  
17 in his, his testimony where he and two other individuals  
18 robbed a Dollar General down in Sumter. And there was a  
19 description of the vehicle that was involved in the robbery  
20 and an all points bulletin was issued. The vehicle was a  
21 black vehicle as I recall. It had some discoloration on the  
22 hood and it had a temporary plate.

23 Approximately five or six hours later, maybe longer, a  
24 police officer observed that vehicle and began to follow it  
25 and then called in the, the, the description and then, as a

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 result of that, ultimately the people sought, it was  
2 Mr. Forde and his two codefendants, were arrested.

3 Q. (Indiscernible).

4 A. And then, in the course -- there had been an  
5 investigation going on in a series of armed robberies in  
6 Sumter County involving an individual who had a -- what was  
7 called a Jamaican accent. And so when Mr. Forde was  
8 arrested and law enforcement recognized that he spoke with  
9 a -- an accent, they kind of put two and two together and  
10 ultimately he confessed to all of the armed robberies except  
11 one.

12 Q. And regarding that arrest or, or his initial arrest  
13 after the Dollar General incident, did you see any issues  
14 with the arrest in that?

15 A. I raised a motion -- I mean I, I did -- you know, I  
16 raised a motion. Mr. Forde is, you know, we had a, we had  
17 a -- pretty in depth conversations about the motion. But I  
18 did raise the motion and basically my argument was at the  
19 time that they, they -- the issue would of been was there  
20 probable cause to arrest at the time that they stopped the  
21 vehicle because it was like a SWAT team coming in to stop  
22 that vehicle. They had guns blazing. There wasn't -- it  
23 wasn't your traditional stop. It was a (indiscernible) or,  
24 you know, a, a stop with guns drawn.

25 And, and so my argument was, for the, for the Court,

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 was did probable cause to arrest exist at the time of the  
2 stop and that was kind of my argument. And the Court  
3 ultimately concluded that there was probable cause.

4 Q. So, ultimately, your motion was denied, correct?

5 A. Yes. I also want to point out too that I had done a  
6 lot of research on whether or not we would be estopped -- I  
7 mean -- well, you know, the, the reality was we had eight  
8 armed robberies we needed to worry about at the time. One  
9 ended up being dismissed at the, at the plea but we had  
10 eight armed robberies at the time.

11 I did some research in regard to whether or not we  
12 would be estopped from raising these arguments later on. My  
13 conclusion was we probably would be.

14 So, this was kind of like -- and, and Mr. Forde and I  
15 had conversations about that. And so I knew that, you know,  
16 I either raise it now or I don't and that -- that's actually  
17 why I raised it because it was, in my mind, a pretty close  
18 call. It wasn't really a close call. I, I thought we'd  
19 probably lose it. It was worth raising at the time and I  
20 also believed that, if we were gonna win it, we were gonna  
21 win it at trial and then that would -- that, that would  
22 obviously be the -- detrimental to the rest of the armed  
23 robberies most likely.

24 So, it was more, you know, we either raise it now or  
25 you lose it. So, that was one of the reasons I raised it.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 Q. In the conversations that you had with Mr. Forde  
2 regarding that motion, do you believe that he understood  
3 your communications regarding that?

4 A. I'm just saying this, without any reservation, that  
5 Mr. Forde is the most intelligent client I have ever had and  
6 I had over a hundred and some clients including probably 40  
7 or 50 that went to trial. And he's the single most  
8 intelligent client I've ever had.

9 There is no doubt in my mind that he understood every  
10 single conversation we had. He raised issues that I thought  
11 were interesting and, and, you know, we would discuss. As  
12 he indicated earlier, we had a very professional, I believe  
13 professional, and, and rather cordial relationship for most  
14 of it. I mean there's times -- you know, there's ups and  
15 downs that you, you have over the course of a -- any  
16 relationship. In particular, this kind of relationship.

17 But there is no doubt in my mind he understood the  
18 risks involved. I did not -- I, I -- you know, it, it was  
19 not a situation where I had to, to, for lack of a better  
20 word, dummy down the law with him. I mean he -- that's one  
21 of the reasons why I shared some of the cases -- case law  
22 and stuff. He was curious about it and I, I think one of  
23 the letters even references that, you know, I'm happy he's  
24 educating himself. But there was no question that he  
25 understood my, my advice when I gave it.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 Q. And did you -- so you met with him to discuss the  
2 charges that he was facing?

3 A. I met with Mr. Forde, according to my records, a dozen  
4 times. I can give the specific dates if you like.

5 We met before the preliminary hearing on July 11<sup>th</sup>,  
6 2008. We met on February 10<sup>th</sup>, 2009. We obviously met  
7 back at the preliminary hearing. What I recall at the  
8 preliminary hearing is his wife and child were there. He  
9 was allowed to see his child.

10 We had a client meeting on March 5<sup>th</sup>, 2009. We had  
11 another one on May 22<sup>nd</sup>, 2009. We had another jail visit on  
12 June 24<sup>th</sup>, 2009, July 24<sup>th</sup>, 2009, July 31<sup>st</sup>, 2009,  
13 September 8<sup>th</sup>, 2009, September 15<sup>th</sup>, 2009, September  
14 19<sup>th</sup>, 2009, October 20<sup>th</sup>, 2009, December 4<sup>th</sup>, 2009,  
15 February 4<sup>th</sup>, 2010, February 19<sup>th</sup>, 2010, and March 16<sup>th</sup>,  
16 2010.

17 And, in addition, I wrote him 13 letters and those were  
18 substantive letters. Those were not form letters that were  
19 generated by the Public Defender Office in regard to notices  
20 and things like that. These were letters that I drafted for  
21 him cause he would either call me, leave a message in my  
22 private office, or it was a follow-up to something that we  
23 had discussed and I, I would respond to it.

24 So, all those letters, they're in the record. Plus I,  
25 I think there's a couple after that were flipped around out

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 there but I, I have them in my file.

2 Q. Now, have you had an opportunity to discuss the  
3 indictments against him?

4 A. At some point, yes. We had the -- all I can say -- you  
5 know what?

6 This was -- it's, it's been a while.

7 Okay. What, what I know is that he was indicted on  
8 February 19<sup>th</sup>, 2009.

9 Okay. I think what happened was the solicitor misspoke  
10 when we were at the second bond hearing and that was  
11 probably the follow-up with -- was when he was asking about  
12 that. I told him look, you, you were indicted in February.  
13 So, yeah, it is what it is.

14 I mean you were indicted in February and that was, that  
15 was a mistake I believe the solicitor made. Although I --  
16 to be frank, I don't recall, I don't recall much about that  
17 hearing. I don't re -- I, I don't re -- I have a vague  
18 recollection that there was an issue about the indictment.  
19 But I looked at the indictments I remember, and then I don't  
20 really recall there being an issue after that.

21 Q. And do you see any basis for challenging the  
22 indictments in this case?

23 A. No.

24 Q. And you had an opportunity to discuss the possible  
25 punishment and the maximum sentence that he can receive in

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 this or from these charges?

2 A. Yes. Early on in my initial interviews with Mr. Forde,  
3 he was interested in some sort of plea deal. He initially  
4 indicated he would like to plea to about 12 years, and, and,  
5 quite frankly, that drove, to some degree, my decisions on  
6 the whole speedy trial issue because I viewed this initially  
7 as some sort of plea and I wanted it to seen -- well, what  
8 exactly would the solicitor's Office be willing to offer.

9 I mean we had -- you know, to eight armed robberies, 12  
10 years is pretty sweet. That's a pretty sweet deal for the  
11 armed robberies. So, I approached the -- with Mr. Forde's  
12 permission, I, I approached the solicitor and said look, my  
13 client's considering a plea but what, what would you be  
14 willing to offer.

15 Now, in my experience, the more a solicitor's Office  
16 prepares for a case, the better their case gets. So -- and  
17 the lousier the deal gets.

18 So, initial -- their initial offer was 15 years and I,  
19 I said, you know, they said well, let me look at that and I  
20 said well, you know, they have a criminal record. I mean,  
21 you know, it's close to 10, you know. I mean I realize he's  
22 not gonna -- probably 10 isn't, isn't reasonable because he  
23 did eight armed robberies. But as close to 10 as we can get  
24 and the initial offer was 15.

25 well then, at that point, two things came to my

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 attention that the, the solicitor briefed me on.

2 The first was he was suspected in a armed robbery in  
3 Richland County and the -- they just told me that and they  
4 said well, we can do the 15 but there's this Richland County  
5 armed robbery and my response was well, that doesn't make a  
6 lot of -- that, that -- that's not good for, for, for this  
7 because Richland could just notice him for life and, and try  
8 him in the Richland County one. So, you know, that's not  
9 gonna work.

10 So, unless the Richland County armed robbery's  
11 incorporated into this plea, we're not gonna make -- you  
12 know, that, that can't work. We're not gonna plead to, to  
13 our armed robberies.

14 The second thing that was brought to my attention was  
15 that he was -- and, and I approached this with Mr. Forde.  
16 He admitted he had committed the Richland County armed  
17 robbery.

18 So then the second thing that came to my attention was  
19 the solicitor told me that he was also suspected of an armed  
20 robbery in North Carolina around the time he was visiting  
21 his family. I approached Mr. Forde with that. He denied  
22 he'd, he'd committed an armed robbery in North Carolina.

23 But the, the -- my consideration at that point was one  
24 of his codefendants had already gone federal and, you know,  
25 I thought well, you know, if the feds kind of get interested

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 in this, then, you know, I don't know what his codefendant's  
2 gonna say cause if his codefendant starts cooperating -- and  
3 I did, I did a lot of federal defense work through my  
4 private firm while I was acting as the public defender and  
5 the chief public defender. So, I did all that at the same  
6 time.

7 But my concern on the federal side was look, if, if his  
8 codefendant starts cooperating, he implicates him in some  
9 armed robbery up in North Carolina, they're gonna pull the  
10 case. So I, I thought it, it, it probably behooves us to,  
11 to, number one, get the Richland County case incorporated  
12 into this plea and then, number two, try to plead him as  
13 soon as possible so that -- to avert this whole possibility  
14 of a federal case.

15 well, the federal thing never really developed. What  
16 happened with the Richland County was Richland County  
17 solicitor said all right, you know, we'll, we'll, we'll  
18 dismiss this case but we want two extra years. So, the  
19 offer came back 17 years that -- and then it was during that  
20 process that Mr. Forde decided the, the motion -- the  
21 suppression motion was the magic bullet that would make all  
22 his cases go away and, and he wanted to go to trial. So, I  
23 wanted to be sure about that. I got it -- I got his -- I  
24 mean there was a deadline set and we rocked and rolled and  
25 went, went to trial.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 Q. Yes, sir.

2 And during the course of your conversations regarding  
3 plea negotiations and trying to include that Richland County  
4 charge, did you discuss with Mr. Forde what conversations  
5 you were having with the solicitor and what you were  
6 attempting to do?

7 A. Yes.

8 Q. And he understood all those negotiations?

9 A. Yes. I mean he was of two minds. I mean, on the one  
10 hand, he, he, he was still -- I mean -- and that's one of  
11 the -- I mean he was kind of -- it wasn't so much a back and  
12 forth but it was like he, he, on the one hand, wanted to  
13 keep the deal process kind of opened but prepare for trial  
14 and I mean in one of the conversations we had was in regard  
15 to the motions in particular was well, maybe we could, we  
16 could leverage the motions to, you know, get Richland County  
17 and the solicitor to give us back the 15 year deal. That's,  
18 that's, that's in one of my notes in our conversations with  
19 him that, that I kind of recall.

20 But the -- you know, I told him, in regard to the  
21 motions, I went into a lot of detail as far as what I  
22 thought about them. Obviously you have the letters about  
23 what I thought about them.

24 In -- you know, in, in my judgment, it -- they, they  
25 were the kind of motions you raise but I, I thought -- I, I

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 would of been kind of surprised if we would of won and it  
2 certainly -- we also had conversations, but this was later  
3 on which I'm sure we'll address is, you know, post plea or  
4 during the process of when he finally decided to plea.

5 But I did have a conversation. You know, I told him I  
6 said, look, you know, these kind of motions you win them at  
7 trial because, you know, I also did appellate work and,  
8 and -- appellate work in Federal Court and there's deference  
9 given to the, to the trial judge in regard to the motions  
10 that he or she might make.

11 So, as tenuous, I guess, as the chances were of winning  
12 these motions before a trial judge, they were worse on  
13 appeal and that was my judgment. And, and I just conveyed  
14 that to him in similar, in similar language at some point.

15 Q. All right. And do you remember, during the course of  
16 your representation, discussing his rights with him and the  
17 right to challenge State's evidence, to confront witnesses,  
18 to remain silent if you wanted to, and obviously his right  
19 for a jury trial?

20 A. Oh, yeah. We, we, we brought -- once he turned down  
21 that second plea offer, we prepped it for trial. So -- I  
22 mean I was preparing the whole time anyway but I spoke to  
23 all the officers involved. I spoke to -- I mean at first I  
24 didn't even know which case they were gonna call. I mean  
25 they were eight of them.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1           The strongest was probably the Food Lion one which they  
2 actually called. There were also two trials, two trials  
3 involving or two armed robberies that had a -- at one  
4 Young's and then I think it was another Young's. There was  
5 another kind of convenience store and I, I went to -- I went  
6 to all of those places, looked at the crime scenes, spoke to  
7 the individuals that were there.

8           The Food Lion case, they had video. They had the  
9 fingerprint. They had the DNA. They had his confession.  
10 So that was probably the strongest and they had clear  
11 identifications by the witnesses.

12           The other ones, some of the witnesses, as I recall,  
13 like there was one Young's case armed robbery where the ID  
14 was really solid and then other ones I really don't recall.  
15 I mean I know some of them were a little stronger than  
16 others in regard. All of them talked -- all of the victims  
17 talked about, in the, in the reports, talked about his  
18 accent. So I do, I do recall that.

19           But of -- the ones I focused on that I thought were the  
20 strongest initially were the Food Lion one and the Young's  
21 one, and then when the solicitor told me they were going  
22 with the Food Lion, that then made sense to me.

23 Q.   And you've just briefly discussed several of your  
24 investigations into this case.

25           Do you remember what all you did to investigate this

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 case and these charges?

2 A. I, I, I interviewed all the officers involved. I  
3 visited the, the crime scene. I actually shop there. So I  
4 was very familiar with it. I talked to the personnel.

5 The solicitor gave me the opportunity to speak to every  
6 witness that they were gonna testify to. I had a good  
7 relationship with the solicitor's Office. So, prior to  
8 trial I, I spoke to every single witness that they were  
9 going to -- that was going, going to testify and, and that  
10 pretty much covers it.

11 I mean obviously I reviewed all the discovery and I  
12 spoke to Mr. Forde and explained to him that this was the  
13 kind of case where, you know, we make the motions to see if  
14 we can win those motions. But as far as the substance of  
15 the trial goes, it was pretty bleak from a defense point of  
16 view. I mean they had a lot -- I mean it was, it was bleak.  
17 I mean they made a strong case.

18 And so in a, in a case like that, what you try to do  
19 and I, I -- it's actually in one of my letters, what I told  
20 him I was gonna do, and that is you try to, for lack of a  
21 better word, commit (indiscernible) in some of the things  
22 that may be confusing. In other words, you try -- you know,  
23 you, you, you focus on certain things and, and one of the  
24 things Mr. Forde pointed out in his recent testimony here  
25 today is that -- about this sweatshirt, for example.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1           Okay. He -- this sweatshirt on the video of the -- of  
2 Mr. Forde on the video does not have an emblem on it.

3           Okay. The sweatshirt that was discovered near the  
4 crime scene, which his DNA was on, did have an emblem on it.  
5 So that was something I wrote down.

6           All right. There was a discrepancy there. That's  
7 something. The descriptions, so the warrant, things like  
8 that, those were things that I was prepared to talk about  
9 and basically you just -- you know, Mr. Gamble, at that  
10 time, he's now Judge Gamble, he's a magistrate judge, but  
11 Judge Gamble at that time was -- I think this was his --  
12 maybe his second trial. So, you know, he, he wasn't quite  
13 as smooth as I'm sure he became.

14           So there were a series of things that I wrote where,  
15 you know, there were discrepancies and then what you do is  
16 you hope, over time in your closing argument, you can, you  
17 can point to those things and hopefully you can build a  
18 reasonable doubt kind of argument out of those. It's a,  
19 it's a tactic that I've, I've used before, sometimes  
20 potentially, usually not, quite frankly, usually not, but  
21 it's a, you know, it's what we had because their case was,  
22 was -- this was the, the one case they had that was  
23 incredibly strong given everything -- given the DNA and the  
24 video and everything else and the fingerprint. So --.

25 Q.   And to go back briefly, you said that you talked to all

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 the witnesses that the State had for this case.

2 were there any surprise witnesses that came up at the  
3 start of the trial?

4 A. None that I recall.

5 Q. And if there would of been a witness that you would not  
6 been given notice of, would you have raised that issue prior  
7 to trial?

8 A. I would of certainly raised it with the solicitor and I  
9 would of been at, you know, told the Court quote -- you  
10 know, I need opportunity to, to talk to this person at a  
11 minimum.

12 Q. Did you find no need to move to suppress the testimony  
13 of any of the prosecution's witnesses---

14 A. No.

15 Q. ---due to lack of notice?

16 A. There were no surprises in this case from my  
17 prospective.

18 Q. Yes, sir, and we'll briefly touch on the  
19 inconsistencies in witness testimony and incident reports.

20 Do you remember there being any inconsistencies or  
21 issues with the affidavit in his arrest warrant?

22 A. I don't recall that and, and I haven't had the benefit  
23 of looking at the transcripts. I, I don't have a  
24 recollection of, of that.

25 Q. And if you felt that there were inconsistencies between

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 what was said on the affidavits and what was testified to at  
2 Court, would you have raised that issue?

3 A. Yeah, probably on cross-examination.

4 Q. Yes, sir.

5 And---

6 A. I do recall the, the note issue and I think, I think  
7 what Mr. Forde's referring to is the, is the -- what's  
8 this -- it's the suppression hearing if I recall. I mean  
9 I -- I mean I might be wrong but I think that's what he's  
10 referring to is her testimony during the suppression  
11 hearing. But, you know, her, her statement -- his  
12 statements were admissible. So --.

13 Q. So you thought no need to object to her referring to  
14 his statements?

15 A. No, I, I don't object for chuckles. I mean, you know,  
16 you either, you either have them -- you know, when I object  
17 to something, I want to have a, a good chance of getting  
18 some sort of favorable ruling or it is clearly for the  
19 preservation of the record.

20 Q. Now -- and regarding the second set of fingerprints, do  
21 you recall any conversation with him about the solicitor and  
22 the police obtaining a second set of fingerprints from him a  
23 month before trial?

24 A. Vaguely. I mean I, I -- vaguely. When he raised it,  
25 I, I really didn't have -- I really vaguely recall something

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 about a finger -- with the fingerprint card. But I really  
2 can't testify to that with any current recollection.

3 Q. And---

4 A. I, I will say this though. His finger -- the, the  
5 whole thing with the pop can -- but it was a can. It was  
6 not a bottle. It's a Mountain Dew can.

7 The whole thing with the, the -- he, he -- the person  
8 on the video, which is him, cause he admitted to me it was  
9 him, comes up, puts the Mountain Dew can on the checkout and  
10 then pulls out the gun and then proceeds with the armed  
11 robbery. The evidence is the fingerprint. It's not the  
12 can.

13 when, when, when de -- you know, and by being -- it was  
14 the fingerprint and the fingerprint was admissible and, you  
15 know, it is what it is. I, I have -- if I recall correctly,  
16 my, my, my examination was along the line well, fingerprints  
17 stay on things and, you know, you can, theoretically, have  
18 Alexander the Great's fingerprint on something because they  
19 don't disintegrate over time and -- but that's my  
20 recollection of the whole fingerprint issue is it, it wasn't  
21 an issue really.

22 Q. And there was no need to object to the solicitor, I  
23 guess, failing to introduce this can or this bottle or this  
24 soda?

25 A. No, I mean I guess I could raise it in closing argument

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 saying where's the can but the, the evidence is the  
2 fingerprint. It's not the can. I mean you, you don't  
3 introduce a car when you have fingerprints on the car. So,  
4 I -- you know, it's, it's -- and he never raised it with me.  
5 Mr. Forde never mentioned anything about a can or a bottle  
6 to me.

7 Q. And you ultimately didn't have a closing argument where  
8 you could of raised that (indiscernible)?

9 A. No, no. My, my closing arguments would of been based  
10 on the evidence or discrepancies that arose during the trial  
11 and we never got to that because of the incident involving  
12 the officers looking at my notes.

13 Q. And did you feel any reason to object to the clothing  
14 that was introduced?

15 A. No, I mean, you know, again it's -- you know, it's --  
16 it goes to the weight, you know, that, that a lot of the  
17 evidence you don't object to, it just goes to the weight and  
18 then you argue well, look, you know, this is some sweatshirt  
19 out of here. It wasn't -- and it wasn't like it was right  
20 next door to the store. It was somewhere else.

21 You try to rely on -- the DNA -- the way the DNA  
22 comes -- the, the way the report comes out, you know, they,  
23 they had that magic language in there that only, only  
24 lawyers understand where they're saying well, he can't be  
25 excluded. well, that means it's him and, you know, I was

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 hoping maybe the jury would pick up on that, that -- my  
2 recollection is that Mr. Gamble didn't quite drive home that  
3 point during his examination with the DNA experts.

4 So, you know, you kind of hope -- some of it is you,  
5 you kind of expect -- you, you, you, you expect certain  
6 things to occur so that, you know -- but if they don't  
7 occur, you're prepared for that too. But, you know, I  
8 wasn't -- I, I -- there was a -- Mr. Forde, at one point,  
9 wrote me and said he wanted the, the sweatshirt retested and  
10 I said well, I don't -- you know, we're not gonna retest it  
11 because it's still gonna come back with your DNA and then  
12 we've basically through -- you know, preserved an issue  
13 with -- we've, we've, we've solidified a piece of evidence  
14 that, maybe at trial, they'll screw up with and, and that  
15 was my philosophy on this.

16 Q. And I believe in your letter dated March 30<sup>th</sup>, 2010,  
17 you said something along those lines, that you felt there  
18 was no need to retest the DNA evidence.

19 Do you still feel that same way?

20 A. Yes. well, that was his sweatshirt. I mean I, I -- it  
21 was his DNA and then it was his sweatshirt. He told me it  
22 was his sweatshirt. So, I knew it was his. I mean, you  
23 know, I told -- you know, I'm not gonna retest something I  
24 know is gonna come back to him again.

25 Q. And, prior to trial, you -- there was a conversation

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 back and forth about whether to file a motion for a speedy  
2 trial.

3 Do you remember, do you remember who actually drafted  
4 the motion for a speedy trial that was filed in this case?

5 A. I did.

6 Q. would you -- be your practice ever to just file a  
7 motion that your client has drafted?

8 A. No. And I, and I think my letter show that I'm --  
9 sometimes don't file them when they ask me to. So, I filed  
10 the speedy trial motion when it was very clear to me that,  
11 number one, we weren't -- there was, there was some -- all  
12 right. We got discovery in January of 2009 but it wasn't  
13 complete. That was number one. And, number two, it just  
14 seemed to me that things were kind of -- they were -- you  
15 know, things were just kind of dragging and, at that point,  
16 we had just had a second bond hearing, which was denied and  
17 it seemed to me that, you know, it was time.

18 I was prepared for trial cause, at that time, it was  
19 around the time it was very clear to me we were gonna go to  
20 trial. I was prepared and, you know, it was time to start  
21 putting some pressure on the solicitor's office to try to  
22 get us to go there.

23 Q. And do you have conversations regarding your decision  
24 to file a motion for a speedy trial and why you might have  
25 waited as long as you did?

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 A. Yeah. I mean he was aware why I was waiting and that  
2 was because he kept on -- well, we were still kind of  
3 focused on the between type option for lack of a better word  
4 that remained viable. I mean -- and I don't, I don't -- I,  
5 I would, I would -- I guess I would use -- I would  
6 characterize Mr. Forde's attitude during that timeframe as  
7 kind of coy. I mean sometimes he would even talk about the  
8 pleas, sometimes it was a trial, something -- you know, kind  
9 of the together but it, it wasn't always consistent.

10 So as long as the option for the plea, in my mind, it  
11 seemed to be viable. That was one aspect of the, of the  
12 speedy trial.

13 The second thing was I wasn't ready. I mean we -- you  
14 know, this is eight, eight armed robberies. There's a,  
15 there's a bunch of discovery I got to go through. It, it,  
16 it was -- it would -- it was prejudicial to us to rush this  
17 case to trial when I wouldn't have had time to really  
18 prepare adequately. So there was no benefit to the defense  
19 to hurry up with this case before we were ready and I  
20 communicated that to him.

21 Q. And do you believe Mr. Forde understood your thinking  
22 regarding the motion for a speedy trial?

23 A. Yes.

24 Q. Ultimately he may have disagreed but he, at least,  
25 understood your thought process?

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 A. Oh, he understood it. I, I -- and I did simply  
2 disagree.

3 Q. And prior to the conclusion of his trial, there was a  
4 issue where you moved to have these charges dismissed.

5 Do you remember exactly what led to that?

6 A. Oh, yeah. It's -- it was one of the more unique things  
7 that have ever, ever happened. We were in, in a recess and  
8 I was taking my notes, and, you know, a lot of them were  
9 based okay, look, these are areas where there's a problem  
10 and I, I had probably four or five different things in them  
11 and I -- we were either going in chambers or something and  
12 there, there was a recess and I turned my tablet over.

13 Excuse me.

14 Well then, the next day, Mr. Gamble, this is my  
15 recollection, okay, and they're parts of it that are very  
16 clear and parts of it that are maybe a little fuzzy. But  
17 the next day, Mr. Gamble and his co-counsel, who was  
18 Mr. Griffin, who's now Judge Griffin, came to me and said  
19 look, we got an issue. Billy Lyons, who was the detective,  
20 was instructed to look at your notes and then Madison told  
21 him -- I'm sorry. Mr. Gamble told me.

22 I wondered why they were coming up to me asking me to  
23 recall witnesses, and, and -- and I, I said this makes --  
24 you know, this is why. It was because they -- and I, and I  
25 had asked them why but I wondered why they were coming up

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 and I told them no, I'm not recalling any witnesses. We're  
2 done cause they -- I believe they had just rested.

3 And -- well then we went into our chambers and then  
4 Kelly Jackson, the solicitor then, she was still the  
5 solicitor then, walked in and the police officers, and I  
6 believe it was Ms. Raven and Ms. Coolick, went to -- told  
7 Mr. Jackson, and, again, this is what Mr. Jackson I believe  
8 testified to at the hearing, said we want you to tell  
9 Mr. Gamble to recall this witness and he said why, and they  
10 said well, we looked at, at Tim Murphy's notes and he's made  
11 this big point out of the discrepancies with these  
12 witnesses.

13 So then he went to the judge. He went to Judge James  
14 to begin with.

15 So, when Mr. -- what Mr. Forde testifies to regarding  
16 prosecutorial misconduct is not true. They did the right  
17 thing and they went directly to the judge and that's why we  
18 had that hearing. So -- and, and at that hearing, like  
19 manna from heaven, it dawned on me look, this is, this is  
20 pretty serious. I've never been -- you know, I've never had  
21 a situation where police officers are looking at a defense  
22 attorney's notes that are, that are on the defense table.

23 So, I moved for a dismissing -- dismissal of the  
24 charge, and the dismissal, I didn't want a, I didn't want a  
25 mistrial and I think that's on the record too cause I

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 actually thought this might work, if we continue down the  
2 trial, this is an issue that's viable. Unlike the ones  
3 we've lost, this one actually has some merit to it and  
4 that's what the -- that's what the, the hearing was.

5 And, after, after that hearing, then Mr. Gamble  
6 reapproached me and said look, I want you to know the  
7 concurrent offer is still on the table if your client wants  
8 to take it and I can tell -- and I mean and, and Mr. Forde  
9 accurately portrays one aspect of our pre-plea dialogue and  
10 the only aspect of that pre-plea dialogue and that is that I  
11 did tell him look, if you are going to plead, now's the time  
12 because I can tell Judge James was livid and he, he was --  
13 he wanted to send -- I can tell. I know Judge James  
14 personally and I also know him professionally on the bench  
15 and I can tell he was livid and he wanted to send a message  
16 to those officers.

17 And I thought well, it's, it's -- so -- and then -- and  
18 the second thing is look, when a, when a solicitor comes up  
19 to you and says look, I want you to know this is still on  
20 the table, well, I have an ethical obligation to convey that  
21 to my client. I'm not forcing him to do anything. So, I  
22 conveyed to him and then we began our discussion on the  
23 plea.

24 Q. So you have to backtrack re -- or make sure I have a  
25 few things right on this.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1           The solicitor actually reported to you that the police  
2 had or the investigator had looked at your notepad, correct?

3 A.    Yes, me and the judge.

4 Q.    And then you moved for a dismissal of the charges with  
5 prejudice, correct?

6 A.    Yes.

7 Q.    And that was ultimately denied?

8 A.    Yes.

9 Q.    And then the solicitor reintroduced the concurrent plea  
10 offer to you which you then communicated to Mr. Forde?

11 A.    Yes.

12 Q.    Now, regarding the plea conversation that you had on  
13 the 15<sup>th</sup>, did you look -- we'll just briefly touch -- did  
14 you raise your voice or scream at him as Mr. Forde  
15 indicated?

16 A.    I speak to him like I'm speaking now. No, I mean I've  
17 had people tell me I come across pretty strong but I, I  
18 never raised my voice. I mean I, I -- again, I try -- I --  
19 I'm a pro -- I try to be a professional guy. I -- and in my  
20 relationship with clients, I am. I never raise my voice.

21           Now he is correct. It was very emotional. What I told  
22 him was this. Look -- I said look. It's very clear to me  
23 that the idea of a trial was probably a little different  
24 than the reality of a trial for Mr. Forde.

25           Okay. And he -- you know, and I went to him and I said

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 look, if you're, if they're gonna plea, now's the time. But  
2 we have a motion on a dismissal. We talked about that. I  
3 said I've done appellate work, and if you're gonna defer to  
4 the judge, okay, there's gonna be a deference to him, and  
5 you're facing seven more armed robberies. And, you know,  
6 you -- you're probably gonna get notice for life if, you  
7 know, they go down this road.

8 So, now's the -- you know, like I said, now's the time  
9 to plea if you want to and he said well, can I, can I  
10 talk -- you know, his family was there. I believe he talked  
11 to them. I'm not, I'm not positive. He was, he was -- he  
12 started to cry and, you know, we worked through that and,  
13 and then he said -- it was like the dam broke. It -- you  
14 know, he, he said okay, I'll, I'll, I'll plead and then I  
15 went over to -- the questions with him.

16 I adamantly deny that I ever raised my voice. I, I  
17 don't -- I did not raise my voice. It was not a coercive  
18 conversation at all. I, I don't deny, nor would I, that I  
19 advised him to take the deal -- to, to plea. I think that  
20 it was the right call. I believe it's the right call today.  
21 Had he listened to me eight months before, he would of got a  
22 17 year deal.

23 So I, I -- I'm not gonna, I'm not gonna back away from  
24 that. I believe that was the right advice. However, I also  
25 understand it's his choice not to follow that advice and

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 that's okay. I mean that -- you know, you know, I, I like  
2 doing trials. So, it, it, it doesn't bother me when clients  
3 don't follow my advice. I don't take that personally, you  
4 know.

5 So the idea that I just want to dissolve my radar  
6 (indiscernible) is ignorant. I mean other than -- at that  
7 time, it's what I did. So -- and I, you know, it, it --  
8 that was fine. It was his choice to make.

9 I, I also -- for him to say I ever said this is just a  
10 formality, that's a lie. I never said that. I have never  
11 said that to any client of mine.

12 Now, I do go over the questions with him but I would of  
13 never -- I never say that. Never because if -- I don't want  
14 a client, halfway through a plea agreement, saying, you know  
15 what, I don't understand or whatever. That -- that's never  
16 happened to me and, and I'm very careful on, you know, ex --  
17 explaining to my clients and explaining to Mr. Forde at the  
18 time that this is his decision. It's his decision to make  
19 and he was ready to make that decision at that time and  
20 there's no doubt in my mind.

21 It was, it was somewhat emotional. He was grateful to  
22 me for the work I did. He was grateful and it's, it's, you  
23 know -- you know, as far as the appeal process, which is the  
24 other thing we talked about, I explain to all my clients  
25 what their appellate rights are.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1           In regard to this case, I explained to him very  
2 clearly, during a plea, pre-plea conversation about our  
3 motions and that we would lose them. But I told him, and I  
4 recall very specifically saying this, you know, those  
5 suppression motions are the kind of motions you got to win  
6 at trial. I don't think we're gonna win them on appeal and  
7 you know that and he agreed.

8           All right. So, we had that kind of conversation. I  
9 also told him he had the right to appeal this and I advised  
10 him you don't want to appeal this depending on the sentence.

11           So it was kind of like let's wait and see what the  
12 sentence is and then we'll, you know, maybe we can reengage.

13           Okay. But there was no question that his decision to  
14 plea at that time was his decision to plead. I, I did not  
15 coerce him. I did not force him in any way to plead. I did  
16 not tell him or it was a -- that these words were just a  
17 formality and he clearly understood.

18           Like I said before, he's the most intelligent client  
19 I've ever had. He knew exactly what he was doing and it,  
20 and it seems to me rather odd that he said well, I'm just  
21 following your advice when, up to that day, he wasn't  
22 following my advice, which was okay. That's okay.

23           He wasn't follow -- that -- you know, it's his  
24 decision -- it was his decision to go to trial. It was also  
25 his decision to plead on that date given those

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 circumstances. I think the 22 year sentence did reflect  
2 Judge -- Justice James now, Judge James then, irritation  
3 with the police because the armed robberies and a 22 year  
4 deal -- and a 22 year sentence I think is rather generous.

5 Q. To -- just to briefly clarify, he did have an  
6 opportunity to -- did he have an opportunity to talk with  
7 his family prior to pleading guilty on the 15<sup>th</sup>?

8 A. I -- he had that opportunity. I can't recall whether  
9 or not he talked to them. I believe he did but I -- I'm not  
10 sure.

11 Q. And if he'd chosen, at that point, to not plead guilty,  
12 you were prepared to go through with the conclusion of his  
13 trial?

14 A. Yes.

15 Q. And ultimately whose decision was it to plead guilty in  
16 this case?

17 A. His.

18 Q. There was no threat, force, or coercion that you put on  
19 him to get him to plead guilty?

20 A. No. None.

21 Q. And do you feel that pleading guilty in this case was  
22 in his best interest?

23 A. I believe it was in his best, best interest then, yes.

24 Q. And---

25 A. And I think he got a benefit for pleading guilty.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 Q. And you discussed all of his constitutional rights with  
2 him prior to pleading guilty and prior to him going before  
3 Judge James?

4 A. Yes, it's my practice to go through the -- in the  
5 military we call it a care inquiry. But it's the, the, the  
6 questions that the judge asks. We do go over those like in  
7 detail so that he's prepared and he understands what's  
8 coming.

9 Q. And that would have included you discussing his right  
10 to appeal?

11 A. Yes.

12 Q. And he understood all those discussions?

13 A. No doubt in my mind he did.

14 Q. And following his guilty plea, did he ever ask you to  
15 file an appeal on his behalf?

16 A. No, I got one letter from him asking -- Richland County  
17 hadn't dismissed their case and he wrote to me asking me to  
18 follow-up on that. I did. I engaged with Mr. Gamble.  
19 Mr. Gamble contacted the Solicitor's Office in Richland  
20 County and they dismissed the case.

21 Q. And if he would of asked you to file a notice of appeal  
22 on his behalf, would you have been happy to?

23 A. Yes, I would of.

24 Q. No further questions.

25 A. I wouldn't of been happy to but I would of.

Timothy Murphy - Direct examination  
By Mr. Neubauer

1 Q. Yes. Yes, sir.

2 No further questions at this point.

3 THE COURT: All right. Thank you.

4 All right. Cross-examination.

5 MS. MCMAHAN: Mr. Forde is holding his hand up.

6 Let me---

7 THE COURT: Okay.

8 MS. MCMAHAN: Let me ask my questions first and then

9 see if you still need to ask me.

10 okay?

11 (WHEREUPON, there was no audible response.)

12 MS. MCMAHAN: Okay.

13 CROSS-EXAMINATION

14 BY MS. MCMAHAN:

15 Q. When you said that he did not want you to file a notice  
16 of appeal on his behalf, would you, would you have had an  
17 opportunity to speak to him immediately thereafter or within  
18 the next day or two to find out if he wanted a direct appeal  
19 since it has to be filed so quickly?

20 A. I -- yeah, I would of -- well, I spoke to him after the  
21 plea. That -- that's when he thanked me.

22 Q. Okay. And then do you know how long -- and you may not  
23 know this question.

24 But do you know how long or quickly it takes from  
25 Sumter/Lee to get to SCDC once you're sentenced?

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 A. You know, it depends. You know, at that time, it could  
2 of been -- it was a Friday. At that time it could of been  
3 that weekend or it could of been a week. I mean I, I don't  
4 know. I, I, I, I, I want to also say I, I advised him after  
5 the sentence -- I do recall this now. I advised him after  
6 the sentence what -- I don't think this is something you  
7 want to appeal because we had talked about let's wait to see  
8 what the sentence is.

9 So, I did advise him I don't think this -- so we did  
10 have a conversation about the appeal.

11 Okay. I advised him not to appeal.

12 Q. Okay.

13 A. All right. And he accepted that cause he never  
14 contacted me after that.

15 Q. Okay. And just going back to the statements that Mr.  
16 Forde gave to the officers. You had indicated that the  
17 statement given to the officer would of come in with the  
18 notes or -- excuse me.

19 Were the notes coming in as the statements since  
20 Mr. Forde didn't write it?

21 A. No, the, the, the statements were the -- were his --  
22 was his oral -- was his oral statements to Detective  
23 Coolick. That's the evidence. I, I don't, I don't know  
24 what this notes things is. I don't, I don't have a  
25 recollection of that specifically. I think she's referring

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 to her notes at certain points and that, that may have been  
2 what I objected to because you're suppose to use the past  
3 recollection, present recollection, refresh kind of thing.

4 I also am a bit more liberal when it comes to testimony  
5 at a hearing. I don't, I don't object to things expressly  
6 at suppression hearings. So, I don't -- I'm not exactly --  
7 I don't, I don't have a recollection of notes clearly.

8 what I do recall is, is that what the -- what she was  
9 testifying to were his oral statements to her and, you know,  
10 I've raised -- she testified at the trial but she had also  
11 testified at the suppression hearing before the trial on, on  
12 the, on the statements.

13 Q. And the suppression hearing was a Denno hearing to  
14 suppress his statements---

15 A. Yeah.

16 Q. ---that he had given?

17 A. Yes.

18 Q. Okay.

19 A. Yes. And because -- what had happened was it, you  
20 know, she went there to provide him with additional warrants  
21 and he asked to talk to her. I mean he start -- he started  
22 asking her questions and she said well -- I -- you know, I  
23 don't even think it was Ms. Cullick's case and he said well,  
24 I want to -- can I talk to you about this case. I mean can  
25 I ask you questions.

Timothy Murphy - Cross-examination  
By Ms. McMahan

1           She said well, I, I don't get re -- and he wasn't  
2 represented yet. She says well, I didn't know. I, I --  
3 initially I think she testified she was uncertain and then  
4 she went and got her notebook and came back and said do you  
5 still want to talk to me and she -- and he said yes. So  
6 then he started talking to her and at -- that should be in  
7 the suppression, the Denno hearing, all that, all that  
8 information and then the judge concluded it was a voluntary  
9 statement and, and it would -- it came in.

10 Q. And I'm sort of jumping around here. Just trying to  
11 hit the trial -- so the, the letters that were attached to  
12 that last PCR application, are those true and accurate  
13 examples of letters that you would of written him?

14 A. They're all letters that I wrote to him, yes.

15 Q. And then did you---

16 A. They're not all the letters I wrote to him but those  
17 are the letters -- those are some of the letters I wrote to  
18 him.

19           What I -- I, I don't know how many letters there are,  
20 what, eight, nine, something like that?

21 Q. And those are the letters that you wrote?

22 A. Yeah, I wrote more. I wrote like 13.

23 Q. Okay. And did you -- so earlier Mr. Forde was  
24 addressing the issues of the arrest warrant and affidavit.

25           Did you see any issues with that arrest warrant and

Timothy Murphy - Cross-examination  
By MS. McMahan

1 affidavit or were those issues cured in other ways?

2 A. I, I -- you know, I, I don't have a recollection of  
3 that. I have a recollection of the arrests being a problem  
4 that I raised. I believe those warrants and there wasn't a  
5 change in -- there was an issue about the identity of the  
6 individual who committed the Dollar General but the -- I  
7 mean he was arrested on the spot. I mean the probable cause  
8 to arrest occurred when he was in the -- at the car based on  
9 the APB. That's when, that's when he was arrested and the  
10 warrants were kind of after the facts kind of things.

11 Q. So, the issue -- the incident had occurred. They had  
12 gotten it multiple -- APB out on the guys in the car and  
13 then went and got the arrest warrant once they were able to  
14 locate them or a simultaneous---

15 A. No, they arrested him -- there was an APB. He was  
16 arrested and then there, then there was -- I think the  
17 warrants were -- they got the warrant -- the warrants  
18 written and that was -- the, the gravamen of the issue was,  
19 was the probable cause to arrest him at the time he was  
20 stopped.

21 Okay. That's my recollection of the issue.

22 Q. And, and did you---

23 A. The warrants were kind of an after the fact  
24 documentation of what happens as far as I recall.

25 Q. And, and did you believe there was probable cause based

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 on your knowledge of the case?

2 A. Oh yeah.

3 Q. And---

4 A. We had, we had conversations about what probable cause  
5 meant. We had a long -- we had long conversations. We  
6 probably had two or three meetings about probable cause and  
7 I mean cause I, I think, I guess from reading Black's Law  
8 Dictionary and, and his own education, I tried to educate  
9 him that probable cause is -- isn't a super high standard to  
10 meet when it comes to an arrest and we had, we had long  
11 dialogues about that before the -- before, you know, I  
12 decided to file the motion.

13 Q. So you had conversations with him that it was more  
14 likely than not that he had committed this at the time he  
15 was arrested?

16 A. I'm sorry?

17 Q. So you had conversations with him then that it was more  
18 likely than not that he's the one that committed this crime  
19 at the time?

20 A. Oh, he told me he committed them, yeah.

21 Q. And---

22 A. There was -- let me, let me be clear about this. There  
23 was never an issue about his guilt. That's why he couldn't  
24 take the stand.

25 Q. Okay.

Timothy Murphy - Cross-examination  
By MS. McMahan

1 A. He admitted -- at the first meeting we had he admitted  
2 he did it. I mean he, he admitted all these armed robberies  
3 he committed. He, he would not plea on one of the Sumter  
4 armed robberies and that was the one that was dismissed.

5 Q. And so I -- did that change the way you would of  
6 represented him given that he told you that he committed all  
7 these things?

8 A. As far as putting him on the stand it would.

9 Q. Okay. What about like---

10 A. He couldn't testify.

11 Q. Yeah.

12 Okay.

13 A. So this is what he -- he can testify to things like how  
14 he (indiscernible) in regard to the interview, you know, in  
15 pretrial motions type things. But he couldn't testify to  
16 the substance cause he, he, he admitted he did it.

17 Q. And --.

18 A. All of them.

19 Q. When you're discussing all these cases with him and  
20 they're about eight pending I believe you had testified  
21 earlier, did you have a conversation with him and explain to  
22 him that he was convicted of one, and convicted of another,  
23 you know, he could be facing LWOP --

24 A. Yes.

25 Q. -- on the sheer number of convictions he could get?

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 A. Yep. Well, that was -- yeah, I mean that was my -- I  
2 mean that's a huge concern obviously. That's the -- that  
3 was my primary concern about the whole, the whole -- his  
4 decision to want to go to trial and it was also part of our  
5 conversations about these -- about the suppression motions  
6 cause I told him, I said, we lose this in one trial, we're  
7 probable gonna -- and that's it. I mean we've lost it  
8 because we're not gonna be able to raise it again.

9 Q. And---

10 A. So it becomes the law of the case.

11 Q. Yeah. And you indicated earlier there was DNA involved  
12 in the case that was being tried.

13 Was there DNA in all the other cases or just in that  
14 one?

15 A. There was DNA in another case. But I can't recall the  
16 result. I know they did DNA tests on a lot of things. But  
17 the -- you, you know, at some point when they told me it was  
18 gonna be the Food Lion case, I just started focusing on  
19 that. I mean and that -- the other ones I'd worry about  
20 later.

21 Q. So, when you were then discussing later on after the  
22 motions hearings that -- all that stuff about him pleading  
23 guilty, and ultimately I guess he agreed to plead guilty  
24 because we have a record of it, what, what kind of  
25 conversation were you having with him about what he was

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 gonna have to say to the judge and, and what he was gonna be  
2 questioned about?

3 A. I just went over the questions with him. I said the  
4 judge is gonna, you know, gonna ask you, you know, who, who  
5 you are. Gonna put you under oath. He's gonna read your  
6 rights to you.

7 You have a right to remain silent. If you give up that  
8 right to remain silent -- you know, basically I almost got  
9 it memorized. Well, not so much anymore cause I haven't  
10 done it in a while. But I just went through the questions.  
11 I know that I also do not suggest answers to people.

12 Q. Okay. So the answers -- you don't tell him that he has  
13 to say yes or no or otherwise that these are the  
14 questions---

15 A. No.

16 Q. ---that the judge is gonna ask?

17 A. Yep.

18 Q. And have you ever had a client stop you in the middle  
19 of a guilty plea to ask you any questions at all?

20 A. I sure have.

21 Q. Have you ever had to pause a guilty plea in order to  
22 answer a client's questions?

23 A. I'm sorry?

24 Q. Have you ever had to pause a guilty plea in order to  
25 answer a client's questions---

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 A. Yes, ma'am. Yes.

2 Q. ---about what is going on?

3 Did that happen in this instance?

4 A. Maybe. I don't recall.

5 Q. And ultimately you said it was his decision -- hold on,  
6 Mr. Forde.

7 Ultimately you just said his decision---

8 (WHEREUPON, Mr. Forde was speaking and it could not be  
9 understood.)

10 MR. NEUBAUER: (Indiscernible) object, Your Honor. He  
11 can not testify in the middle of a -- other witnesses  
12 testimony.

13 THE COURT: Yeah, just hold on, sir.

14 MR. FORDE: No, I want to, I want to speak to my lawyer  
15 cause I don't agree, I don't agree---

16 MR. NEUBAUER: Objection. He can't have an  
17 off-the-record conversation in the middle of a  
18 cross-examination of a separate witness.

19 THE COURT: well, hold on, hold on, hold on, hold on.

20 Ms. McMahan, make a note at this point where you are,  
21 and before you conclude your cross-examination, you-all  
22 should have an opportunity to chat so that you can  
23 communicate with your client about any other areas that he  
24 needs you to cross-examine on. Make a note there.

25 Now -- because I'm not gonna stop every time he has a

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 concern and I don't think that would necessarily occur at  
2 trial.

3 Now, Mr. Forde, if you are concerned about an area,  
4 you -- do you -- you don't have a, a, a piece of paper or a  
5 writing implement, do you?

6 MR. FORDE: Ma'am, I do have my notes. However, when,  
7 when---

8 THE COURT: Hold on, hold on -- don't. Just answer my  
9 questions.

10 Do you have a pen?

11 MR. FORDE: Yes, ma'am.

12 THE COURT: Do you have a piece of paper?

13 MR. FORDE: Yes, ma'am.

14 THE COURT: Okay. Make a note. When you need to --  
15 about the things you want to talk to Mr. -- Ms. McMahan  
16 about, and then before she conclude her cross-examination,  
17 y'all have a chance to talk.

18 okay?

19 MR. FORDE: I -- Your Honor?

20 Your Honor, I agree with what -- if it's a note itself.  
21 But it's -- my issue is not with a person that I need to ask  
22 (indiscernible) asking -- (indiscernible) all she's asking.  
23 That's my issues I wanted to speak to her about---

24 THE COURT: Exactly.

25 MR. FORDE: ---before she continues.

Timothy Murphy - Cross-examination  
By MS. McMahan

1 THE COURT: You'll be able to, you'll be able to chat  
2 with her about that before she concludes her cross.

3 Okay. So, if she needs to go back and redo, that will  
4 be fine.

5 Okay. Yes, ma'am.

6 Q. Mr. Murphy, so you said you never have discussions and  
7 you tell them what to say.

8 Do you ever indicate to your clients that, you know, if  
9 you don't say you're waiving these rights then you kind of  
10 go back to a trial?

11 A. I might of. I -- yeah, I mean I, I go over the  
12 questions and sometimes we have those conversations  
13 depending on the intelligence of the, the client.

14 Q. Okay. Did -- and you had indicated Mr. Forde was very  
15 intelligent through this whole process involved and did he  
16 ever express any sort of indication that he did not  
17 understand the process as it was going on?

18 A. Not to me, no. No -- and it -- as I testified earlier,  
19 it was like the dam broke. I mean our conversation was --  
20 there's no doubt in my mind he was ready to plead. So, I  
21 know -- I mean we didn't -- his characterization of that  
22 conversation is -- is -- tells me he really didn't want to  
23 plea and all that, that's just not accurate. That's not,  
24 that's not accurate. That simply is not accurate.

25 Q. So, based on Mr. Forde's behavior at the time, you did

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 not feel like he was being forced into the situation?

2 A. No, he wasn't. No.

3 Q. And in some of those letters that -- back between  
4 yourself and Mr. Forde, it looks like he was a little bit  
5 frustrated with some of the discovery I guess or lack  
6 thereof and you respond to him basically saying you've given  
7 him everything.

8 Do you, do you recall what his frustration was about  
9 it?

10 A. He -- my recollection -- and I, I, I -- the letter that  
11 he wrote me must be in another file. I didn't, I didn't get  
12 it but he wrote he accusing me of withholding discovery and  
13 I told him that I'd given him everything I had. I mean  
14 he -- it was a very atypical letter from him because of --  
15 as clients go, he was pretty respectful and -- but he  
16 accused me of withholding discovery and he was gonna write  
17 the bar and -- and so I wrote him back.

18 I mean he had everything I had and, and then we met  
19 afterwards. I got whatever the issue was. In discovery, I  
20 had -- I got back the discovery and then there was DNA  
21 beginning on the sweatshirt was not given to me at the same  
22 time cause it was at SLED and it took a little while longer.

23 So, I mean maybe that's what he was concerned about.

24 I, I don't really recall but I -- he got everything I had.

25 Q. Okay. And at, and at some point I guess you respond to

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 him about him accusing you of being dishonest saying  
2 (indiscernible)?

3 A. Yeah, it was all in the letter. I just, I just -- it  
4 shocked me really cause, up to that point, we had seemed to  
5 have a pretty good relationship, and, even then, you know,  
6 that we were able to (indiscernible).

7 Q. And so the discovery you had, was it for all eight  
8 cases or just that particular Sumter case that you were  
9 about to try?

10 A. No, I had -- I -- you know, that's a question that I  
11 can't recall. I mean I had -- I, I obviously had more than  
12 just the subject -- more than the Food Lion case cause I  
13 went to Young's. But I don't know if I had full discovery  
14 for Young's yet or the other cases. I -- cause when I got,  
15 when I got my file in -- you know, I don't, I don't keep the  
16 files. The files, we turn it into the Public Defender  
17 office. Then they scan them and they put them in defender  
18 data and they, they sit there.

19 And so when I asked them to send me the file in this  
20 case, that's what they sent me in regard to this particular  
21 case file.

22 Q. Yeah.

23 A. So there may be other -- some other discovery there.  
24 what I recall is I had this case and maybe one or two others  
25 where I did -- and I clearly had information about all of

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 them because they went over all of, all of the cases in the  
2 preliminary hearing and Mr. Forde and I also discussed all  
3 of the armed robberies in my first couple of interviews with  
4 him. So he gave me additional information about each one,  
5 which ones he had committed by himself, his relationship  
6 with the other two codefendants. He knew them.

7 we talked about -- where -- when the Richland County  
8 issue came up, I went to him and said look, are you -- I  
9 didn't have the Richland County discovery and I said, you  
10 know, they're saying -- Richland County's saying you  
11 committed this one, the -- and did you and he said yeah, I  
12 did. And then I asked him about the North Carolina case and  
13 he said no, I did not do that. So I took him at his word.

14 Q. And were all the charges bound over at the prelim -- at  
15 the prelims?

16 A. Oh, yeah.

17 MS. MCMAHAN: Okay. Court's indulgence briefly, Your  
18 Honor.

19 THE COURT: All right.

20 (Pause.)

21 MS. MCMAHAN: I believe I, I need to speak to Mr.  
22 Forde.

23 THE COURT: You do. You do.

24 Now, do we have a phone number that Ms. McMahan can  
25 call?

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 MR. NEUBAUER: I reached out to my contact at Evans or  
2 who I've been contacting since I made contact is not there.  
3 I've not received a response. I don't know -- I think  
4 Mr. Forde's indicating that he's willing to go out into the  
5 hall to call somebody and he -- without, without it being an  
6 issue for him, that is my main concern.

7 MS. MCMAHAN: Oh, there's a phone right there.

8 MR. NEUBAUER: There's a phone right there?

9 MS. MCMAHAN: Okay. Mr. Forde---

10 MR. FORDE: There's one that they, that they all use.  
11 Can you call?

12 THE COURT: Perfect. All right. So what---

13 MS. MCMAHAN: Let me give you the number to call me at,  
14 Mr. Forde.

15 Do you, do you have a pencil?

16 MR. FORDE: I can't call. But I can't call. But they  
17 can give you the number to call. (Indiscernible).

18 MS. MCMAHAN: Okay. That works.

19 (Pause.)

20 MR. FORDE: She said that you have to call to the  
21 east -- to the (indiscernible) and they'll transfer to this  
22 number.

23 MS. MCMAHAN: Okay. Do I just tell them you're in the  
24 conference room?

25 MR. FORDE: Yes, ma'am, that's -- I guess you just say

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 who you are.

2 THE COURT: There's one conference room or it's the  
3 conference room where the hearing's are being held?

4 MR. FORDE: Yes, this is the conference room that the  
5 hearings. But there's, there's another conference room but  
6 there's -- the phone is, is -- it's the phone---

7 THE COURT: Okay.

8 MR. FORDE: ---they put, they put the inmates in to  
9 use.

10 MS. MCMAHAN: I'm gonna mute myself real fast while I  
11 try to call you.

12 okay?

13 MR. FORDE: Okay.

14 THE COURT: And I want you to mute -- can you mute  
15 yourself or do, do they have to come mute you, Mr. Forde?

16 MR. FORDE: They will have to do it cause I don't want  
17 to touch anything and mess it up.

18 THE COURT: Oh, I don't blame you.

19 Can you go get -- tell and tell -- come on, mute you,  
20 and---

21 MR. FORDE: Yes, ma'am.

22 THE COURT: Okay. Go ahead and get them. They'll come  
23 mute you.

24 (Pause.)

25 MS. MCMAHAN: I'm trying, y'all.

Timothy Murphy - Cross-examination  
By MS. McMahan

1 THE COURT: Great. No problem. I just want to make  
2 sure that Mr., Mr. Forde is muted. I think he's muted also.  
3 Yeah, he's muted.

4 MR. NEUBAUER: I can (indiscernible). I apologize. I  
5 (indiscernible).

6 (Pause.)

7 THE COURT: I'm gonna drop off cause I don't want to be  
8 able to see or hear. So --.

9 (Pause.)

10 MR. NEUBAUER: I think we're ready. We're ready.

11 (Pause.)

12 THE COURT: Are, are we ready?

13 Okay.

14 MS. MCMAHAN: Ready, judge.

15 THE COURT: Thank you. You may proceed then. Thanks  
16 so much.

17 CONTINUED CROSS-EXAMINATION

18 BY MS. MCMAHAN:

19 Q. Just a last few questions, Mr.---

20 THE COURT: Sure. Of course, no problem.

21 Q. So, at some point I guess you discussed how the bottle  
22 and clothes were -- just sort of go to the weight of the  
23 evidence.

24 Is that the whole reason that there was the request to  
25 dismiss was the -- based on that, was the -- were the issues

Timothy Murphy - Cross-examination  
By Ms. McMahan

1 that the officers, when they were reading your notes, were,  
2 were they related to the bottles and the clothes?

3 A. No, I don't, I don't recall.

4 Q. Okay. And then do only one or two of the actual cases  
5 have a description of someone with an accent but do you  
6 recall that or not?

7 A. My recollection is most of them did.

8 Q. Do you recall if the---

9 A. I don't remember the -- I don't remember the exact  
10 number.

11 Q. Do you recall when---

12 A. What I recall is that, as a result of the arrest and  
13 interviewing Mr. Forde by the police, they put two and two  
14 together because there were a series of armed robberies that  
15 involved an individual with what was called the Jamaican  
16 accent. And when they sat -- when they ultimately sat down,  
17 that's why he got all those warrants for all those armed  
18 robberies is those were the ones they identified with that  
19 individual. And then, when they -- when he was interviewed,  
20 he admitted to all of those armed robberies and he also  
21 admitted them to me.

22 Q. And do you recall if the one that was on trial of that  
23 particular week was that one that -- where the witnesses  
24 that indicated somebody had a Jamaican, Jamaican accent or  
25 not or do you recall?

Timothy Murphy - Cross-examination  
By Ms. McMahan

- 1 A. I don't recall.
- 2 Q. And then regarding the affidavit and Detective Lyons,  
3 the vehicle description is sort of vague in that affidavit  
4 and Mr. Forde indicates he was picked up 10 hours later.  
5 Do you remember---
- 6 A. Yes.
- 7 Q. ---about that?
- 8 A. Yeah, I do recall that.
- 9 Q. Is that accurate, sir?  
10 Is that accurate, sir?
- 11 I'm sorry.
- 12 A. Ten hours?
- 13 Q. Yeah.
- 14 A. Yeah, I -- that -- that's probably correct. I  
15 believe -- what I remember, I was talking about that in the  
16 context of the suppression motion that he---
- 17 Q. Okay.
- 18 A. ---was asked some questions about whether or not the  
19 APB (indiscernible) and we talked about the probable cause,  
20 you know.
- 21 Q. And did you attach on that Detective Lyons I guess was  
22 perjuring himself in his testimony when, in his affidavit,  
23 he talks about how Mr. Forde fits the description and then,  
24 at the trial, he testified that he did not?
- 25 A. I don't believe Mr. Lyons ever willingly told a

Timothy Murphy - Cross-examination  
By MS. McMahan

1 falsehood on the stand. If there, if there was an  
2 inconsistency, which there -- apparently there was, I, I  
3 don't have a clear recollection of those hearings. They all  
4 kind of blur together with me.

5 I mean I know there were some -- I know there were  
6 suppression motion hearings and I know there's a trial and I  
7 have a vague recollection of, of, of the -- I don't remember  
8 the specifics in that. I haven't had access to the  
9 transcripts. So whatever the transcript say, that's what it  
10 was.

11 Q. Okay. Thank you.

12 Your Honor, I have nothing further at this time.

13 THE COURT: Cross -- recross.

14 MR. NEUBAUER: Redirect. Yes, Your Honor.

15 THE COURT: I mean redirect. I'm so sorry. Redirect.

16 MR. NEUBAUER: You're fine.

17 REDIRECT EXAMINATION

18 BY MR. NEUBAUER:

19 Q. So, Mr. Murphy, do you remember, during the motion to  
20 suppress hearing, challenging the description of the  
21 vehicle?

22 A. I believe I did because that was one of the, the -- I  
23 mean it was sent upwards. I mean now that I -- I knew it  
24 was a timeframe issue. I didn't know cause I think I  
25 testified earlier it was (indiscernible). I'll take that --

Timothy Murphy - Redirect examination  
By Mr. Neubauer

1 I knew that was an issue. But the description pretty much  
2 said -- I mean it was a dark vehicle, three black males, and  
3 I think in the judge's ruling he, he talked about the  
4 identity was sufficient for a followup by the police  
5 officers.

6 Q. And you, again, in the suppress, suppress hearing  
7 raised the issue with the possible staleness with him being  
8 found 10 hours after the followup APB was put out for him?

9 A. Yeah, I, I believe I raised that with the judge, yes.

10 Q. And ultimately that motion to suppress was denied by  
11 the Court, correct?

12 A. That's correct.

13 Q. And regarding his right to appeal, you testified that  
14 you told him that he probably should not appeal that -- did  
15 you make it clear that that was your opinion?

16 A. Yes.

17 Q. And---

18 A. I didn't tell him not to appeal. I -- what, what -- we  
19 had talked during our brief plea conversation. I went over  
20 all the rights with him, what the judge is gonna say. I'll  
21 go through the 10 day appeal. You know, you have 10 days to  
22 appeal this. I do that with every single client and the  
23 reason I do it is because one of the very first clients I  
24 had I didn't do it and I was, like today, it became, it  
25 became an issue.

Timothy Murphy - Redirect examination  
By Mr. Neubauer

1           So I was very careful, since then, of making sure I go  
2 through all the questions and we -- then I told him at that  
3 time, I said we, you know, because it was -- if the  
4 recommendation was concurrent, I believe the judge would go  
5 with that. I didn't know what timeframe it was gonna be  
6 but, you know, it was really an open plea.

7           I mean he could of got, you know, a bunch of stacked up  
8 time if, if -- you know, theoretically, and we discussed  
9 that too. But I said we'll see what -- you know, I  
10 probably -- basically I'll make my recommendation on the  
11 appeal after we find out what the sentence was. And then  
12 when he got 22, which I thought was pretty good, I  
13 suggested. I said look, this is something. I don't see a  
14 lot of merit in an appeal and I don't think you should  
15 appeal and he, you know, he seemed to understand that.

16 Q.   And he, in the 10 days following his guilty plea, never  
17 requested that you file a direct appeal?

18 A.   No. And had, had he, had he or had a member of his  
19 family contacted me, that's the one area I make exceptions  
20 for. Typically I don't -- I want to hear from the client,  
21 not a member of the family. But given the 10 day issue, if  
22 a member of a family contacts me and says hey, so and so  
23 wants to appeal, I -- I'll file the appeal cause I figure  
24 they can always withdraw it later. So --.

25 Q.   Thank you.

Timothy Murphy - Redirect examination  
By Mr. Neubauer

1 No further questions.

2 MS. MCMAHAN: I have one brief follow-up question, Your  
3 Honor?

4 THE COURT: Okay. I don't normally do the -- but,  
5 yeah, I do, do -- yeah, I got to get my procedure together.  
6 I think it's so focused, quite frankly, on thinking so hard  
7 about, about Mr. Forde. But yes, go right ahead.

8 Yes, ma'am.

9 RE CROSS EXAMINATION

10 BY MS. MCMAHAN:

11 Q. Just one brief last question, Mr. Murphy.

12 Did you have a discussion with Mr. Forde and just tell  
13 him that the prosecutorial misconduct issue was an  
14 appealable issue?

15 A. There was no prosecutorial misconduct.

16 MS. MCMAHAN: Nothing further.

17 THE COURT: Okay. Thank you. Thank you.

18 A. Well, but, but if I can clarify?

19 I did tell him the dismissal, the motion to dismiss was  
20 appealable, that I -- that was the one issue that, that --  
21 so I mean it wasn't prosecutorial misconduct. It was police  
22 misconduct to be clear and we did talk about that yes, that  
23 that was the only issue I thought was probative -- that,  
24 that was appealable.

25 But the judge in -- but that it was in the context of

Timothy Murphy - Recross examination  
By Ms. McMahan

1 but we did -- you know, that's been denied and there's gonna  
2 be a lot of deference given to what the judge says. So that  
3 was in that context of that whole conversation about all the  
4 issues and I would do each one indi -- individually. So, I,  
5 I hope that's a fuller answer.

6 Q. It is. Thank you.

7 I have nothing further, Your Honor.

8 THE COURT: All right. Thank you very much.

9 Okay. Yes, Mr. Neubauer, your---

10 MR. NEUBAUER: I---

11 THE COURT: ---next -- I mean Mr. Neubauer, your next  
12 witness please.

13 MR. NEUBAUER: The State would rest at this point. We  
14 have further no witnesses.

15 THE COURT: All right. Will there be any reply or  
16 rebuttal?

17 MS. McMAHAN: No, ma'am. No, Your Honor. None, Your  
18 Honor.

19 THE COURT: All right. Very well. I got -- I've got  
20 things to think about and I will ask -- counsel, I'll --  
21 typically what I prefer to do is to -- you know, I'll ask  
22 you.

23 Do y'all want to do -- each do a proposed order or do  
24 you want me to just to -- just notify them and ask one of  
25 you to do a proposed order based on my review?

1           what would y'all prefer?

2           MR. NEUBAUER: I would be fine of you just notifying  
3 the prevailing party and having them writing a proposed  
4 order.

5           MS. MCMAHAN: Judge, I would be okay with that provided  
6 I'm given some time to review that order and make sure---

7           THE COURT: Oh, dear gosh.

8           MS. MCMAHAN: ---the issues are addressed.

9           THE COURT: Of course. Yeah, absolutely. well, yeah.

10          MS. MCMAHAN: It's---

11          THE COURT: (Indiscernible).

12          MS. MCMAHAN: (Indiscernible) review it and---

13          THE COURT: But you're objecting your -- I gather  
14 you'll give the same to Mr. Neubauer, right?

15          MS. MCMAHAN: Yes.

16          THE COURT: Okay. Very well. Very, very well.

17          MS. MCMAHAN: All right. Thank you. (Indiscernible).

18          THE COURT: Thank you--all so very much. Everyone  
19 please be safe and be well. Thank you.

20          MR. NEUBAUER: Thank you, Judge.

21          MR. FORDE: All right.

22          THE COURT: Take care.

23

24           \* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

25

## C E R T I F I C A T E

1  
2  
3 I, Pamela E. Green, Official Court Reporter for the  
4 State of South Carolina, do hereby certify that the  
5 foregoing is a true, accurate and complete Transcript of  
6 Record of the proceedings had and evidence introduced in the  
7 trial of the captioned case, relative to appeal, in the  
8 Court of Common Pleas Nonjury for Sumter County, South  
9 Carolina, on the 29<sup>th</sup> day of November, 2021.

10 I do further certify that I am neither of kin, counsel  
11 nor interest to any party hereto.  
12  
13  
14

15 October 8<sup>th</sup>, 2022  
16  
17  
18

19 \_\_\_\_\_  
20 PAMELA E. GREEN, Court Reporter  
21  
22  
23  
24  
25

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER, ) FOR THE THIRD JUDICIAL CIRCUIT

RECORDED

2023 MAR 13 P 4:46

Jason Forde,  
S.C.D.C. No. 340328,

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Case No.: 2011-CP-43-00754

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief filed by Jason Forde (“Applicant”) on April 15, 2011, and amended on November 4, 2013; November 5, 2021; and November 15, 2021. The Court convened a virtual evidentiary hearing into the matter on November 19, 2021. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Michael J. Neubauer represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Timothy W. Murphy, Esquire, who represented Applicant at his trial and plea proceedings, also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original trial and plea transcripts, the records of the Sumter County Clerk of Court regarding the subject convictions, and the pleadings. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and, therefore, denies and dismisses this application with prejudice. The Court finds as follows:

**I. PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections. In a series

of similar crimes occurring during May 2008, several businesses in Sumter County were robbed at gunpoint by a black male suspect described as tall, skinny, and speaking with a Jamaican accent. Two clerks were able to pick Applicant out of a lineup, and another was able to narrow a six-person lineup to Applicant and one other individual. (Plea Tr. pp. 30–33). After Applicant was arrested, he gave a statement in which he confessed to robbing one of the businesses, a Food Lion. (Trial Tr. pp. 214–15).

Applicant was indicted at the February 2009 term of the Sumter County Grand Jury for seven counts of armed robbery (2009-GS-43-218, -242, -243, -244, -245, -246, and -248). He was represented by then-Assistant Public Defender Timothy W. Murphy (Counsel). On April 12–15, 2010, Applicant proceeded to a jury trial before the Honorable George C. James. On April 15, 2010, Applicant changed his plea to guilty. Judge James sentenced Applicant to twenty-two years imprisonment on each charge, all to run concurrently. Applicant did not appeal his convictions or sentences.

### **Present Application**

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

1. Ineffective Assistance of Counsel for failing to make a speedy trial motion for almost one year and then failing to make a motion to dismiss for failure to prosecute for another year after making the speedy trial motion;
2. Ineffective Assistance of Counsel for failing to object to the introduction of a new set of fingerprints taken over Applicant's refusal where the prosecution lied as to the reason for taking a new set of prints;
3. Ineffective Assistance of Counsel for advising Applicant to plea rather than requesting a mistrial after his motion to dismiss the charges was erroneously denied;
4. Ineffective Assistance of Counsel for failure to move to suppress the testimony of a witness who was not made known to the defense until the first day of trial or to object to inconsistencies between that witness's testimony and the incident report;
5. Ineffective Assistance of Counsel for failing to notice that the prosecution's admission of Applicant's statement was inadmissible hearsay because prior

- statements may only be used for impeachment and Applicant did not take the stand;
6. Ineffective Assistance of Counsel for failing to object to the introduction of fingerprint evidence taken from a soda bottle when the bottle itself was never presented;
  7. Ineffective Assistance of Counsel for failing to object to the admissibility of clothing where the prosecutor never established a connection between the clothing and the crime;
  8. Ineffective Assistance of Counsel relating to the legality of Applicant's arrest and search.

As his requested relief, Applicant seeks to have his conviction and sentence vacated and remanded for a new trial.

On November 4, 2013, through counsel, Applicant filed an amended post-conviction relief application raising the following claims:

1. Ineffective Assistance of Counsel pursuant to *Hill vs. Lockhart*.
2. Abuse of Discretion.
3. Belated Direct Appeal pursuant to *White vs. State*.
4. Judicial Errors.
5. Constitutional Violations.
6. Prosecutorial Misconduct.
7. Invalid Affidavit.

On November 5, 2021, through counsel, Applicant filed a second amended post-conviction relief application clarifying his allegation that he was entitled to belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), based on ineffective assistance of Counsel.

On November 15, 2021, through counsel, Applicant filed a third amended post-conviction relief application consisting of thirteen letters from Counsel to Applicant concerning Counsel's decisions during the course of his representation of Applicant.<sup>1</sup>

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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<sup>1</sup> At the outset of the evidentiary hearing, Applicant's counsel clarified that the issues raised in the amended applications were "really all the same issues" as those raised in the initial application. (PCR Tr. p.8, lines 9-15). Therefore, the Court will address Applicant's claims as they are set forth in the original application, as well as the *White v. State* claim that was raised for the first time in Applicant's amended application.

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

### **Ineffective Assistance of Counsel, Generally**

In a PCR action, Applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690).

The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694). “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” Harrington, 562 U.S. at 111–12 (quoting Strickland, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” Id. at 112.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696–97.

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial

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

### **Speedy Trial Motion**

Applicant alleges Counsel was ineffective for failing to promptly file a motion for a speedy trial and for failing to move to dismiss the charges when more than a year elapsed after the filing of the speedy trial motion. The Court finds this allegation to be without merit.

Applicant testified he was arrested in May of 2008. He wrote a letter to Counsel in September of 2008 requesting Counsel make a motion for a speedy trial. (PCR Tr. p.11, line 23–p.12, line 8). Counsel replied by letter dated September 18, 2008, that he did not intend to move for a speedy trial at that time because he did not believe the State was “slow rolling” Applicant’s case and nothing the State had done thus far had prejudiced Applicant’s defense. (September 18, 2008, letter; PCR Tr. p.11, lines 6–22). Counsel also informed Applicant that the State had offered a 15-year negotiated plea, which Counsel viewed as a good offer, and that filing a speedy trial motion would alert the State that Applicant was not interested in the plea. (March 20, 2009, letter). At the evidentiary hearing, Counsel articulated multiple reasons for not filing a speedy trial motion when Applicant first requested it: at the time, Applicant was not willing to commit to a trial as

opposed to a guilty plea; Counsel wanted to preserve the option of accepting the plea offer; and Counsel believed it would be prejudicial to the defense to rush the case to trial because he needed more time to prepare. (PCR Tr. p.96, line 23–p.97, line 20). In March of 2009, Counsel believed he was prepared for trial and filed a speedy trial motion to “put some pressure on the Solicitor’s office.” (March 30, 2009, letter; PCR Tr. p.96, lines 3–22).

The Court finds Applicant has failed to prove Counsel’s conduct fell below an objective standard of reasonableness as to this allegation. Applicant was tried in April of 2010, less than two years after his arrest in May of 2008. Counsel articulated multiple valid strategic reasons for waiting as long as he did to file the speedy trial motion: the State’s delay in bringing the case to trial was not initially unreasonable; the delay arguably benefited the defense by allowing more time to prepare for trial; and Counsel wanted to preserve what he saw as a favorable plea offer until Applicant insisted on going to trial. Finally, Applicant has not shown how he was prejudiced by the delay. Because Applicant has failed to prove either deficiency or prejudice arising from Counsel’s conduct, the Court finds this allegation is meritless and must be denied and dismissed with prejudice.

#### **Failure to Object to Second Set of Fingerprints**

Applicant alleges Counsel was ineffective for failing to object to the introduction of a second set of fingerprints collected from Applicant approximately one month before trial, claiming the prosecution lied about the reason they were seeking Applicant’s fingerprints. The Court finds this allegation to be without merit.

At Applicant’s trial, the State’s fingerprint expert, Marie Hodge, testified she examined a fingerprint obtained from the scene of the Food Lion robbery and compared it against a set of fingerprints obtained from Applicant on May 28<sup>th</sup>, 2008. (Trial Tr. p. 186, line 25–p.189, line 10).

She identified the fingerprint found at the crime scene as belonging to Applicant. (Trial Tr. p. 191, lines 15–17). Approximately one month prior to Applicant’s trial, she obtained a second set of fingerprints from Applicant and confirmed that they matched the first set. (Trial Tr. p.191, line 18–p. 192, line 8).

Applicant claims the original set of fingerprints were “invalid” because they were not signed by the reviewing officer. At the PCR hearing, Applicant testified he was told the reason for collecting the second set of fingerprints was because the State had “messed up” the chain of custody regarding the first set. (PCR Tr. p.19, lines 2–22). He claimed this was inconsistent with the testimony at trial that the second set of fingerprints was taken to make sure it matched the original set. (PCR Tr. p.20, lines 3–7; p.21, lines 16–25).

Applicant argues Counsel should have objected to the introduction of the second set of fingerprints because of this “perjury.” The Court finds Applicant has not shown that any perjury occurred. The comparison between the first and second sets of fingerprints to confirm that they matched is perfectly consistent with an attempt to cure a chain-of-custody problem with the first set. Furthermore, the trial transcript reveals Counsel did object to the introduction of Applicant’s fingerprint cards, and that objection was overruled. (Trial Tr. p.192, lines 9–17). Accordingly, the Court finds Applicant has failed to prove either deficiency or prejudice as to this issue.

Applicant also complains that Counsel advised him to give the second set of fingerprints because, if he refused, the trial judge would order him to give the fingerprints anyway. (PCR Tr. p.22, lines 14–17). Applicant argues Counsel’s advice “basically fed [him] essentially to the wolves” because the second set of fingerprints strengthened the State’s case against him. (PCR Tr. p.26, line 14–p.27, line 7). However, Applicant also testified that he *did* refuse to give the second set of fingerprints and that the trial judge *did* order him to give fingerprints over his refusal.

(PCR Tr. p.22, lines 17–22).

Far from showing ineffectiveness, Applicant's testimony proves that Counsel's advice about what would happen if he refused to give the fingerprints was accurate, and therefore not deficient. In addition, Applicant could not have been prejudiced by advice that he admittedly ignored. The Court, therefore, finds that this allegation is meritless and must be denied and dismissed with prejudice.

#### **Failure to Request a Mistrial**

Applicant alleges Counsel was ineffective for advising Applicant to plead guilty rather than requesting a mistrial after Applicant's motion to dismiss the charges was denied. The Court finds this allegation to be without merit.

At one point during the trial, police officers who were in the courtroom caught a glimpse of an exposed notepad on Counsel's desk and approached the solicitor about recalling witnesses to address the issues Counsel had written about. (Trial Tr. pp.242–44). When he learned the officers had read from Counsel's notes, the solicitor informed both Counsel and the trial court of what had happened. (Trial Tr. pp.242–44). The State informed the court that it had no intention of recalling any witnesses in response to the officers' request. (Trial Tr. p.258, lines 6–25). Counsel moved to dismiss the charges against Applicant on the ground that the officers' attempt to influence the trial based on reading his notes constituted prosecutorial misconduct and raised an irrebuttable presumption of prejudice. (April 14<sup>th</sup>, 2010, Motions Hearing Tr. p.3, line 14–p.6, line 24). Counsel argued a mistrial would not be an appropriate remedy because "the cat is out of the bag" and the State would be able to correct the imperfections in its case in a subsequent trial. (April 14<sup>th</sup>, 2010, Motions Hearing Tr. p.6, line 25–p.7, line 7).

The court agreed that the officers' actions were improper, but it held that dismissal of the

charges was not a proper remedy. (April 14<sup>th</sup>, 2010, Motions Hearing Tr. p.22, line 7–p.25, line 12). The court noted it would likely grant a mistrial if Counsel requested one, but Counsel was “perhaps correct in not asking for one.” (April 14<sup>th</sup>, 2010, Motions Hearing Tr. p.23, line 19–p.24, line 13).

At the PCR hearing, Counsel testified he did not want to move for a mistrial, but he wanted to seek dismissal of the charges because, “unlike the [issues] we’ve lost, this one actually has some merit to it.” (PCR Tr. p.99, line 23–p.100, line 4). He also testified that, after the hearing on his motion for dismissal, the solicitor approached him and told him the State’s concurrent plea offer was still on the table. (PCR Tr. p.100, lines 5–8). Counsel conveyed that offer to Applicant and told him, “Look, if you are going to plead, now’s the time because I can tell Judge James was livid and he . . . wanted to send a message to those officers.” (PCR Tr. p.100, lines 8–16).

The Court finds Applicant has failed to show that Counsel was deficient for not requesting a mistrial. Counsel possessed a valid strategic reason for not proceeding with a mistrial: he believed a new trial would not benefit Applicant because it would give the State the opportunity to correct any imperfections with its case. At the same time, he believed the judge would likely impose a relatively lenient sentence if Applicant entered a guilty plea because the judge was “livid” at the officers’ misconduct. Having tried, and failed, to obtain a dismissal of the charges, Counsel expressed to Applicant his belief that “now is the time” to accept the State’s plea offer if that’s what Applicant wanted to do. Applicant then made the decision to plead guilty. The Court finds Counsel conducted himself with reasonable professional judgment as to this issue. Accordingly, the Court finds this allegation is meritless and must be denied and dismissed with prejudice.

#### **Failure to Suppress Testimony for Lack of Notice**

Applicant alleges Counsel was ineffective for failing to move to suppress the testimony of

David Holzbach, one of the State's witnesses. Applicant claims the defense never received notice that the State intended to call Mr. Holzbach. Applicant also claims Counsel failed to effectively cross-examine Mr. Holzbach regarding alleged inconsistencies between his testimony and that of Officer Curtis Hodge. The Court finds this allegation to be without merit.

Mr. Holzbach testified at the pre-trial suppression hearing. He testified that, on May 28, 2008, he was driving a vehicle in Sumter County when he observed a slate blue Cadillac moving at a high rate of speed and disregarding stop signs. (Trial Tr. p.41, line 19–p.43, line 5). Shortly afterward, he observed police cars at “what appeared to be a crime scene” at the nearby Dollar General. (Trial Tr. p.42, line 20–p.43, line 10). Suspecting that the Cadillac was fleeing the crime scene, Mr. Holzbach called 911 and gave the dispatcher a description of the car and its occupants. (Trial Tr. p.42, line 23–p.43, line 18).

Officer Hodge testified that he was responding to a report of an armed robbery at the Dollar General that day when a call came in from dispatch that a powder blue, older model vehicle was seen leaving the area. (Trial Tr. p. 47, lines 3–15). Officer Hodge then spoke with Mr. Holzbach, who told him he had almost been hit by a powder blue vehicle speeding away from the crime scene and running stop signs. (Trial Tr. p.47, line 16–p.48, line 4). Officer Hodge testified that, later that day, he learned that a vehicle matching Mr. Holzbach's description had been spotted, and he joined an investigatory stop of the vehicle that ultimately resulted in Applicant's arrest. (Trial Tr. p.48, line 7–p.49, line 14).

Applicant now argues that Counsel should have objected to Mr. Holzbach's testimony because the defense was not given notice that the State intended to call him as a witness. At the PCR hearing, Counsel denied that he was surprised by any of the witnesses called by the State, and he saw no grounds to move for the suppression of testimony based on lack of notice. (PCR

Tr. p.90, line 25–p.91, line 17). The Court finds Applicant has failed to show that the defense was indeed prejudiced by not receiving notice of Mr. Holzbach or any other witness. Therefore, Applicant has not met his burden of proving that Counsel was deficient for not moving to suppress the testimony.

Applicant also argues Counsel should have challenged Mr. Holzbach's testimony on the ground that Mr. Holzbach did not witness the actual commission of the robbery. The Court finds that Mr. Holzbach's testimony was relevant circumstantial evidence that the occupants of the blue Cadillac were involved in the robbery of the Dollar General due to the vehicle's suspicious haste in driving away from the crime scene. The fact that Mr. Holzbach did not personally observe the commission of the robbery is not a ground for the suppression of his testimony. Therefore, Counsel was not deficient for failing to move for suppression on that basis.

Finally, Applicant claims that Mr. Holzbach's testimony was inconsistent with Officer Hodge's testimony, because Mr. Holzbach testified he told police the suspicious vehicle was a Cadillac while Officer Hodge stated Mr. Holzbach did not identify the make of the vehicle. (Trial Tr. p.45, lines 6–12; p.44, line 22–p.45, line 2). Applicant complains that Counsel was ineffective for failing to challenge that inconsistency. The transcript, however, reveals that Counsel *did* expose the inconsistency during his cross-examination of both witnesses. He then argued to the trial court that this inconsistency rendered the investigatory stop illegal. (Trial Tr. p.81, lines 7–18). While Counsel's attempt to suppress the evidence on this ground was ultimately unsuccessful, the Court finds he clearly *did* raise the issue and, therefore, was not deficient. Accordingly, the Court finds that this allegation is meritless and must be denied and dismissed with prejudice.

#### **Failure to Object to Applicant's Confession**

Applicant alleges Counsel was ineffective for not objecting to the introduction of

Applicant's confession as inadmissible hearsay. Applicant argues that, because he never testified at the trial, his confession could not have been admitted as a prior inconsistent statement. The Court finds this allegation to be without merit.

After his arrest, Applicant gave a confession about his involvement in the Food Lion robbery to Detective Irene Culick. Counsel challenged the voluntariness of Applicant's confession at a pre-trial Jackson v. Denno<sup>2</sup> hearing. (Trial Tr. pp.124–28). He renewed his objection during trial when the State began questioning Detective Culick about the confession. (Trial Tr. p.208, lines 21–22; p.210, lines 16–18). Counsel also objected multiple times to Detective Culick's reading from a document containing her notes of the confession; the trial court overruled Counsel's objections. (Trial Tr. p.212, line 10–p.213, line 8; p.214, lines 14–24).

The Court finds Applicant's confession was admissible as a statement of a party opponent, which is not hearsay. See Rule 801(d)(2)(A), SCRE. Therefore, Counsel correctly decided not to object on that basis. To Counsels' credit, he attempted to exclude the statement on other grounds, but the trial court ruled against him. Accordingly, the Court finds Counsel was not deficient as to this issue, and this allegation must be denied and dismissed with prejudice.

#### **Failure to Object to Soda Bottle Fingerprint**

Applicant alleges Counsel was ineffective for not objecting to the introduction of a fingerprint taken from a soda bottle when the bottle itself was not presented. The Court finds this allegation to be without merit. Applicant has not pointed to any law requiring an object to be introduced into evidence before the State may introduce a fingerprint taken from the object. As Counsel stated during the evidentiary hearing, "You don't introduce a car when you have fingerprints on the car." (PCR Tr. p.94, lines 2–3). Applicant argues that Counsel should have

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<sup>2</sup> 378 U.S. 368 (1964).

introduced the bottle because the prosecution could have fabricated the fingerprint evidence; however, Counsel testified that he knew that the fingerprint on the soda bottle belonged to Applicant because “he admitted to me it was him.” (PCR Tr. p.93, lines 8–9). Therefore, the Court finds Applicant has not met his burden of proving either deficiency or prejudice as to this allegation. Accordingly, the Court finds this claim must be denied and dismissed with prejudice.

#### **Failure to Object to Clothing**

Applicant alleges Counsel was ineffective for failing to object to the admissibility of clothing on the ground the prosecutor never established a connection between the clothing and the crime. The Court finds this allegation to be without merit.

At trial, Officer Tassone testified he located a black t-shirt, a grey sweatshirt, and a pair of blue sweatpants with a bundle of cash in the pocket on the side of road while patrolling near the intersection of Highways 378/76 and 261. (Trial Tr. p.172, lines 2–17). Detective Culick testified Applicant told her that, after robbing the Food Lion, he had thrown his clothes—a grey hoodie and blue sweatpants—out the window near a stoplight on Highway 261. (Trial Tr. p.215, lines 14–16).

The Court finds the State did, in fact, establish a connection between the clothing found on the side of the highway and the robbery of the Food Lion. Specifically, the discovery of the clothing at that location corroborated the portion of Applicant’s confession in which he stated he had thrown a grey hoodie and blue sweatpants out of the window at Highway 261. Applicant has failed to explain why the clothing was inadmissible in light of this connection. Accordingly, the Court finds Applicant has not met his burden of proving Counsel was ineffective for failing to object to the introduction of the clothing, and this allegation must be denied and dismissed with prejudice.

### **Legality of Arrest and Search**

Applicant alleges Counsel was ineffective regarding the legality of Applicant's arrest and search. The Court finds this allegation to be without merit. The transcript of the pre-trial suppression hearing reveal that Counsel vigorously challenged the legality of Applicant's arrest and search, arguing that officers lacked both reasonable suspicion to justify an investigatory stop of Applicant's vehicle and probable cause to place Applicant under arrest. (Trial Tr. pp.23-75; pp.79-81). Applicant has not explained how any of Counsels' conduct regarding that issue fell below an objective standard of reasonableness. Although Applicant may disagree with the trial court's ruling as to the legality of the arrest, allegations of trial court error are not cognizable on post-conviction relief. See S.C. Code Ann. § 17-27-20(B) (stating PCR "is not a substitute for . . . direct review of the sentence or conviction"); Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (holding a PCR application cannot assert any issues that could have been raised at trial or on appeal).

### **White v. State Claim**

Applicant alleges he is entitled to belated review of his direct appeal issues because Counsel was ineffective in failing to file an appeal from Applicant's guilty plea. The Court finds this allegation to be without merit.

Defense counsel should make certain that a criminal defendant is fully aware of his appeal rights and, in the absence of an intelligent waiver of those rights by the defendant, pursue an appeal. White, 263 S.C. at 118, 208 S.E.2d at 39. Counsel's constitutionally imposed duty to consult with a defendant about an appeal arises *only* when there is reason to think (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 471 (2000).

These elements are much harder to establish when a conviction follows a guilty plea, because a plea both reduces the scope of appealable issues and indicates that the defendant sought an end to judicial proceedings. Id. In addition, to prove prejudice, an applicant must demonstrate a reasonable probability that he would have timely appealed but for counsel's deficiency. Id. Evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal is highly relevant to this determination. Id. at 472.

Even where the post-conviction relief court finds an applicant was denied the right to a direct appeal due to the ineffective assistance of counsel, the court may not grant post-conviction relief on that basis. Davis v. State, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986). Instead, the proper remedy is for the applicant to petition for belated review of direct appeal issues pursuant to the procedure set forth in Davis. Id.

At the evidentiary hearing, Counsel testified that he discussed the appeal process with Applicant and explained what his appellate rights were. (PCR Tr. P.103, lines 21–25). He explained that entering a guilty plea would preclude Applicant from appealing the denial of his pre-trial motions. (PCR Tr. p.104, lines 1–3). Counsel testified he had no doubt that Applicant understood all of his discussions about the right to appeal. (PCR Tr. p.106, lines 9–13). Counsel also testified he advised Applicant that the 22-year sentence was a “pretty good” result given Applicant’s numerous armed robbery charges, that an appeal would not have much merit, and that Counsel did not recommend appealing. (PCR Tr. p.129, lines 7–15). Counsel testified that Applicant seemed to understand Counsel’s recommendation and never asked him to file an appeal. (PCR Tr. p.129, lines 15–24). Counsel said he would have filed one if Applicant had asked him to. (PCR Tr. p.106, lines 14–25).

The Court finds Applicant has failed to prove Counsel was ineffective as to this issue.

Counsel's testimony shows that he fulfilled his duty to advise his client of the right to appeal and that Applicant did not ask Counsel to file an appeal. Therefore, the Court finds Applicant is not entitled to belated review of any direct appeal issues, and this allegation must be denied and dismissed with prejudice.

### Other Allegations

The other allegations raised in the 2013 Amended PCR Application and not specifically mentioned above are:

1. Ineffective Assistance of Counsel pursuant to Hill vs. Lockhart.
2. Abuse of Discretion.
3. Judicial Errors.
4. Constitutional Violations.
5. Prosecutorial Misconduct.
6. Invalid Affidavit.

No allegations were raised nor was testimony taken at the hearing regarding Abuse of Discretion, Judicial Errors, Constitutional Violations, Prosecutorial Misconduct, and Invalid Affidavit. These are not issues for post-conviction relief. Rather, these allegations concern direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993).

The ineffective assistance of counsel claim citing Hill v. Lockhart has been addressed above under the general allegations of ineffective assistance counsel listed, *supra*.

### III. CONCLUSION

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

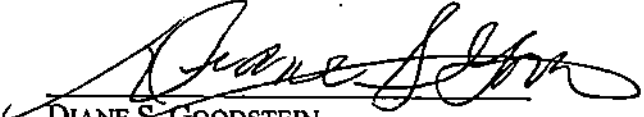
with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 2<sup>nd</sup> day of March, 2023.

  
 DIANE S. GOODSTEIN  
 Presiding Circuit Court Judge

St. George, South Carolina