

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable R. Ferrell Cothran, Circuit Court Judge

SYLVESTER SCOTT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000624

APPENDIX

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1 2-2 was on a Newport cigarette pack from the rear
2 floorboard. That's what is written on the card. I'm not
3 there when the prints are lifted, so I can only tell you
4 what they put on the card.

5 Q. And the other print?

6 A. The print that was non-comparable was lifted from
7 the exterior driver's door.

8 Q. Does it say what kind of car?

9 A. No.

10 MR. OSBORNE: Okay. No further questions.

11 THE COURT: Anything else?

12 MR. KOZELSKI: Nothing further, Your Honor.

13 THE COURT: You may step down. Thank you.

14 Next witness?

15 MR. KOZELSKI: Your Honor, the defense calls
16 Catherine Leisy to the stand.

17 CATHERINE LEISY

18 having been called as a witness for the defendant at 4:39
19 p.m., was sworn and testified as follows:

20 DIRECT EXAMINATION BY MR. KOZELSKI:

21 Q. Good afternoon, Ms. Leisy.

22 A. Good afternoon.

23 Q. Can you tell this jury a little bit about
24 yourself. Where do you work?

25 A. I am a forensic scientist assigned to DNA casework

1 department at the South Carolina Law Enforcement
2 Division, more commonly referred to as SLED.

3 Q. And what do you specifically do for the South
4 Carolina Law Enforcement Division?

5 A. My responsibilities include processing forensic
6 cases, generating reports based on results and
7 conclusions drawn, and testifying to those reports as
8 necessary. I also assist in the training of newly hired
9 analysts, and I have several quality control duties
10 within the laboratory.

11 Q. So you're saying -- is testifying part of your
12 normal course of business?

13 A. It is.

14 Q. And how did you become involved in this case?

15 A. We received several sets of swabs that were
16 specific to the case submission regarding, I believe,
17 Charleston PD submission for this particular crime, or
18 alleged crime.

19 Q. Let me show you what's been entered into evidence
20 as Defense Exhibit 1. Does that look familiar to you?

21 A. Yes, it does.

22 Q. Okay. And what does that package contain?

23 A. This is a heat-sealed pouch. This is how items of
24 evidence are submitted to SLED. The particular items are
25 placed within the pouch. They are assigned a specific

1 case number, which is seen on the bar code.

2 The bar code allows us to track the package as it
3 moves throughout the departments, essentially like an
4 item at the grocery store. You can scan it and it
5 locates exactly who is in custody of that item at a
6 particular time, and each item within the sealed pouch is
7 assigned a unique item number so we know exactly what to
8 identify that particular number as as far as testing and
9 reporting.

10 Q. If you can open that up, I think there may be a
11 pair of scissors there. Can you explain to the jury why
12 this is sealed the way that it is?

13 A. The pouch is sealed -- again, when the items are
14 placed inside, there's a seal placed across it, just a
15 heat seal, and the initial of the individuals who sealed
16 it are placed along the seal along with the date. And
17 the reason that the pouch is to always be sealed and
18 intact is to ensure that there's no tampering, no one has
19 removed or added anything, so we always know what is
20 within the pouch, and we can always see who has been able
21 to access the evidence.

22 Q. And you're the one that specifically accessed
23 these DNA swabs?

24 A. That's correct.

25 Q. And can you explain to the jury sort of your

1 process or methodology in how you examine these kind of
2 swabs.

3 A. Essentially what my job is to try and develop a
4 DNA profile from unidentified biological materials that
5 are found on an item of evidence or at a crime scene. So
6 when items such as these are submitted to the laboratory,
7 I take cuttings of the swabs and again attempt to develop
8 a DNA profile. Once that profile is developed, I can try
9 to compare it to that of a known individual.

10 Q. Okay. And did you do any comparisons in this
11 case?

12 A. For this particular case, I did not receive any
13 known subject standards, so all I was able to do was
14 develop profiles or partial profiles from the evidence
15 that was submitted.

16 Q. Okay. And what do you do with those?

17 A. It depends. As we were pulling them out, some of
18 the partial profiles that were developed were
19 insufficient, just meaning that there was not enough DNA
20 on that particular swab to develop a profile suitable for
21 comparison. We can also develop profiles that are
22 suitable for entry into a DNA database that allows us to
23 compare that profile to other DNA profiles that have been
24 identified at crime scenes or on items of evidence, also
25 again other known individuals to try and identify the

1 contributor to that item.

2 Q. And are you talking about CODIS?

3 A. That's correct. CODIS stands for Combined DNA
4 Index System that's the electronic database that contains
5 all the profiles that we use for comparison.

6 Q. And are you one that makes a comparison to what is
7 in the CODIS database?

8 A. My responsibility is to develop the profile,
9 determine whether or not the item that that profile was
10 developed from is eligible for CODIS entry and then
11 determine if the profile is of suitable quality. I then,
12 if those conditions are met, I enter that profile into
13 the database. Once it's searched if there is a hit or a
14 conclusion that can be made, that reporting is done by
15 our database department.

16 Q. And did you have a chance to do that in this case?

17 A. I did enter one profile in this case, yes.

18 Q. And can you explain to the jury where that profile
19 came from in your testing.

20 A. Based on the descriptions of the items that we
21 received, that swab was from the steering wheel of the
22 vehicle.

23 Q. And you don't necessarily know what vehicle we're
24 talking about, do you?

25 A. I believe the submission paperwork indicated it

1 was a silver or gray Dodge Charger.

2 Q. And once you find that DNA profile and send it to
3 CODIS, what happens next?

4 A. Once the comparison is made through the database,
5 again, if there's an indication that we have a match to a
6 profile that's already present or there is a profile that
7 could be included as a contributor, our database
8 department receives notification. They then perform
9 confirmation of that hit or that inclusion and they
10 report out that data.

11 Q. So somebody else does the comparison and
12 conclusion, right?

13 A. Right. Once the database and software performs
14 the comparison, a member of our database department
15 issues a report on that.

16 MR. KOZELSKI: Thank you, Ms. Leisy. Answer
17 any questions the State may have for you.

18 MR. OSBORNE: Just briefly, Your Honor.

19 CROSS-EXAMINATION BY MR. OSBORNE:

20 Q. So you were submitted five swabs in this case?

21 A. That's correct.

22 Q. Okay. And the first being swabs from the exterior
23 door, driver's handle from the Dodge Charger?

24 A. Yes, sir.

25 Q. And there was no DNA profile developed from that?

1 A. That's correct. There was what we call the gender
2 marker. There was some information present, but it was
3 not a suitable profile for comparison.

4 Q. The second swab was from the interior door,
5 driver's door handle. Again, insufficient DNA for
6 profile?

7 A. Correct. Again, there was not enough information
8 there for a comparison.

9 Q. Number three, swabs from the steering wheel of the
10 Dodge Charger, there you had enough to compare it to
11 someone; is that fair to say?

12 A. Yes.

13 Q. And number four -- and this is what Mr. Kozelski
14 was talking about. You got that CODIS hit from number
15 four -- or from three, I'm sorry.

16 A. That's correct. A portion of the profile
17 developed from our item number three, the swabs from the
18 steering wheel, is what was entered into CODIS.

19 Q. And from your experience, would it be shocking to
20 you to see that the registered owner of a vehicle's DNA
21 comes back to the steering wheel?

22 A. No. You would expect that anyone who routinely
23 drives a vehicle, or is in a vehicle, for their DNA to be
24 present. That would be common.

25 Q. If a person was wearing a glove while they were

1 driving a car, would you expect to find DNA then on the
2 steering wheel?

3 A. Anything like a glove, any barrier that prevents
4 the actual physical contact with the item would
5 definitely restrict, if not just completely prohibit
6 transfer of DNA.

7 Q. Okay. Swab number four was swabs from the
8 gearshift -- well, you just tell us: What did you find
9 out from that one?

10 A. From the swabs from the gearshift, there was a
11 partial DNA developed. It was a mixture of at least two
12 individuals, but due to the inability to calculate a
13 statistic, I couldn't perform any further interpretation.

14 Q. So even if the police had provided you a known
15 sample of DNA from a defendant, you couldn't have done
16 anything with it anyway; is that fair to say?

17 A. Correct. Based on our protocols at the time the
18 search was done, there is just no comparison that could
19 been made. It was just an insufficient amount and not of
20 good enough quality for comparison.

21 Q. Last, swabs from safety glasses. Tell us what you
22 found from that.

23 A. On that item, a partial DNA profile was developed
24 but, again, was insufficient for interpretation and was
25 not suitable for comparison.

1 Q. Mr. Kozelski asked you, you were never provided
2 any known samples to compare to DNA in this case, but the
3 whole story is really you had nothing to compare it to;
4 isn't that correct?

5 A. With the exception of, again, a portion of the
6 profile developed from the steering wheel, part of that
7 profile was suitable for comparison. That was just about
8 it.

9 Q. That's the one that came back to the CODIS hit?

10 A. That's right.

11 Q. So you already know who that guy was --

12 A. Based on that information.

13 Q. I know it's a little tricky.

14 A. Yes, sir.

15 Q. But it hit somebody in CODIS?

16 A. My understanding, and based on the information in
17 our systems, it did hit on an individual in CODIS.

18 MR. OSBORNE: Thank you. No further
19 questions.

20 MR. KOZELSKI: Nothing further, Your Honor.

21 THE COURT: You may step down. Next witness?

22 MR. KOZELSKI: Your Honor, defense calls
23 Andrea Simmons.

24 ANDREA SIMMONS

25 having been called as a witness for the defendant at

1 4:49 p.m., was sworn and testified as follows:

2 DIRECT EXAMINATION BY MR. KOZELSKI:

3 Q. Good afternoon, Ms. Simmons. Can you tell the
4 jury who you are and where you work.

5 A. Sure. I'm a DNA analyst for the State Law
6 Enforcement Division, also known as SLED.

7 Q. And what does a DNA analyst for SLED do?

8 A. I work in the DNA database department, and so I
9 receive known standards from across Tusstat. I analyze
10 those standards, and I generate a DNA profile from them
11 and then enter them into the DNA database.

12 Q. This jury just heard testimony from Ms. Leisy.
13 How does -- how do you fit in this picture with what the
14 testing that Ms. Leisy does?

15 A. She works in the DNA casework department, so she
16 generates DNA profiles from evidence and puts those into
17 the database, and so the DNA database will run a search
18 daily, and if a profile that was generated from the item
19 of evidence hits against a known standard, I then
20 evaluate that match, and I'm able to report a hit to the
21 case.

22 Q. Can you tell this jury a little bit about how
23 CODIS works.

24 A. Sure. It's a DNA database, and it houses,
25 basically, casework profiles as well as known profiles

1 and then also profiles from lab personnel for elimination
2 purposes and contamination checks. It runs using an
3 algorithm that was made by the FBI, and it searches daily,
4 except for the weekends, and we are able to look at those
5 matches that return. It also hits at the national level
6 and so we can get matches between states. We can get
7 matches between local labs as well as Tusstat level.

8 Q. Is that what you did in this case?

9 A. That is what I did.

10 Q. Okay. And can you explain to the jury the process
11 and methodology and how you go about doing that.

12 A. Sure. In this case in particular, I received a
13 match and evaluated it, and it hit between Catherine
14 Leisy's casework profile and one of the profiles that was
15 in our database, and when I received the match, I make
16 sure that it's a good match. And in this case, high
17 stringency match, and so that just means that it was an
18 exact match, every location on the DNA.

19 And so once we determine that it is a good match,
20 I then go through a confirmation process to ensure that
21 the sample -- you know, that there were, you know -- all
22 the bases were covered when the sample was originally run
23 and put into the database. So what I do is take that
24 sample, and I re-extract the DNA, reanalyze it, and
25 determine that it does match.

1 Once I determine that the original sample and the
2 sample that I ran match, then I will go through a
3 confirmation process which includes -- which includes
4 writing the hit up and also having the latent prints
5 evaluated to determine that they also match.

6 Q. That's what you did in this case, right?

7 A. That is.

8 Q. And after you, I guess, double-check your work to
9 make sure you have a match, what do you do then? How do
10 you -- do you inform law enforcement?

11 A. Yes. We write a CODIS hit letter, and that is
12 sent to the law enforcement agency.

13 Q. I'm going to show you what's been premarked as
14 Defense Exhibit 6. Is that what you're talking about?

15 A. Yes, that's correct.

16 Q. And what is that?

17 A. This is the CODIS hit notification from this
18 particular match.

19 Q. And is that something that you do in the ordinary
20 course of your business?

21 A. Every day.

22 MR. KOZELSKI: Your Honor, at this time we'd
23 ask that Defense Exhibit 6 be entered into evidence.

24 MR. OSBORNE: No objection.

25 THE COURT: Admitted.

1 (Defense Exhibit 6 was marked for
2 identification and admitted into evidence.)

3 BY MR. KOZELSKI:

4 Q. Can you tell the jury a little bit -- what does
5 that say, essentially?

6 A. Do you want me to read it?

7 Q. Not verbatim, just a general sense.

8 A. So, basically, this is just informing the
9 investigator that the match that returned in this case
10 from the database did hit to a known profile, and that
11 profile was Anthony Holsberg, and we just give a little
12 bit of identifying information for the agency.

13 Q. Okay. And do you know who Anthony Holsberg is?

14 A. I do not.

15 Q. Do you know anything about this case, really,
16 other than what you've been given?

17 A. I don't.

18 MR. KOZELSKI: Thank you, Ms. Simmons.
19 That's all the questions I have for you.

20 MR. OSBORNE: No questions.

21 THE COURT: You can step down. Thank you.
22 Next witness.

23 MS. KNOX: The defense calls Harriet Cordero.

24 HARRIET CORDERO

25 having been called as a witness for the defendant at

1 4:56 p.m., was sworn and testified as follows:

2 DIRECT EXAMINATION BY MS. KNOX:

3 Q. Good afternoon, Ms. Cordero. Are you acquainted
4 with Silvester Scott?

5 A. No. He's just there.

6 Q. Just there?

7 A. He's just there.

8 Q. Can you tell me what you mean by that.

9 A. This year I'll be 70. He's maybe in his 40's.
10 When I say he's just there, he's -- like, in your
11 neighborhood, you got people that just there.

12 Q. Okay.

13 A. He's just there.

14 Q. So you're familiar with him from your
15 neighborhood; is that what you're saying?

16 A. English Street, yes.

17 Q. Okay. And you said English Street. Is that where
18 you live?

19 A. No. I live on Clement.

20 Q. You live on Clement, and are you aware of where
21 Mr. Scott lives?

22 A. Yes.

23 Q. And where does he live?

24 A. He live on English Street. I go up and down
25 Chicora on my moped.

1 Q. So how far apart about are your houses?

2 A. About four blocks.

3 Q. Okay. Would you be able to say how long you've
4 known Mr. Scott, or known of him?

5 A. I don't know him. He's just there.

6 Q. Okay.

7 A. I don't know him.

8 Q. And what -- do you know him by any other names?

9 A. Scotty. That's it.

10 Q. Scotty. Is that what you call him?

11 A. That's it.

12 Q. Okay.

13 A. That's all I know, Scotty.

14 Q. Do you recall the day of March 4th, 2015?

15 A. Yes.

16 Q. Okay. Can you describe how your day began, do you
17 remember?

18 A. I eat breakfast late. I stayed in the house until
19 about 2:25, something like that, and then I went on my
20 moped.

21 Q. And what were you doing in your house that day?

22 A. Cleaning up, sweeping -- me and my sister live
23 together.

24 Q. Okay.

25 A. And I cook dinner while she clean up and do the

1 bathroom and stuff, so about 5:00, 5:30, what it's close
2 to now, and my stomach telling me I'm hungry.

3 Q. Okay. And you and your sister were in the
4 apartment for the early part of the day?

5 A. I was. She stay in the apartment most of the
6 time.

7 Q. Okay.

8 A. Unless she got someplace to go.

9 Q. And you said -- what time about was it that you
10 left on your moped?

11 A. About 2:25, something like that; yeah, about 2:25,
12 yeah.

13 Q. Okay. Where were you going on your moped?

14 A. Up and down Chicora.

15 Q. Just up and down?

16 A. The traffic there is very light. It's like a
17 steep hill you go up, and when you come down, like this,
18 you go -- yeah. I like that.

19 Q. Okay. About how long were you out there on your
20 moped, would you say?

21 A. I was doing that for about -- maybe 30 or
22 40 minutes. Then it ran hot.

23 Q. The moped ran hot?

24 A. Yeah.

25 Q. Can you describe what you mean by that.

1 A. Smoke started coming out the tail and heat on the
2 seat. The seat was getting real warm.

3 Q. Okay. And did you do anything about that? Did
4 you get off the moped?

5 A. I got off of it, yeah, cause the seat was getting
6 hot, yes. I got off of it, and I was pushing it.

7 Q. You were pushing it?

8 A. Yeah.

9 Q. And what street were you on at this point?

10 A. On Chicora, and I was near English. That's when I
11 saw him and he came helping.

12 Q. You saw Mr. Scott?

13 A. Scotty, yeah.

14 Q. After you had been on your moped for how long did
15 you say?

16 A. Forty-five, maybe an hour; zoom, zoom, up and
17 down. If you see Chicora Avenue, there's no traffic
18 there, and when you go up this way and you come back
19 down, you get speed, and it feels good, yeah.

20 Q. Okay. So you mentioned that you encountered
21 Mr. Scott. Where was he exactly?

22 A. In his back yard smoking a cigarette.

23 Q. He was smoking a cigarette in his yard?

24 A. Yeah. You could see that because there's no fence
25 up or nothing. You could see if somebody is outside.

1 You can see the house. Somebody come outside smoking.

2 You can see that, uh-huh.

3 Q. Okay. And you mentioned you were pushing your
4 moped?

5 A. Yes.

6 Q. Did you have any encounter with Mr. Scott at that
7 point?

8 A. He came and helped me. That's all. He's just
9 there, you know? That's just it. He came and helped me.

10 Q. What did he do to help you, can you describe?

11 A. He pushed it, and he tell me to just let it sit
12 until it cool off, and that's it.

13 Q. How long did it take for your moped to cool down,
14 would you guess?

15 A. For me, it would have been about a half an hour,
16 but he told me no, it was still hot. So we just stayed
17 there and talked, that's all, about nothing.

18 Q. How long were you there speaking with Mr. Scott?

19 A. About 30, 35 minutes because I wanted to get out
20 of there. I wanted something else to do.

21 Q. And were you speaking the whole time?

22 A. Trying not to, no. We got nothing in common.
23 Nothing to talk about. Only thing I was concerned about
24 is how I can get this cooled down, how I can go about my
25 business.

1 Q. Okay. Would you be able to estimate how long you
2 spent with Mr. Scott that afternoon?

3 A. I'd say it again, maybe 30, 35 minutes.

4 Q. Okay.

5 A. Because it have to get cool, and then I started
6 back up again, and I took it straight home.

7 Q. Did you start it back up again?

8 A. Yeah. I didn't do it with the key, though. I
9 kicked on the side, and it started back up, and I went
10 home and dropped it back off and got my bicycle and went.

11 Q. Do you know about what time you got home?

12 A. 3:30, something to 4:00. I'm not sure about that.
13 I'm not quite sure.

14 Q. Okay.

15 MS. KNOX: I have no further questions.
16 Please answer any questions the State may have.

17 THE COURT: Cross?

18 MR. OSBORNE: Briefly, Your Honor.

19 CROSS-EXAMINATION BY MR. OSBORNE:

20 Q. Good afternoon, Ms. Cordero. Okay. So before you
21 had -- before you saw Mr. Scott that day, you were
22 having, like, a little Bible study with your sister; is
23 that correct?

24 A. I was in the house. I was cooking. She was
25 reading, and she asked me questions, and I answered to

1 the best of my ability.

2 Q. Okay.

3 A. I don't like doing that either.

4 Q. You don't like doing what, answering questions?

5 A. Yeah, about the Bible and stuff. I don't liking
6 doing that either. I try to get out. I try to leave out
7 the house, yeah.

8 Q. Okay. Do you and your sister frequently have
9 conversations about the Bible?

10 A. Yeah. We pray together every night. We say the
11 our father. That's the only prayer that's written in the
12 Bible, the our father. We pray together, yeah.

13 Q. Pray together, talk about the Bible together?

14 A. Now, we gossip too now, about the neighbors.

15 Q. So is it fair to say that March the 4th of 2015
16 was just a normal day in your life?

17 A. Pretty much so.

18 Q. Okay.

19 A. Except for my moped ran hot.

20 Q. Right. But you get what I'm asking specifically,
21 is that it wasn't your birthday or anything like that,
22 was it?

23 A. No. My birthday in [REDACTED].

24 Q. Your sister, does she have a relationship with the
25 defendant -- I'm not saying -- I'm just saying, does she

1 know him? That's all that means.

2 A. Nothing -- no.

3 Q. Nothing?

4 A. No, huh-uh. Most of the people I talk to she
5 wouldn't even say hello, no.

6 Q. Okay. All right. So now, I understand the
7 defendant is just somebody who's around. Y'all clearly
8 aren't in the same circles, but did you hear when he was
9 arrested for this incident, for the bank robbery?

10 A. I didn't hear nothing -- he's just there. Let's
11 see. Let me think this -- he's just there.

12 Q. I'm not trying to upset you. I'm just asking, did
13 you see it on the news? Was there word of mouth on the
14 street? Did you hear anything about him being arrested
15 for the bank robbery?

16 A. Not really, no.

17 Q. Nothing. When did you first become aware he had
18 been arrested for the bank robbery?

19 A. When he -- who asked about that? Where is she at?
20 She's in the room. Yes, Ms. Verdell. Ms. Verdell, she
21 came to my house and asked me what happened, yeah.

22 Q. This investigator back here?

23 A. Yes, uh-huh.

24 Q. With the PD's office?

25 A. Uh-huh.

1 Q. That was the first time that you heard the
2 defendant had been arrested; isn't that correct?

3 A. I didn't -- I'm trying to think if I heard
4 something on the block. I don't know. I think so.

5 Q. Okay. Sorry. I don't mean to interrupt you. And
6 that date would have been on May the 8th, over two months
7 after the incident. Does that sound about right?

8 A. Man, I'm 70 years old. I don't remember the dates
9 or nothing like that, no, but when she talked to me, I
10 told her what happened, and that was it.

11 Q. You told her what happened over two months ago on
12 an insignificant day, on March the 4th; is that correct?

13 A. That wasn't a insignificant date.

14 Q. That wasn't insignificant?

15 A. My moped ran hot.

16 Q. I understand that.

17 A. That's not insignificant to me.

18 Q. I understand that, but I guess what I'm asking you
19 is, two months after the incident, how did you know that
20 that happened on March the 4th?

21 A. Because I was told.

22 Q. Because you were told?

23 A. Yes.

24 Q. You were told by the investigator?

25 A. Yes.

1 Q. So she's the one that fed you that information to
2 say that your moped ran hot?

3 A. No, she did not feed me no --

4 Q. But she told you that?

5 A. No. She didn't tell me my moped ran hot.

6 Q. And she told you that happened on March the 4th,
7 correct?

8 A. She told me when -- I don't know the exact date,
9 but it was written down, though.

10 Q. It's written down?

11 A. Yes.

12 Q. By the investigator?

13 A. Yeah. I signed it.

14 Q. In her statement?

15 A. My statement. I said it.

16 MR. OSBORNE: No further questions.

17 THE COURT: Redirect?

18 REDIRECT EXAMINATION BY MS. KNOX:

19 Q. Ms. Cordero, when Ms. Verdell, who you just
20 pointed out, came to talk to you, is that when you first
21 found out Mr. Scott had been arrested?

22 A. I might have heard some talk about that, but
23 certain things I don't pay attention to. I might have.
24 I'm not too sure, okay.

25 Q. Okay.

1 A. That's over four years now, you know.

2 Q. And just to go back to what we were discussing
3 before, on March 4th, 2015, where were you at 3:30?

4 A. On Chicora, riding up and down on my moped.
5 That's where I was.

6 Q. At 3:30 p.m.?

7 A. At 3:30 because I left the house, it take me about
8 two minutes to get from my house to Chicora, okay, and as
9 soon as I get there, there was no traffic. Zoom, that's
10 what I do, all right? That's me, and that's what I do.

11 MS. KNOX: Beg the Court's indulgence.

12 BY MS. KNOX:

13 Q. And is that when your moped overheated at that
14 time?

15 A. I was on Chicora the whole time, going up and
16 down, and that's when it overheated, yes.

17 Q. Okay. And that's when you encountered Silvester
18 Scott?

19 A. I don't know all the name -- Scotty, yeah.

20 MS. KNOX: Nothing further. Thank you.

21 THE COURT: Recross?

22 MR. OSBORNE: No questions.

23 THE COURT: You may step down.

24 THE WITNESS: Thank you. I told the whole
25 truth.

1 THE COURT: Lawyers, up here a second.

2 (A bench conference was held off the record
3 at 5:10 p.m.)

4 (Back on the record at 5:10 p.m.)

5 Okay, folks. We're going to break for today
6 at this point and resume tomorrow. Let me have you come
7 in at 10 o'clock a.m., and we will resume shortly
8 thereafter. I'm going to have the lawyers in a little
9 earlier than that so that at 10 o'clock we will be in a
10 position to finish up the rest of the case and hopefully
11 get it to you to begin your deliberations by lunchtime,
12 so I think that's pretty optimistic.

13 So do not begin your deliberations or
14 discussions about this case. Don't talk to anybody about
15 it, including other members of the jury panel, and don't
16 try to find out anything about it on the Internet or the
17 news and don't post anything on social media, and if
18 anybody does approach you about the case, please report
19 that to me tomorrow.

20 Thank you for your patience, and I'll see you
21 tomorrow morning at 10 o'clock.

22 (The jury left the courtroom at 5:12 p.m.)

23 Okay. Now, we're going to break for today.
24 I want the lawyers here at 9:30 tomorrow for a final
25 decision on whether or not Mr. Scott is going to testify.

1 Also, the jury charges, if you have anything other than
2 what I send home with you, please send that to my law
3 clerk this afternoon or this evening, and we will take a
4 look at it. So, hopefully, we'll finish and get started
5 in the morning. We'll be in a position to get it to the
6 jury fairly soon.

7 Now, Mr. Scott, you and I talked about
8 whether or not you're going to testify, and from what I
9 understand, your lawyer has no other witnesses that he's
10 going to call on your behalf at this point, and so the
11 only thing left is for you to decide whether or not you
12 are going to testify and tell your side of the story to
13 the jury.

14 Completely up to you, and it is a decision
15 that you and you alone have to make, although I strongly
16 encourage you to discuss this with your lawyers, and I
17 know that you have, but, again, I want you to sleep long
18 and hard on it because it is your chance to tell the jury
19 anything that you want them to hear.

20 Now, if you do testify, the State is going to
21 have the right to cross-examine you. I don't know what
22 criminal record you have, but if you decide you want to
23 testify, I'll make a final decision as to whether or not
24 they can cross-examine you about any prior convictions
25 that you have, and the lawyers know pretty much at this

1 point what does and doesn't come in, but you know what
2 your prior record is, and your lawyers can discuss that
3 with you.

4 I do want to make sure that you understand
5 what you're doing, and -- let me ask you again, how old
6 are you now?

7 THE DEFENDANT: Fifty-two.

8 THE COURT: And how far did you get in
9 school?

10 THE DEFENDANT: I graduated.

11 THE COURT: From high school?

12 THE DEFENDANT: Uh-huh.

13 THE COURT: And did you have any kind of job
14 that you held before you got arrested?

15 THE DEFENDANT: Yes, yes.

16 THE COURT: What were you doing?

17 THE DEFENDANT: Plastering work.

18 THE COURT: Well, it sounds like you know
19 what you're doing, and it will be ultimately your
20 decision. If you want to talk to a family member or
21 whatever about your decision to testify, I'll give you
22 tonight to talk to your lawyers, make that final
23 decision, but ultimately it will be your decision and
24 your decision alone. You either exercise it or you waive
25 it, but it is totally up to you as to whether or not you

1 testify.

2 I also talked to you earlier about the plea
3 offer the State has made to you. I know that it seems
4 like a long, long time; to me, it certainly is, and I'm
5 sure it is to you as well, but there's a gap between the
6 numbers, and it seems like a lot, but when you're looking
7 at the downside to the amount of time that you will get
8 if you are convicted, which will be the rest of your
9 life, well, any number is not that big.

10 It all depends on how long you live, because
11 life without parole, as I told you on Monday, means you
12 never go home. The only way you get out of prison is
13 when they carry you out in a pine box.

14 So I want you to think about that tonight.
15 There is a scenario that is a very small window that's
16 closing in which you might possibly be able to get out if
17 you get convicted -- which would include a plea, but if
18 you are convicted after a jury trial, the verdict -- the
19 sentence would have to be life without parole.

20 So that's a tough decision, so I'm going to
21 give you tonight to sleep on it. I want an answer at
22 9:30 tomorrow morning when we come back. Do you have any
23 questions you want to ask me?

24 THE DEFENDANT: No. No, sir.

25 THE COURT: Okay. Well, good luck, and I'll

1 see y'all at 9:30 tomorrow morning.

2 MR. WARING: Thank you, Judge.

3 (The Court recessed at 5:16 p.m. and
4 reconvened on Thursday, March 14, 2019.)

5 - - -

6 (Whereupon, the proceedings were concluded.)

7 - - -

8 I, the undersigned, Amanda Kelly Haffenden, RPR, CRR,
9 Circuit Court Reporter for the Ninth Judicial Circuit of
10 the State of South Carolina, do hereby certify that the
11 foregoing is a true, accurate, and complete transcript of
12 record of all the proceedings had and evidence introduced
13 in the trial of the captioned case, relative to appeal,
14 in the Circuit Court for Charleston County, South
15 Carolina, on the 11th through the 13th of March, 2019.

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

18 February 13, 2021

19
20
21 

22 _____
23 Circuit Court Reporter
24
25

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
State of South Carolina,	)	CASE NO. 2015-GS-10-03396
	)	2015-GS-10-03997
PLAINTIFF,	)	2015-GS-10-04000
	)	2015-GS-10-04001
VS.	)	2015-GS-10-04002
	)	2015-GS-10-04003
Silvester Desmond Scott,	)	
	)	
DEFENDANT.	)	ORIGINAL
	)	

March 14, 2019

Charleston, South Carolina

B E F O R E:

The Honorable Roger Young

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

Thomas Richard Waring, II, Esquire
For the Plaintiff

John J. Kozelski, III, Esquire
For the Defense

Susannah R. Knox, Esquire
For the Defense

Certified Transcript Provided For: SC Attorney General

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

Silvester D. Scott – Alford Plea
2019-CP-10-03295

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I N D E X

HEARING - Alford Plea

-- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT

-- 13

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: Mr. Scott, we left yesterday afternoon. And
2 I had talked to you about your decisions that you needed to
3 make overnight. I wanted you to sleep on them.

4 So we are back here this morning. And so you have got
5 to -- some decisions to make which were -- either be to finish
6 your trial, testify or not testify, or enter a plea.

7 And so I am now told that you want to enter an Alford
8 plea to the two charges, that being armed robbery and
9 possession of a weapon during the commission of a violent
10 crime. Is that correct?

11 DEFENDANT SCOTT: Yes, sir.

12 THE COURT: All right. Well, let me just go over a
13 couple of things with you, which are some rights that -- I
14 mean we are almost finished with the trial, but we are not
15 finished with the trial; so I need to make sure that you
16 understand what you are doing. Because I understand that you
17 are entering a negotiated plea for a 20-year sentence. So I
18 want to make sure you know what you are doing.

19 Now any time you enter -- or you get arrested or charged
20 with a crime in this state you have the right to a jury
21 trial -- which we were just about to complete. And as part of
22 that trial you saw the State had to present enough evidence to
23 convince you -- convince 12 jurors that you were guilty beyond
24 a reasonable doubt. All 12 jurors would have to agree that
25 you were guilty in order to convict you. And if convicted you

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1 would have the right to appeal. You could challenge any of
2 the evidence the State puts, put up evidence of your own,
3 testify if you want. And if you didn't not want to testify,
4 as I told you, I would instruct the jury they were not to hold
5 that against you.

6 You understand all of those rights; is that correct?

7 DEFENDANT SCOTT: Yes, sir.

8 THE COURT: And you have decided that you do not want to
9 exercise all of those rights to a jury trial and you want to
10 enter this plea instead; is that correct?

11 DEFENDANT SCOTT: Yes, Your Honor.

12 THE COURT: Now an Alford plea is a plea in which you are
13 stating that you didn't do it however there is a benefit to
14 you in entering a guilty plea even though you maintain you
15 didn't do it.

16 The benefit to you in this case, as I understand it, is
17 that the State has served you with notice of life without
18 parole and if you were convicted of the armed robbery offense
19 because you have the previous strike offense in the most
20 serious category you would be facing life without parole.
21 That would be your sentence if convicted.

22 Under this negotiated sentence I will sentence you to
23 twenty years in the Department of Corrections on the armed
24 robbery and five years on the weapons charge. They would run
25 concurrent and you would get credit for the time that you have

1 spent in jail since you got arrested on this charge.

2 Is that what your understanding is?

3 DEFENDANT SCOTT: Yes, Your Honor.

4 THE COURT: All right. And that is what you -- the
5 benefit to you is you do not face life without parole, you
6 face 20 years. It is a no parole offense. You have to serve
7 85 percent of that. But you do get credit for the roughly
8 four years that you have been in jail. All right.

9 So now I am not going to try to talk you out of this. I
10 just need to make sure that you understand the rights that you
11 have.

12 Because later on people get put in the Department of
13 Corrections and sometimes start getting people that tell them,
14 oh, man, you made a terrible decision and they get second
15 thoughts and then they want to come back and say, oh, you
16 know, I didn't know what I'm doing.

17 I want to make sure you know what you are doing. And
18 because we are to the point where we are almost ready to have
19 the jury try the case -- or decide the verdict in the case.

20 Now you have heard all of the evidence that the State has
21 against you. They presented their case in full. You sat down
22 with your lawyers and talked with them about what the State
23 would have to prove in order to convict you of armed robbery
24 and possession of a weapon during the commencement of a
25 violent crime; is that correct?

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1 DEFENDANT SCOTT: Yes, sir, Your Honor.

2 THE COURT: All right. And after you have heard all of
3 this evidence and understanding what the State would have to
4 prove you have decided that there -- despite the fact that you
5 maintain you didn't do it, there is a pretty good possibility
6 that you would get convicted by this jury based on the
7 evidence that was presented this week; is that correct?

8 DEFENDANT SCOTT: Yes, Your Honor.

9 THE COURT: All right. So you had your lawyers put up
10 several witnesses yesterday including an alibis witness who
11 said, you know, in her opinion she remembers that you weren't
12 there and you couldn't have possibly done it because you were
13 somewhere else and she was there.

14 You had -- you would have the right to testify or not
15 testify.

16 You don't want to exercise those rights?

17 DEFENDANT SCOTT: No, Your Honor.

18 THE COURT: All right. And you don't want to put up any
19 other witnesses?

20 DEFENDANT SCOTT: No, Your Honor.

21 THE COURT: All right. Ultimately this is your decision
22 and your decision alone. But you have had the opportunity to
23 discuss this with your lawyers; is that correct?

24 DEFENDANT SCOTT: Yes, Your Honor.

25 THE COURT: All right. And so you want to give up all of

1 those rights that I told you about and you want to give up the
2 right to have the jury decide the verdict on this case?

3 DEFENDANT SCOTT: Yes, Your Honor.

4 THE COURT: Other than this negotiated plea -- let me ask
5 you this: Of the outstanding other armed robbery charges and
6 possessions of weapons, I think from two -- 2014 charges --

7 MR. WARING: Yes, Your Honor.

8 THE COURT: --- are those being disposed of with this
9 plea?

10 MR. WARING: They are, Your Honor. They are.

11 THE COURT: They are being nolle prossed?

12 MR. WARING: Yes, Your Honor.

13 THE COURT: Okay. All right. So they are going to
14 dismiss the two other indictments that you had for armed
15 robbery and two other indictments that you had for possession
16 of weapons during the commission of violent crimes. And you
17 want me to impose a 20-year sentence.

18 Other than that did anybody promise you anything or
19 threaten you to get you to plead guilty?

20 DEFENDANT SCOTT: No, Your Honor.

21 THE COURT: All right. And how old are you?

22 DEFENDANT SCOTT: Fifty-two.

23 THE COURT: And how far did you get in school?

24 DEFENDANT SCOTT: I graduated high school.

25 THE COURT: All right. And I know I asked you this

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1 yesterday, but tell me again what you do; did you ---
2 DEFENDANT SCOTT: Glass ---
3 THE COURT: --- have a job?
4 DEFENDANT SCOTT: Yes. Yes, sir.
5 THE COURT: And what did you do?
6 DEFENDANT SCOTT: Glass fitter.
7 THE COURT: All right. Are you married?
8 DEFENDANT SCOTT: Yes, sir.
9 THE COURT: And do you have children?
10 DEFENDANT SCOTT: Yes, sir.
11 THE COURT: All right. Well, Mr. Kozelski, in your
12 opinion does this gentleman understand what he is doing?
13 MR. KOZELSKI: He does, Your Honor.
14 THE COURT: And do you agree with his decision?
15 MR. KOZELSKI: I do.
16 THE COURT: How about you, Ms. Knox, do you believe he
17 understands what he is doing?
18 MS. KNOX: Yes, Your Honor, I do.
19 THE COURT: And you agree with his decision?
20 MS. KNOX: I do.
21 THE COURT: All right. Well, I have heard all of the
22 evidence that got presented in this case. So there is I
23 believe a substantial factual basis for the plea. And I will
24 hear from the State now if you want to tell me anything about
25 this.

1 MR. WARING: Your Honor, if you are inclined to accept
2 the negotiation of 20 years I don't really need to get into
3 his criminal history. I don't believe the victim wants to say
4 anything, if you are also inclined to go along with the
5 recommendation -- or excuse me, negotiation.

6 THE COURT: All right. Mr. Kozelski, do you want to say
7 anything?

8 MR. KOZELSKI: Just briefly, Your Honor. You know, I
9 want to make it clear for the record, you know, I have
10 really -- I don't know if joy is the word that I want to use.
11 But I have appreciated my relationship with Mr. Scott over
12 these last four years. The first time that I met him he
13 regaled me of stories of my good friend Andrew Grimes. So I
14 have always had a soft spot for him.

15 You know, he does have a bad record. But he does have
16 good in his heart. I told you back in chambers of the time
17 that -- the last time he was in the Department of Corrections
18 he unfoiled a plot to actually kill a guard.

19 That guard actually works at the Charleston County
20 Detention Center. And I have spoken with her. And she was
21 willing to come to his sentencing on previous occasions to
22 speak up on his behalf.

23 So he is a person who has good in his heart. I honestly
24 believe that him going to prison, as warped as this sounds, is
25 going to have him -- let him have a longer life. Because I

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10

1 think that the way that he was going around with his addiction
2 and the people that he was with are dropping like flies with
3 this opioid crisis that we have.

4 So I hope that he does more good while he is incarcerated
5 in the Department of Corrections. But I hope I never see him
6 back here.

7 THE COURT: All right. Ms. Knox, do you want to say
8 anything?

9 MS. KNOX: No, I don't have anything to add. Thank you,
10 Your Honor.

11 THE COURT: Mr. Scott, would you like to say anything?

12 DEFENDANT SCOTT: No, Your Honor.

13 THE COURT: All right. Do you have any total number of
14 days that he gets credit for; have you calculated that?

15 MR. KOZELSKI: It is almost four years -- let's see ---

16 THE COURT: Well, if you can figure that out in a little
17 bit I will put down the number of days. Otherwise I will just
18 put credit for time served and they will calculate it.

19 Sometimes later on I get letters from people and they
20 say, well, I don't think I'm getting proper credit. So they
21 will put down whatever number I give them.

22 MR. KOZELSKI: Okay. I have 1,471 days.

23 THE COURT: One thousand and ...?

24 MR. KOZELSKI: ... four hundred and seventy-one.

25 THE COURT: One thousand four hundred and seventy-one

1 days. All right.

2 Well, Mr. Scott. You know, I told my law clerk this
3 morning when we were talking about this that I am glad I
4 didn't have to make this decision. I didn't know whether or
5 not -- at that point whether or not you had decided to plea.

6 You know, there is certainly enough evidence that was
7 there that could convict you. I know you maintain -- you are
8 maintaining that you didn't do it. But any time you are
9 looking at an Alford plea and you are looking at life without
10 parole, well, you have got to look long and hard at any kind
11 of sentence that you can get that is less than life without
12 parole.

13 Because, as I said, life without parole means exactly
14 that. You are never eligible to get out early. You are never
15 going to leave that prison other than in a pine box.

16 And this way here you are -- in my view the older I get
17 you are a relatively young man. Trust me. Because I am 59.
18 Just turned 59. So at your age you are a youngster in my
19 book.

20 You will get through this. Roughly you have got -- 85
21 percent of 20 is around 17 years. And you are getting credit
22 for 1,400 days. So, you know, you have got a pretty good
23 chance of getting out and still being a very young man, from
24 my perspective. Now these youngsters they are thinking, man,
25 you guys are over the hill at that age.

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1 But you are probably thinking about it a lot more like I
2 am at this point and going, well, I am expecting to -- at
3 least hoping to be around here for a lot longer.

4 So you can make it. It sounds like you did a good job
5 while you were in prison before. It is a tough place to be,
6 and I wouldn't want to be there. But, you know, you know what
7 you have got to do to survive it.

8 I will put down here ATU which is their addiction
9 treatment unit. You can get help for your drug problems while
10 you are there. You have got to figure out a way to beat that
11 thing.

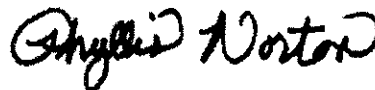
12 Because I know you can get drugs in prison, but that
13 stuff is going to kill you and there is no reason to go
14 through life with something like that hanging over your head
15 that just is -- it is going to kill you. Something is going
16 to kill you in this life; but, you know, drugs is just a -- it
17 is a no-win situation. But the lifestyle is what got you
18 here. And so I am going to impose 20 years for the armed
19 robbery. I am going to run that concurrent with a five-year
20 sentence for the weapons charge. Give you credit for 1,471
21 days on both of them. And wish you good luck. All right.
22 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on March 14, 2019.

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



PHYLLIS NORTON, CVR

Date: July 25, 2019

Certified Transcript Provided For: S.C. Attorney General
Certification Reference #

FORM 5

STATE OF SOUTH CAROLINA

County of CharlestonSilvester Desmond Scott
Full name and prison number (if any) of Applicant

v.

State of South Carolina

2019-CP-10-3295
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEFFILED
2019 JUN 18 PM 3:42
JULIE E. BOSTRONG
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kielclaw Correctional Center
2. Name and location of Court which imposed sentence General Sessions Court 9th Circuit, Charleston, S.C.
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2015-GS-10-04003
 - (b) 2015-GS-10-04002

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 14, 2019 ~~20 yrs~~ 6 yrs
- (b) March 14, 2019 20 yrs
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere ✓
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. N/A
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) WAS NOT RECOMMENDED BY ATTORNEY
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Trial counsel was ineffective for giving Applicant BAD ADVICE
- (b) Trial counsel was ineffective for not investigating an eyewitness
- (c) Trial counsel was ineffective for not interviewing alibi witness before trial.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) AS DESCRIBED ABOVE
- (b) AS DESCRIBED ABOVE
- (c) AS DESCRIBED ABOVE
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

NO

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

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

(a) N/A
 (b) N/A
 (c) N/A

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

(a) your arraignment and plea? yes
 (b) your trial, if any? yes
 (c) your sentencing? N/A
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A

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

(a) the name and address of each attorney who represented you:

i. John J. Kozelski III
101 Meeting St., 5th Floor
 ii. Charleston, S.C. 29401
 iii. _____

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

i. Plea + Trial
 ii. _____
 iii. _____

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

Applicant ask that the court vacate conviction +
sentence AND demand for new trial

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

NO

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Silvester Scott, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Silvester Scott

SWORN to and subscribed before me this 13
 day of June, 2019.

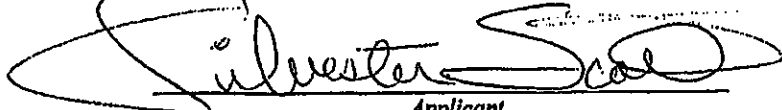
Melissa Opie (L.S.)
 Notary Public

My Commission Expires: Dec. 1, 2025

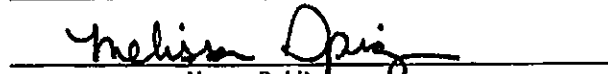
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Silvester Scott, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
13 day of June, 2019.


Notary Public

My Commission Expires: Dec. 1, 2025

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Silvester Scott #296019,

Case No.: 2019-CP-10-3295

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

The State (Respondent), making its Return to the application for Post-Conviction Relief (PCR) filed on June 18, 2019, would respectfully show this Court:

I. Procedural History

Silvester Scott (Applicant) is presently confined pursuant to orders of the Charleston County Clerk of Court. In August 2015, the Charleston County Grand Jury indicted Applicant for Armed Robbery (2015-GS-10-04002) and Possession of a Weapon During the Commission of a Violent Crime (2015-GS-10-04003).

John J. Kozelski, Esquire, represented Applicant. Assistant Solicitor Susannah Knox, Esquire prosecuted the case. On March 14, 2019, Applicant pleaded guilty as indicted to all charges before the Honorable Roger Young. Judge Young sentenced Applicant to a negotiated twenty years concurrent on all indictments. Applicant did not appeal his plea.

II. Current Application

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

1. Trial counsel was ineffective for giving applicant bad advice
2. Trial counsel was ineffective for not investigating an eyewitness

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JULIE J. KNOX, ROXON
CLERK OF COURT
BY [Signature]

3. Trial counsel was ineffective for not interviewing alibi witness

In relief sought, Applicant is seeking: “that the court vacate conviction and sentence and remand for a new trial.”

Attached to this Return and incorporated by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the records from the South Carolina Department of Corrections, the plea transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials. Applicant alleges he received ineffective assistance of counsel. Nevertheless, Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

III. Ineffective Assistance of Counsel

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his or her application. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland, 466 U.S. at 669. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. at 688). 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. With respect to plea counsel, 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. See Hill v. Lockhart, 474 U.S. 52, 52 (1985).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983). Because Applicant's claims of ineffective assistance of counsel are not conclusively refuted by the record, then Respondent would request an evidentiary hearing to fully resolve this issue.

IV. Failure to Investigate

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State."

McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent **634 investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). “[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions....” Strickland, 466 U.S. at 691, 104 S.Ct. 2052. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” Id. at 690, 104 S.Ct. 2052. Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014). Respondent submits that Applicant cannot meet his burden in regards to any claims that counsel was ineffective for failure to investigate.

V. State's Assertion and Reservation of Rights

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCF. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCF. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCF.

VI. Request for Evidentiary Hearing

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Conclusion

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN HUNTER LIMBAUGH
Assistant Attorney General

By: *Benjamin Limbaugh*
ATTORNEYS FOR RESPONDENT

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

October 17, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Silvester Scott, #296019	)	
	)	Case No.: 2019-CP-10-3295
Applicant,	)	
	)	
v.	)	Affidavit of Service by Mail
	)	
State of South Carolina	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, SC 29402

DATED this 17th day of October, 2019.


 Jennifer Jennison, Administrative Coordinator
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2019-CP-10-03295

Silvester Scott

)

) TRANSCRIPT OF RECORD

-vs-

)

) April 8, 2022

State of South Carolina)

) Charleston, South Carolina

) (Via the Virtual Courtroom)

B E F O R E:

The Honorable R. Ferrell Cothran, Jr., Judge

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

Samantha J. Weidauer, Esquire
Attorney for the State

James K. Falk, Esquire
Attorney for the Applicant

Reported By:

Yvestre Torres, OCR
Circuit Court Reporter for the
Ninth Judicial Circuit

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1 THE COURT: You can call the case.

2 MS. WEIDAUER: All right. We call the
3 case of Silvester Scott. Samantha Weidauer on behalf
4 of the State. This is a post-conviction relief matter,
5 Case No. 2019-CP-10-3295 out of Charleston County.
6 In his underlying general sessions case, Mr. Scott was
7 indicted for armed robbery and possession of a weapon
8 during the commission of a violent crime. Applicant
9 proceeded to trial on March 11th, 2019, before the
10 Honorable Roger Young.

11 Prior to closing arguments, on March 14th,
12 2019, Applicant pleaded guilty, as indicted, pursuant
13 to North Carolina v. Alford. Applicant was represented
14 by John Kozelski and Susannah Knox. Richard Waring
15 of the Ninth Circuit Solicitor's Office prosecuted
16 the case. Judge Young sentenced Applicant to
17 a negotiated sentence of 20 years on all indictments,
18 to be served concurrently. Applicant did not appeal
19 his plea or convictions -- sentences or convictions.

20 Though not formally alleged, Mr. Falk has
21 provided the following amended allegations to the State,
22 and it is our understanding that Applicant will be
23 alleging that his plea was involuntary because counsel
24 failed to adequately investigate and prepare an alibi
25 witness for trial and that there was some defect

1 with the indictments. I would ask at this time
2 for Mr. Falk to clarify the allegations for the record.

3 MR. FALK: Yeah, Your Honor, we are -- our
4 issue is really regarding the failure to prepare Harriet
5 Cordero [ph.] to testify.

6 THE COURT: Okay.

7 MR. FALK: I don't believe that the
8 indictment issues are meritorious.

9 THE COURT: Okay.

10 MS. WEIDAUER: And you won't be raising
11 any testimony on the indictment issue, Mr. Falk?

12 MR. FALK: No, we're not.

13 MS. WEIDAUER: Okay.

14 THE COURT: Okay. You can call your first
15 witness, Mr. Falk.

16 MR. FALK: If I can just sort of give
17 a summary of what we believe happened here. So this
18 case originally went to trial, and the trial was
19 proceeding along. I think it went through at least
20 two days of testimony. And, at some point, it became
21 clear to trial counsel, and Mr. Scott was told that,
22 you know, they really now had a problem with this trial,
23 and that's why on the third day, they decided --
24 Mr. Scott pled guilty.

25 And it's our contention that he never would

1 have had to plead guilty had this testimony from one
2 witness not had gone so badly. My client then felt
3 forced to plead guilty. So that's kind of where
4 we are, is that we had a trial, we believe that trial
5 counsel inadvertently drove the trial off the tracks,
6 and the only salvation -- the only thing to save it
7 would be to sort of cut their losses and enter a plea.
8 So that's our introduction, and I'll call Mr. Scott.

9 THE COURT: All right. Mr. Scott.

10 THE APPLICANT: Yes, sir.

11 THE COURT: Raise your right hand, please,
12 sir.

13 MR. SILVESTER SCOTT was called as a witness,
14 being duly sworn, was examined and testified as follows:

15 THE COURT: Did you hear me?

16 THE APPLICANT: I do, yeah.

17 THE COURT: Okay. Thank you. All right.
18 Yes, sir, Mr. Falk.

19 DIRECT EXAMINATION

20 BY MR. FALK:

21 Q. All right, Mr. Scott, tell me about the
22 preparation for the trial in this case. What was your
23 -- John Kozelski was just sort of -- was the main lawyer
24 on the case; is that correct?

25 A. Yeah, that's correct.

1 Q. And then he had an assistant that helped him,
2 an associate counsel that helped him, Ms. Knox.
3 But Mr. Kozelski was your main attorney?

4 A. Correct.

5 Q. Okay. And so what was the trial strategy going
6 into this trial?

7 A. The trial strategy was that the State only had
8 circumstantial evidence. And at the opening statement,
9 Mr. Kozelski said that, you know, we'll present an alibi
10 witness to refute all of this circumstantial evidence
11 that they will present to the jury.

12 Q. And then what did -- going into those, were there
13 plea negotiations with the State?

14 A. Yeah, we had -- they wanted a ten-year plea
15 negotiation. And the reason it's the ten is because
16 the State didn't have a witness, no one said anything,
17 none of that. All they had was circumstantial evidence.
18 And we supposedly had an air-tight alibi witness who
19 was going to testify to my whereabouts during the time
20 of this crime being committed.

21 Q. But where were you when the crime was committed?

22 A. I was in North Charleston.

23 Q. And how do you remember what was going on that
24 day? What was your -- what were you doing that day?

25 A. Oh, that particular day, I was helping -- I was

1 talking to a friend of mine. And Ms. Harriet, the alibi
2 witness, she drives a moped around the area to get back
3 and forth to the grocery store or whatever.

4 So during this time of the day, she came by,
5 and her moped stalled on her right there in front
6 of the road by my driveway. So, I helped her with the
7 moped that day. I brought it in my yard, tried to work
8 on it for her. I tell her I'll let it cool off right
9 there, Ms. Harriet, and I'll give you a lift home,
10 and later on after it cools off, I'll bring you back
11 to come get it, or I'll bring it to you myself.
12 And that's what happened that particular day.

13 Q. And can you describe a little bit about -- you
14 called her Ms. Harriet. Can you give me an idea how old
15 she is?

16 A. She's very old.

17 Q. She's as old as your grandmother?

18 A. Basically, yes.

19 Q. Okay.

20 A. And she was old at the time when this happened.
21 That's why everyone in the neighborhood pretty much
22 looks out for her when she started to be independent
23 at her old age.

24 Q. At one time, she -- I think in prior testimony,
25 she said she's in her 70s. Does that sound right

1 to you?

2 A. Yeah, I think at least -- at that time, at least
3 70s.

4 Q. And she's driving around on a moped?

5 A. Yes, sir.

6 Q. All right. And you have also had some -- when
7 we had some conversations, you had some concerns about
8 Mr. Kozelski's advice about your liability under hand
9 of one, hand of all theory. What was that?

10 A. Well, there was a recess, and we went in the back
11 and discussed the case. And, you know, he told me ---

12 Q. Okay. Let me just set the stage here again.
13 So this recess, this is after Ms. Cordero testified?

14 A. Yes, sir.

15 Q. Okay.

16 A. After she testified, we had a recess and we
17 spoke, and he was, like, I should think about taking
18 a plea at this point. And I was, like, you know, well,
19 why should I because the State's witness just said
20 that I wasn't the guy? The State's witness testified
21 herself, and said I wasn't the guy. So why should
22 I take this plea? Then he said, well, they probably
23 can convict you with the hand of one, hand of all.

24 And I was confused because I was, like, they
25 never introduced a co-defendant or anyone, you know,

1 saying that I conspired with anyone. So he said that,
2 and then along with Ms. Cordero's testimony, so at this
3 point, you know, I felt kind of stuck, like, you know,
4 this was, you know, life in prison, or take the deal.
5 That's what I had on the table.

6 Q. Okay. Was it also your understanding that one
7 of the police suspects had passed away by the time this
8 case went to trial?

9 A. The case was basically a vehicle being used
10 in an armed robbery.

11 Q. Okay.

12 A. And the owner of the vehicle, I think he ---

13 Q. He's the one that passed away?

14 A. Yeah. He overdosed prior to trial, the owner
15 of the vehicle.

16 Q. Okay. Would he have been potentially a witness
17 against you, a State's witness?

18 A. He could have.

19 Q. Okay.

20 A. Yeah, he could have been.

21 Q. All right. So going back to -- so all of
22 a sudden -- well, was there a discussion about your
23 liability with the hand of one, hand of all? Did you
24 ever have that discussion with Mr. Kozelski before this
25 case went to trial?

1 A. No, that was the first time he ever said anything
2 about it.

3 Q. Okay. Okay. And, you know -- so you went to the
4 plea colloquy, the judge asked you if, you know, you're
5 being threatened or anything like that. And he probably
6 said are you pleading guilty because you are guilty?
7 I mean, you wound up going through a standard plea,
8 right?

9 A. Yes, sir.

10 Q. And your testimony is, the reason why you pled
11 was because your trial was going -- your lawyer
12 suggested strongly that ---

13 MS. WEIDAUER: Objection. Leading.

14 MR. FALK: I'm just trying to ---

15 THE APPLICANT: I pled because that was
16 the advice of my attorney.

17 MR. FALK: Okay. Fair enough. That's
18 what kind of what I was trying to get to.

19 BY MR. FALK:

20 Q. And his advice changed -- at the beginning of the
21 trial, you think that he was optimistic about this case?

22 A. Yes, he was.

23 Q. Okay. And so his advice changed once Harriet
24 Cordero testified; is that accurate?

25 A. Yes, after the testimony he was, like -- everyone

1 was shocked of her condition on the stand, her mental
2 condition.

3 Q. Okay.

4 MR. FALK: I have no further questions
5 for Mr. Scott.

6 CROSS-EXAMINATION

7 BY MS. WEIDAUER:

8 Q. Good afternoon, Mr. Scott. How are you?

9 A. All right. How are you doing?

10 Q. You pleaded guilty, ultimately, in 2019 following
11 three days of trial, correct?

12 A. Correct.

13 Q. And as a result of that plea, do you remember
14 the State dropping a couple of charges?

15 A. I believe they did.

16 Q. Okay. Specifically, two armed robbery ---

17 A. I'm not sure.

18 Q. Specifically, they dropped two armed robbery
19 charges and two possession of a weapon charges, correct?

20 A. Correct.

21 Q. Okay. And you understand that if you're granted
22 this PCR, you would be able to be retried and convicted
23 on all of those charges they dropped, this armed robbery
24 and possession of a weapon during the commission
25 of a violent crime, and the State could seek life

1 without parole?

2 A. Yes, I know.

3 Q. Okay. Do you remember roughly how many times
4 you met with your attorney prior to trial?

5 A. Well, this was quite -- it was a five-year span
6 from the arrest to trial. So -- and I had other charges
7 too that I went to trial on. I went to trial because
8 of other charges, so we met frequently about that.
9 I mean, about those charges more than, you know, the one
10 that ---

11 Q. Okay. Do you remember some of the discussions
12 you had with your attorney regarding these specific
13 charges during those meetings?

14 A. Basically, it was just about the circumstantial
15 evidence. That's about it.

16 Q. Okay. And you recall reviewing discovery
17 with your counsel?

18 A. Excuse me?

19 Q. Do you recall reviewing discovery with counsel?

20 A. I think we did discovery on the other charges.
21 The other charges were more -- more of importance than
22 this one, to be honest with you. I think Mr. Kozelski
23 put more emphasis on the other charge because that one
24 was more -- had more issues than this one. This was
25 the weaker of the charges -- of all the charges I had,

1 this one that I had. So, I believe he went over
2 discovery over the other charges than this one.

3 Q. Okay. And it's your understanding, as you
4 testified, that this was a circumstantial evidence case,
5 correct?

6 A. Yes, ma'am.

7 Q. Okay. Did you give your attorney any leads
8 or witnesses to investigate?

9 A. Yes, ma'am.

10 Q. And who would that be?

11 A. Ms. Harriet Cordero, I gave them as an alibi
12 witness.

13 Q. Did you give them anyone else?

14 A. No, ma'am.

15 Q. Okay. Ultimately, you did decide to plead guilty
16 in this case, correct?

17 A. Correct.

18 Q. And you testified that that was your decision,
19 correct?

20 A. Yeah, but it's a decision based upon the advice
21 of my attorney.

22 Q. Okay. During the plea, it looks like Judge Young
23 asked you that -- whether you had discussed all of
24 the evidence against you and spoken with your attorneys
25 and whether this was your decision, and your decision

1 alone, correct?

2 A. Correct.

3 Q. Okay. And you answered that it was your
4 decision, and your decision alone, at the plea, correct?

5 A. Yes, ma'am.

6 Q. Okay. Prior to pleading guilty, I would like
7 to expand on those discussions a little bit. After
8 Harriet Cordero's testimony, what did your discussions
9 with counsel look like? What did they say to you?

10 A. Basically, that I needed to take a plea.

11 Q. Did they tell you that they could call the
12 investigator that had interviewed that alibi witness
13 before the close of the defense's presentation of
14 the case to combat that alibi witness's testimony?

15 A. No.

16 Q. They did not tell you that they could call
17 Investigator Verdell?

18 A. No.

19 Q. Okay. Okay. And everything that you testified
20 here to today, you understand that you could have
21 testified at trial, you have the right to testify
22 on your own behalf at trial, and could have presented
23 that testimony to the jury?

24 A. Yes, I know I had the right to testify,
25 and I know I had the right to remain silent as well.

1 Q. You did. And the testimony you presented
2 here today that you had an alibi, that you were with
3 Ms. Cordero, you could have testified to that at trial,
4 correct? Do you understand that?

5 A. Yes, ma'am.

6 Q. And, ultimately, why didn't you?

7 A. Because I have a prior -- my prior record,
8 so Mr. Kozelski said it wasn't -- you know, he didn't
9 think it was a good idea for me to take the stand.

10 Q. Okay.

11 MS. WEIDAUER: Beg the Court's indulgence
12 for one moment, Your Honor.

13 THE COURT: Okay.

14 BY MS. WEIDAUER:

15 Q. One last question. At your plea, do you remember
16 the Court asking you that you believed there was a good
17 possibility you would be convicted based on the evidence
18 presented by the State?

19 A. No, I don't remember that. I mean, I was --
20 basically, I was numb about the situation that took
21 place on the stand. I was -- you really had to have
22 been there to just understand what happened. It was
23 shocking.

24 But at the same time, I respect Mr. Kozelski,
25 you know what I'm saying? I like him as a person.

1 He's a good person, and he's a good attorney. It's just
2 that -- you know, I guess, he just -- he just slipped
3 on that one. That one got out of hand on him. As far
4 as the colloquy, you said when the judge was asking me
5 a question, I was -- you know, I was shocked. I didn't
6 -- I mean, he probably did ask me that. I can't
7 remember verbatim right now, ma'am, exactly what the
8 judge asked me.

9 Q. Okay. So prior to -- and I don't want to put
10 words in your mouth. But prior to the State's
11 cross-examination of Harriet Cordero, you were satisfied
12 with counsel's representation; is that fair?

13 A. In my own understanding of the case -- I'm not
14 an attorney, but from me being there, the trial was just
15 based on circumstantial evidence that didn't amount to
16 anything. And then the State's witness testified that
17 this ain't the guy. The circumstantial evidence ---

18 Q. But prior to the cross-examination of Harriet
19 Cordero, you felt -- you mentioned you respected
20 Mr. Kozelski, and that you liked him?

21 A. Yes.

22 Q. You were happy of his -- with his representation
23 of you prior to the State cross-examining Harriet
24 Cordero, correct?

25 A. I feel as though that it was going well prior

1 to that.

2 Q. And he did everything that you asked him to do
3 and looked into all -- investigated everything you gave
4 him to look into, correct?

5 A. Well, I can't say that because, evidently,
6 he didn't investigate Ms. Cordero prior to trial.

7 Q. All right.

8 MS. WEIDAUER: Thank you, Your Honor.
9 Nothing further.

10 THE COURT: Okay. Anything further
11 with this witness, Mr. Falk?

12 MR. FALK: No, Your Honor.

13 THE COURT: Okay. You may call your next
14 witness.

15 MR. FALK: We'll call Mr. Kozelski to the
16 stand.

17 THE COURT: Okay. Can you turn your mic
18 on, please, sir -- I mean, your camera? Thank you.
19 You're on mute. All right.

20 MR. JOHN KOZELSKI was called as a witness,
21 being duly sworn, was examined and testified as follows:

22 THE COURT: Okay.

23 MR. FALK: Are you in the passenger's seat,
24 or the driver's seat?

25 THE WITNESS: I am in the passenger's seat.

1 I apologize. Planned family vacation. Sorry.

2 I apologize for that.

3 MR. FALK: No, I just wanted to make sure
4 you weren't driving. That's all.

5 THE WITNESS: No, no.

6 DIRECT EXAMINATION

7 BY MR. FALK:

8 Q. In your opening -- I know you don't have it in
9 front of you. But in your opening statement, you had
10 said that you're going to hear from Harriet Cordero,
11 who spoke to my investigator shortly after Silvester
12 was arrested. So you kind of told the jury that they
13 were going to hear from an alibi witness?

14 A. That's correct. And, you know, it was kind of
15 the embarrassing thing about this case, is that I did
16 mention that at the beginning in opening. And I talked
17 to my investigator the week before this and asked her
18 if she had been in touch with Harriet Cordero because
19 I knew she was older. She was a lot older, and it had
20 been almost five years since the time that we had
21 originally spoken to her to the time that the trial
22 was ultimately going to happen.

23 And so I -- you know, I asked her, you know,
24 is she still with it, essentially. And my investigator
25 said, yeah, she remembers it like it was yesterday.

1 So, I actually took that term or that phrase and used
2 that in my opening, which ultimately I do regret, but,
3 yeah.

4 Q. And Mr. Scott described her as in her 70s, so she
5 was elderly?

6 A. Originally talked to her -- when my investigator
7 had originally talked to her. But we sort of first
8 had something out in the hallway when the solicitor
9 attempted to speak with her before she testified.
10 The solicitor came up to me and told me that when
11 he tried to talk to her, she basically refused to talk
12 to him. So, I told him I didn't know what that was
13 all about, for him to essentially talk to Susannah,
14 who's second chair, who's assisting me with Harriet
15 Cordero.

16 Q. So when you're preparing -- and your defense
17 in this case was going to be this alibi witness?

18 A. Yeah.

19 Q. Yeah?

20 A. It was definitely that my client didn't do
21 it and that we had a witness to prove that he wasn't
22 there at the time of this bank robbery.

23 Q. And so did you personally speak with her or sort
24 of reviewed her testimony prior to the trial?

25 A. I never spoke with her directly; we did get

1 a statement. About two weeks after Mr. Scott was
2 arrested, my investigator went to speak with him, and
3 he gave her the alibi witness, her name and her number.
4 She contacted her, and they then got her statement,
5 and I sent that statement to the original solicitor
6 on this case.

7 Q. And would you agree that -- was David Osborne
8 the solicitor on this case?

9 A. So he wasn't the original solicitor.
10 The original solicitor was Chad Simpson, and then
11 it switched when he left the solicitor's office.
12 It switched to David Osborne. We actually objected
13 to him being the solicitor because he had been
14 a detective that had arrested Mr. Scott in a previous
15 case, and we didn't know if they were going to try
16 to pile in any of those cases into his current case,
17 so we thought there was probably some sort of conflict
18 there. And Mr. Osborne, I don't know if he agreed
19 with us, but he gave the case to Richard Waring and just
20 for, I guess, caution's sake.

21 Q. Okay. Now let me just -- Ms. Verdell is
22 the public defender's investigator; is that right?

23 A. Yeah, Verdell Young is her name. Yes, she was
24 my investigator at that time.

25 Q. Okay. Would you agree that the cross-examination

1 was a problem for this case?

2 A. It was, I would say, probably my most
3 embarrassing moment in court. Essentially, what they
4 did, and I think she was very old and very flustered
5 by the questioning. But he essentially made it sound
6 like we put her up to making the statement.

7 Q. And the judge -- the cross-examination starts
8 on Page 5 -- well, the problematic part, starts on
9 Page 521, about Line 18?

10 A. Okay.

11 Q. So this is a case where you said it was five
12 years later?

13 A. Yeah, it was almost five years later.

14 Q. And so you would anticipate when you've got
15 an alibi witness, knowing that they had contact with
16 the Defendant five years earlier, you would anticipate
17 a question from the prosecutor, how do you remember
18 it, what was it, March 4th? I mean, that's an obvious
19 question, isn't it?

20 A. I would say so, yeah.

21 Q. And she said that she remembered it because
22 her moped was running hot that day; is that right?

23 A. I believe that is what she testified to.

24 Q. And she remembered -- I mean, she certainly
25 testified that Mr. Scott was helping her with the moped,

1 right?

2 A. Correct. She just couldn't -- she couldn't
3 tell the solicitor why she remembered it was that day.
4 And so when he pressed her on that, she said that that's
5 the day that my investigator told her, which is not the
6 case.

7 Q. If we look at page -- I know you don't have
8 the transcript. So if we look at Page 522, there
9 was a question from Mr. Waring, and she told you that --
10 "And she told you that happened on March 4th, correct?"
11 And Ms. Cordero said, "She told me when. I don't
12 know the exact date, but it was written down though."
13 Next question: "It was written down?" "Yes." Next
14 question: "By the investigator?" "Yeah, I signed
15 it." So it looked like the investigator told her what
16 the date was?

17 A. Right.

18 Q. And there's some testimony, and there's some
19 cross-examination testimony earlier, "When did you first
20 become aware that the bank had been robbed and he's been
21 arrested for the bank robbery?" She responded, I think,
22 Page 520, Line 19, "Who asked about that? She's in
23 the room?" "Yes, Ms. Verdell. She came to my house,
24 and she asked me what happened. The investigator with
25 the PD's office."

1 And so then when we get into her -- him asking
2 on cross-examination, "Why do you remember that date?"
3 "Because my moped ran hot." And then, "How do you know
4 it was that date?" "Because the prosecutor -- the
5 investigator told me." That's her testimony?

6 A. That's correct. Sorry about that.

7 Q. So how did that change -- so how did that change
8 your opinion on how this case was going?

9 A. Well, it essentially made us look like we put
10 this old lady up to create an alibi defense, which is
11 not what we had intended. It's not what we, you know,
12 we're planning to do. I -- to be perfectly honest with
13 you, I didn't do that much with Harriet Cordero because
14 I had given that job to my second chair, Susannah Knox.

15 Q. Okay.

16 A. And so all the interactions that were dealt
17 with Ms. Cordero was with Ms. Knox.

18 Q. But you recommended that he accept the plea,
19 I mean, at that point; is that correct?

20 A. Certainly. I mean, he did not -- he never wanted
21 to take a plea. And he was right, there was a ten-year
22 plea offer before the trial, and he had done five years
23 of that in the county jail. But he didn't want to take
24 that. You know, I think the judge -- Judge Young
25 was also pressuring the solicitor to make an offer,

1 and that didn't happen. And so they, ultimately,
2 came with a 20-year offer.

3 And I told Silvester that, look, we sort of put
4 all our eggs in that basket, Ms. Cordero's basket,
5 and that basket got dropped. So that's kind of why
6 I told him, you know, I didn't -- he was already served
7 with LWOP notice. I didn't want to see him go to prison
8 for the rest of his life based on, you know, this bad
9 testimony. But I think he's right, I think we were
10 winning that trial up to that point, and then it sort
11 of took a turn.

12 Q. And you thought his liability could be
13 established on a hand of one, hand of all theory?

14 A. What was your last question?

15 Q. And you told him that his liability could be
16 established under a hand of one, hand of all theory?

17 A. I don't remember talking to him about that.
18 I don't think that they were pursuing that avenue
19 because there was no co-defendant. I don't think
20 that they ever thought this was a two-person job,
21 and they certainly didn't arrest anybody else for it.
22 So, I don't remember saying that, but I could have --
23 it could have been a possibility of something that
24 we had discussed.

25 Q. And just -- if you could just briefly summarize.

1 So what was the State's case against Mr. Scott?

2 A. I mean, it was fairly circumstantial, as Mr.
3 Scott stated. They essentially tied him to a vehicle
4 that was used in the bank robbery. It was owned by
5 an addict, and he frequently lent his car out to people
6 to go get drugs. Mr. Scott had borrowed the car earlier
7 that day, and there was an Alonzo [ph.] Green.

8 He was a witness in the trial who stated
9 that Silvester had borrowed the car at some point,
10 and that he's going to get drugs for Mr. Green.
11 And that ultimately -- they were gone for several
12 hours. He called the phone and somebody else picked
13 up. But it, basically, revolves around that car that
14 was used in the -- to get away, the getaway vehicle.

15 Q. So the State could put him in the car, and they
16 could put the car at the scene?

17 A. Right. Essentially, that was it; that was the
18 link.

19 Q. Okay.

20 MR. FALK: Your Honor, I don't believe
21 I have any further questions for Mr. Kozelski.

22 THE COURT: Okay. State has any?

23 CROSS-EXAMINATION

24 BY MS. WEIDAUER:

25 Q. Good afternoon. Is it Mr. Kozelski? How do

1 I properly pronounce that?

2 A. That's perfect. Thank you.

3 Q. Okay. All right. I have a tricky last name
4 as well, so. How long have you been practicing law?

5 A. It's going to be ten years in November.

6 Q. Okay. And how much of that has been criminal
7 law?

8 A. That's how long I've been a PD, so it's been
9 about 11 years and ten of it has been as a PD.

10 Q. Okay. And in this case, you said that you were
11 appointed, correct?

12 A. Yes.

13 Q. And that was roughly four or five years before
14 trial?

15 A. Correct.

16 Q. Okay. How many times do you think you met
17 with Applicant and discussed this case in the course
18 of that representation, if you could give us a ballpark?

19 A. I probably met with Silvester over the course
20 of five years, probably 40 times.

21 Q. Okay. And in the course of that ---

22 A. I would ---

23 Q. Go ahead.

24 A. I would say that he's correct, probably most
25 of those meetings surrounded the earlier charges that

1 he had. He had been served with LWOP notice for
2 a trafficking heroin case that we did take to trial.
3 And Judge Dennis, ultimately, suppressed that for
4 an illegal search, and then we sort of switched gears
5 to this trial.

6 Q. Okay. But over that course of four to five
7 years, and in the course of your representation, you did
8 receive discovery in this case and were able to review
9 that with Applicant, correct?

10 A. Yes, yes.

11 Q. Okay. And you would have reviewed the
12 indictments, and all of the elements of the offenses
13 that Applicant was facing, with him?

14 A. Yes, absolutely.

15 Q. Okay. What were your conversations regarding
16 LWOP? You said that he did not want to plead initially?

17 A. He did not want to plea. There were a lot
18 of other extraneous factors that sort of influenced,
19 I think, that decision. But there wasn't very many
20 offers until Chad Simpson was off the case and David
21 Osborne came in, and he essentially just said, hey,
22 I'll give him ten years if he wants to plead guilty.

23 And, yeah, I thought that was a pretty good deal
24 considering the amount of time that he had already spent
25 in the jail. But, you know, it wasn't a very strong

1 case, to be honest with you. So, I do understand
2 his want to go to trial.

3 Q. Okay. Prior to trial, can you explain the
4 investigation that you did, either personally or through
5 an investigator?

6 A. So the investigation for this was done --
7 probably most of it was done about two weeks after Mr.
8 Scott was arrested. I met with him, and my investigator
9 also met with him, to figure out what we needed to
10 sort of find. And I think he also had hired a private
11 attorney for some of his other charges, so it was kind
12 of we were, like, balancing what we needed to find out.

13 And we did speak -- ultimately, speak to
14 Harriet Cordero shortly after this incident took place,
15 but there wasn't much in the way of other witnesses.
16 I think we talked to Alonzo Green several times.
17 I had personally talked to Alonzo Green and met with
18 him several times. Actually, I represented him as well,
19 but I had to conflict it out because of this case.

20 Q. And Mr. Green was ultimately called as a State's
21 witness, right?

22 A. He was, yes.

23 Q. Okay. As far as prep for Ms. Cordero, you said
24 that was done almost immediately after the incident?

25 A. We took a statement from her prior to this

1 incident, but I don't think that we had reached out
2 to her in that five years, other than, you know, a few
3 weeks before trial to make sure she still remembered
4 the statement that she had given us.

5 Q. Okay. Did you have any other -- anything else
6 in way of a defense, other than her alibi testimony?

7 A. Other than putting the State's evidence to the
8 test. I mean, that was essentially our case.

9 Q. And by State's evidence to the test, you mean
10 moving for a directed verdict?

11 A. Certainly. I think without Ms. Harriet, I don't
12 know if we would have gotten a DV motion, but I don't
13 know if there was substantial circumstantial evidence
14 to be sure.

15 Q. Okay. And you actually did move for a directed
16 verdict in this case?

17 A. I believe so.

18 Q. Okay.

19 A. Yeah.

20 Q. But prior to trial, you had no reason to believe
21 that Ms. Cordero would give unfavorable testimony?

22 A. I had no reason to believe that. But, like
23 I said, I had not talked to her; that was Ms. Knox.

24 Q. Okay. And on direct, Ms. Cordero actually
25 did testify that she knew Applicant, correct?

1 A. Yes.

2 Q. And she did describe the day in question,
3 correct?

4 A. I believe so.

5 Q. Okay. And on direct, you were able to elicit
6 testimony that Applicant had helped her with her moped
7 during the time of this incident?

8 A. Ms. Knox did.

9 Q. Okay. So it wasn't until cross where Ms. Cordero
10 seemingly faltered a bit as to whether she was certain
11 of the date?

12 A. Right. I mean, it was cross-examination, which
13 sort of showed her fragility, I guess you could say,
14 or her diminished capacity.

15 Q. Okay. And sometimes that happens on -- in your
16 experience, sometimes that happens on cross, the
17 solicitor is able to hone in on something and somehow
18 refute what you had been able to favorably have -- was
19 testified to on direct?

20 A. Correct, yeah.

21 Q. Okay. Can you explain what your conversations
22 looked like prior to Applicant's plea with him?

23 A. Well, like I just said, I told Silvester that we
24 sort of put our eggs in this basket and that the basket
25 just got dropped. I didn't want him -- I didn't want

1 to see him do the rest of his life in prison.

2 It was sort of cut your losses sort of conversation.

3 Q. Sorry, I didn't hear the last half of your
4 answer.

5 A. It was sort of cut your losses situation.

6 I mean, I didn't -- I liked Silvester personally.

7 I thought he was a great client, he's very knowledgeable
8 of the law, and I think he was very understanding.

9 He still didn't want to plea, but I told him, you know,
10 the situation that had occurred. It made it look like
11 we were -- we promised big, and we certainly under
12 delivered because we promised at the very beginning
13 that this woman remembered it like it was yesterday.
14 And then when she testified, it was almost as if she
15 didn't remember yesterday.

16 And so, you know, I told Silvester that it was
17 certainly a huge risk that he was taking because he had
18 already been served with LWOP.

19 Q. And he understood that was his calculated risk
20 to take, he had to make that ultimate decision to plead?

21 A. I mean, it was -- I think it was, ultimately,
22 his choice, as it is with all my clients. But I was
23 definitely urging him to take it because I did like him,
24 and I didn't want him to see -- you know, I didn't want
25 him to leave in a pine box.

1 Q. Did you speak with him about the possibility
2 of calling Investigator -- sorry, Verdell, correct?

3 A. Yeah, Verdell Young. I think I briefly talked
4 about it. But I told him I didn't know how much
5 difference that would make because we had already said
6 at the very beginning that she was our alibi witness and
7 that she would testify to this, and it basically made
8 it sound like we put her up to this. And, you know,
9 I don't know how well that was going to be smoothed over
10 with the jury by calling Verdell. I think it was maybe
11 briefly mentioned; we didn't sort of harp on it.

12 Q. Okay. And as a result of the Applicant's plea,
13 a few of his existing charges were dropped, correct?

14 A. That's correct.

15 Q. Okay. And you believe Applicant was competent
16 to enter a knowing and intelligent guilty plea and
17 understand the consequences of that?

18 A. Yes.

19 Q. Okay. And you, as you've stated, agreed with
20 his inclination to plea?

21 A. Yeah.

22 Q. Okay.

23 MS. WEIDAUER: Beg the Court's indulgence
24 for one moment, Your Honor.

25 THE COURT: Okay.

1 (Pause.)

2 BY MS. WEIDAUER:

3 Q. Should you have not called Ms. Cordero
4 as an alibi witness ---

5 A. I ---

6 Q. --- what other evidence would you have been able
7 to put up to combat the State's allegation that he was
8 where he was that day?

9 A. We wouldn't have put up any evidence. We would
10 have simply put the State's evidence to the test, which
11 I think is what we were doing, and we were doing a very
12 good job of it at the time. But that -- it did take
13 a U-turn.

14 Q. And ---

15 MS. WEIDAUER: Nothing further, Your Honor.

16 THE COURT: Okay. Thank you. Anything
17 else, Mr. Falk?

18 MR. FALK: Yes, Your Honor, an apology
19 for butchering Mr. Kozelski's last name. I'm sorry.
20 I kind of messed you up between ---

21 THE WITNESS: Not a problem.

22 MR. FALK: --- Brando's character from
23 Street Car, and I just sort of put those two names
24 together. I apologize.

25 THE WITNESS: It's quite all right, sir.

1 THE COURT: All right. Do you have any
2 other witnesses?

3 MR. FALK: I would like to call Ms. Knox.

4 THE COURT: Okay.

5 MS. KNOX: Good afternoon.

6 THE COURT: Good afternoon. Raise your
7 right hand, please, ma'am.

8 MS. SUSANNAH KNOX was called as a witness,
9 being duly sworn, was examined and testified as follows:

10 THE COURT: Thank you. Mr. Falk.

11 DIRECT EXAMINATION

12 BY MR. FALK:

13 Q. Ms. Knox, so it was -- in sort of the division
14 of labor here, it was your job to put Ms. Cordero
15 on the stand?

16 A. That's right.

17 Q. And did you have -- did you have any
18 conversations with her the week prior to?

19 A. Yes, I spoke to her on the phone. I don't
20 remember exactly what day it was, but I did speak
21 to her on the phone prior to trial, within the week
22 prior to trial.

23 Q. And what did you do to kind of prepare her
24 to testify?

25 A. I primarily made sure that she kind of went

1 through her story again and just made sure that she
2 still remembered the same details that were in the
3 statements that she had given five years previously,
4 and made sure the story made sense and that she didn't
5 sound like she had changed or anything like that.
6 That's mostly what I did with her, just made sure
7 she still had the same story and it made sense.

8 Q. Did you try and prepare her for the State's
9 cross-examination?

10 A. I did. And, you know, I don't remember it.
11 It was awhile. I don't remember exactly what I asked
12 her. I did talk to her about the State's cross and what
13 they were likely to ask her, I thought. But I don't
14 think I really prepared for the line of questioning
15 that was taken and what Mr. Osborne took trying
16 to get her tripped up around the date, how she knew
17 it was that date.

18 Q. You're saying you don't recall doing that?

19 A. That's right.

20 Q. Do you sort of agree with Mr. Kozelski's
21 assessment of how her cross-examination -- how that
22 cross-examination testimony affected the trial?

23 A. Yes, I do.

24 MR. FALK: Your Honor, I have no further
25 questions.

1 THE COURT: Okay. Anything from the State?

2 CROSS-EXAMINATION

3 BY MS. WEIDAUER:

4 Q. Can you just describe your scope of
5 representation in this matter?

6 A. It was -- I had helped Mr. Kozelski with -- as he
7 had mentioned, there was some earlier charge that took
8 up most of their time together. I had helped him with
9 that suppression hearing in an unrelated case, and then
10 helped him with this, just trial prep. So, I didn't
11 really meet -- I didn't really have a relationship with
12 Mr. Scott the way Mr. Kozelski did. And so my role was
13 really limited to trial prep and reviewing the evidence
14 and, of course, assisting with Ms. Cordero, her direct
15 testimony.

16 Q. Okay. And you were able, ultimately on direct
17 examination, to get Ms. Cordero to testify that she knew
18 Mr. Scott, the date of the incident was when he helped
19 her with her moped and kind of push her and press her
20 on some of the specifics of that day and why she knew
21 it was that day -- why she knew that's the day he helped
22 her, rather?

23 A. That's right. I don't -- yes, that's right.
24 I think she told the same story that we were expecting
25 on direct.

1 Q. So you had no reason, prior to cross, to believe
2 that she would give unfavorable testimony, or that
3 the solicitor would be able to confuse her as far
4 as the date goes?

5 A. I don't think so. You know, she did come up
6 during direct as a little bit, I would say, quirky.
7 I think somebody who had known her previously maybe
8 would have been able to identify that she had become
9 a little more senile in the past five years. So she
10 became very animated during direct testimony about
11 her moped. But, other than that, I think it went fine.

12 Q. Okay. And, ultimately, Applicant did plead
13 guilty. Did you tell him prior to that plea that you
14 could call Investigator Verdell as a defense witness?

15 A. I didn't personally. Again, Mr. Kozelski
16 was kind of the one with more of a relationship with
17 Mr. Scott. I was present for the conversation when
18 that decision happened, and I believe it was exactly
19 the way Mr. Kozelski described. That was briefly
20 mentioned, you know, and we were discussing what could
21 -- the two options, between pleading and finishing
22 the trial.

23 Q. And, ultimately, that was a strategic decision,
24 as you did not believe that Ms. Cordero's testimony
25 helped any further?

1 A. That's right. I think we were concerned
2 that wouldn't really do enough to combat the impression
3 that we had, you know, put this idea, this particular
4 date, into Ms. Cordero's mind.

5 Q. And in your experience, that sometimes happen
6 on cross-examination, the State is able to pick at some
7 of the testimony from direct?

8 A. Yes, that's the whole purpose of
9 cross-examination.

10 Q. Okay. And just to kind of summarize and clarify,
11 before this, you believed that you would not have
12 put Ms. Cordero on the stand, based on your prior
13 investigation and preparation, should you have believed
14 she would hurt his case?

15 A. No, absolutely not.

16 MS. WEIDAUER: Nothing further, Your Honor.

17 THE COURT: Okay. Thank you. Anything
18 further, Mr. Falk?

19 MR. FALK: No, Your Honor.

20 THE COURT: All right. Any other witnesses
21 from the ---

22 MR. FALK: That's our case, Your Honor.

23 THE COURT: Okay. What about the State?

24 MS. WEIDAUER: No witnesses for the State.

25 THE COURT: All right. Thank y'all. I will

1 review the file further, look at my notes and get back
2 with y'all in a few days.

3 MS. WEIDAUER: Thank you, Your Honor.

4 MR. FALK: Your Honor, you do have the trial
5 transcript, in addition to the plea transcript, right?

6 MS. WEIDAUER: I believe we've provided
7 them both to ---

8 MR. FALK: Okay.

9 MS. WEIDAUER: --- Judge Cothran in advance
10 of this hearing, Jim.

11 (End of Transcript of Record)

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CERTIFICATE OF REPORTER

State of South Carolina)

County of Charleston)

I, the undersigned, Yvestre Torres, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 8th of April, 2022.

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

January 24, 2023



Yvestre Torres

Circuit Court Reporter

Att
GS
Sol
AGSTATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Silvester D. Scott, #296019,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
)) CASE NO. 2019-CP-10-3295
)) ORDER OF DISMISSAL
)2023 APR -6 PM 1:21
JULIE J. ARMSTRONG
CLERK OF COURT
DC4

FILED

The matter comes before this Court by way of an application for post-conviction relief filed by Applicant Silvester D. Scott, asserting various allegations of ineffective assistance of counsel. Respondent the State of South Carolina made its return to the application and requested an evidentiary hearing to resolve the issues as set forth in the application.

An evidentiary hearing was convened on April 8, 2022, at the Charleston County Courthouse before this Court. Applicant was present and represented by James K. Falk, Esquire. Assistant Attorney General Samantha J. Weidauer of the South Carolina Attorney General's Office represented Respondent. Applicant proceeded forward on a sole allegation that his counsel was ineffective for failing to properly prepare a witness to testify. Following testimony from Applicant and his two plea counsels, this Court took the matter under advisement to further review the record and applicable law before making a ruling.

After a thorough review of the record in its entirety, along with the arguments presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismissed this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below:

PROCEDURAL HISTORY

The records before this Court establish that Applicant is presently confined in the South Carolina Department of Corrections. During its August 2015 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2015-GS-10-04002) and possession of a weapon during the commission of a violent crime (2015-GS-10-04003).

Assistant Public Defenders John J. Kozelski ("Plea Counsel"), Esquire, and Susannah R. Knox ("Ms. Knox") of the Charleston County Public Defender's Office represented Applicant. Assistant Solicitor Thomas R. Waring, II of the Ninth Circuit Solicitor's Office prosecuted the case. Thereafter, the State served Applicant with its notice of intention to seek life without parole pursuant to S.C. Code Ann. § 1725-45 based on his prior record.

Applicant proceeded to trial on March 11, 2019, before the Honorable Roger M Young, Sr., and a jury. On March 14, 2019, after the State presented its case and after Applicant called several witnesses in his defense but before the conclusion of the trial, Applicant elected to forgo the right to trial and enter guilty pleas pursuant to Alford v. North Carolina¹ to armed robbery and the weapons charge pursuant to negotiations with the State for a determinate twenty-year term of imprisonment and the dismissal of unrelated, pending charges. Following a thorough plea colloquy with Applicant, Judge Young found Applicant's plea was entered knowingly, intelligently, and voluntarily and accepted his plea pursuant to Alford. Pursuant to the plea negotiations, Judge Young sentenced Applicant to twenty years of imprisonment for armed robbery and to a concurrent term of five years of imprisonment for the possession of a weapon during the commission of a violent crime. Applicant did not appeal his convictions or sentences.

¹ Alford v. North Carolina, 400 U.S. 25 (1970).

SUMMARY OF RELEVANT FACTS LEADING TO CONVICTIONS

Assistance Solicitor Thomas R. Waring presented these facts at Applicant's trial in his opening statement to the Court:

On March 4, 2015, sometime around 1:00 in the afternoon, the defendant went over to his buddy's motel room at the Best Western in Charleston. He had two buddies there, two guys: Anthony Holsberg and Alonzo Green. Now, the defendant went over there because these guys wanted him to go get them some heroin. So he came over. He was wearing a red and white striped shirt, but rather than using his own vehicle to go get these drugs, he wanted to swap cars with Anthony Holsberg, and at that time, Mr. Holsberg was driving a silver or Dodge gray Charger, and you're going to hear about that. That vehicle has after-market additions to it. For example: It had a black top, some fancy rims; it also had tinted windows, a spoiler on the back things of that nature. You're going to hear all about that. So he took that vehicle. Fast forward a few hours, approximately 3:15 p.m. in the afternoon, and an individual can be seen driving a similar such type vehicle, again, a gray or silver Dodge Charger-type vehicle with aftermarket additions, flat top, fancy rims, pulls into the parking lot of the Family Dollar on Rivers Avenue. The individual gets out and walks into that Family Dollar location wearing dark blue coveralls covering his arms and legs, and wearing a red and white striped shirt similar in nature to what the defendant was wearing at his buddy's motel room. That individual purchased a sixpack of dust masks and received a receipt for it. It's time stamped approximately 3:17 p.m. that afternoon, and that individual then leaves the Family Dollar. Fast forward approximately 15 minutes later, around 3:30 in the afternoon, across town, over the Cosgrove Bridge and at the First Palmetto Bank, a similar such type vehicle, again, gray-ish, silver Dodge Charger vehicle, aftermarket additions, black top, spoiler on the back, fancy rims, et cetera, pulls into the parking lot of that First Palmetto Bank on Sumar Street. The individual then walks into that bank wearing dark blue coveralls covering his arms and legs, and a distinct red and white striped shirt similar to the one the defendant was wearing over at his buddy's house. Now, the robber walked in wearing Sperry boat-type shoes, gloves on his hands, dust mask over his face, clear glasses on, silver metallic circular type watch, and he's got a silver gun. He walks up to the victim who's sitting over there in the yellow, points the gun at her, demands money. He's waving the gun around, and he's walking around, and you're going to see this video. All this is on video. Takes the money and then leaves. As he's leaving, the victim, Jasmine Jenkins, looks out the window and sees a similar such vehicle peeling out of the parking lot. She called 911 almost immediately, and so around that time the police are looking for that type of vehicle. Later that night, they see such a vehicle that sounds similar in description to that in the parking lot of the Quality Inn motel, different motel, and it's determined that two individuals who are associated with that vehicle turn out to be the two buddies that the defendant had been hanging out with earlier, and it was

determined that the owner of the vehicle was Anthony Holsberg, and Alonzo Green, the other individual, has known the defendant for over 20 years and can identify him by sight and by name. Now, the police did a search warrant on that vehicle, and that's when things started getting interesting. Inside the vehicle, a Family Dollar bag was found. Inside of that Family Dollar bag, there was a receipt for the purchase of a sixpack of dust masks, and, in addition, there was the actual sixpack of the dust mask packing, minus a dust mask. So we got that in there. Now, the defendant's house was also searched on English Street in North Charleston, and at that house, there was some more interesting things found as well. There was a distinct red and white striped shirt that appeared to be similar to what the individual was wearing in the Family Dollar video who bought the dust masks and similar to what the individual -- robber who robbed the bank was wearing, so you got the red and white striped shirt. You had some Sperry shoes or boat shoes that were similar in nature to what the defendant was described -- the robber was described as wearing in the bank video. There was also some other interesting things. There was a Family Dollar bag indicating that the defendant had purchased items before at the Family Dollar. Now, he was apprehended a couple days later, and on the defendant there was about \$635 in cash and there were two phones found. Now, the police gave a search warrant for his cellphone records, and that's when things really got interesting because cell tower mapping, which is essentially technology that can take somebody's cellphone number and map it out and determine where you are, location-wise, based on which phone calls throughout the day. That cellphone tower mapping pinpointed the defendant's cellphone at specific locations throughout Charleston County at specific times, specifically Best Western before the robbery. Boom. His cellphone is in that area. Family Dollar, around 3:17, boom. His cellphone is in that area. Robbery location: What am I going to say next? Boom. He's in that area, and then, sure enough, later that day, he's back at Best Western in that area, around the area of the Best Western. Due to the evidence against him, the defendant was charged with two crimes: Armed robbery and possession of a weapon during the commission of a violent crime. As the judge has mentioned, it's our burden to prove the defendant guilty beyond a reasonable doubt, firmly convince you of his guilt. For armed robbery that means we have to prove he took and carried away personal property of another through the use of force, threats, or intimidation and with the intent to permanently deprive them of that property while armed with a deadly weapon. For the gun charge, we have to prove he possessed a deadly weapon, such as a gun, during the commission of a violent crime, such as armed robbery. I'm going to challenge you right now to focus on all this evidence that comes out like the judge said, what comes out up on the stand. That's the evidence. I'm going to challenge you to focus on that evidence as it applies to the elements of these charges, and I think if you do that, you'll determine that we've carried our burden, find the defendant guilty. You'll determine that we have removed the mask and identified him as the robber, and you'll find him guilty.

Trial Tr. Vol. II, P. 135-140.

CURRENT PROCEEDING

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

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel ineffective for giving Applicant bad advice."
 - b. "Trial Counsel was ineffective for not investigating an eyewitness."
 - c. "Trial Counsel was ineffective for not interviewing alibi witness."

At the start of the evidentiary hearing, Applicant informed this Court he was proceeding forward on a sole allegation that his counsel was ineffective for failing to properly prepare an alibi witness to testify.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified first on his own behalf. On direct examination, Applicant testified the trial strategy of Plea Counsel was present an alibi witness ("Mc. Cordero") to refute the State's circumstantial evidence against Applicant. Evid. Hr. Tr. P. 6. Applicant testified there were plea negotiations with the State, and offered Applicant a ten-year plea, because they had no witnesses and Applicant has an "air-tight alibi witness". Evid. Hr. Tr. P. 6, line 18. Applicant was in North Charleston when the crime occurred, talking to a friend, and he testified Ms. Cordero's moped stalled in front of his driveway and he helped her. Evid. Hr. Tr. P. 7. Applicant testified he helped Ms. Cordero with her moped, working on the moped in his yard and giving the Ms. Cordero a ride home. Evid. Hr. Tr. P. 7. Ms. Cordero is old, Applicant testified as old as his grandmother, and people in the neighborhood generally look out for her. Evid. Hr. Tr. P. 7. Applicant testified the Ms. Cordero was in her seventies at the time. Evid. Hr. Tr. P. 8.

Applicant testified during a recess in Applicant's trial after Ms. Cordero testified, Plea Counsel advised Applicant to think about taking a plea because the State would be able to convict Applicant on the theory of "hand of one, hand of all". Evid. Hr. Tr. 8, line 16-23. Applicant testified

he was confused by this because the State had not introduced a co-defendant he could have conspired with anyone, and Applicant felt like he only had the choice of life in prison or a deal. Evid. Hr. Tr. P. 8-9. Applicant testified the suspect who owned the vehicle used in the crime passed away before Applicant's case went to trial, who could have been a witness against Applicant. Evid. Hr. Tr. P. 9. Applicant testified discussions about "hand of one, hand of all" had not been discussed before trial, hearing about it for the first time during the recess. Evid. Hr. Tr. P. 9-10.

Applicant testified he did not plead guilty because he was actually guilty, but "I plead guilty because that was the advice of my attorney". Evid. Hr. Tr. P. 10, line 15-16. Applicant stated Plea Counsel's advice changed during trial, and Plea Counsel had been optimistic about his case at beginning of trial, but changed once Ms. Cordero testified. Evid. Hr. Tr. P. 10-11. Applicant testified everyone was shocked of Ms. Cordero's mental condition on stand. Evid. Hr. Tr. P. 10-11.

On cross-examination, Applicant testified he plead guilty after three days of trial, and recalled the state dropping a couple pf charges as a result of the plea. Evid. Hr. Tr. P. 11. The State dropped two armed robbery charges and two possession of a weapon charges against Applicant as a result of his plea. Evid. Hr. Tr. P. 11, line 18-19. Applicant testified he understood that is he was granted this PCR he would be retried and possibly convicted on all charges dropped, with a possibility of life without parole. Evid. Hr. Tr. P. 11-12.

Applicant testified he could not recall how many times he met with Plea Counsel as it was a five-year span from arrest to trial and he had other charges that went to trial, and stated he believes he met with Plea Counsel frequently. Evid. Hr. Tr. P. 12. Applicant recalled discussing the State's circumstantial evidence against him, but recalls going over discovery for other charges more, because Plea Counsel believed those charges to be more of an issue. Evid. Hr. Tr. P. 12-13.

Applicant testified it was his understanding the State's case was one of circumstantial evidence. Evid. Hr. Tr. P. 13.

Applicant testified he informed Plea Counsel that Ms. Cordero could be an alibi witness. Evid. Hr. Tr. P. 13. Applicant testified he ultimately decided to plea, based on advice of his attorney, even though he told the plea court it was his decision alone to plead guilty. Evid. Hr. Tr. P. 13-14. After the testimony of Ms. Cordero, Applicant testified the discussions with Plea Counsel centered around Applicant taking a plea. Evid. Hr. Tr. P. 14. Applicant testified he was not told the State intended to call Investigator Verdell to combat his alibi. Evid. Hr. Tr. P. 14. Applicant testified he was aware he had the right to testify at trial and to remain silent, and he could have testified to the fact he had an alibi at trial. Evid. Hr. Tr. P. 14-15. Applicant stated he did not choose to testify at trial because he had a prior record and Plea Counsel advised him it was not a good idea. Evid. Hr. Tr. P. 15.

Applicant testified he does not recall the plea court asking if he believed "there was a good possibility [Applicant] would be convicted based on the evidence presented by the State". Evid. Hr. Tr. P. 15, line 15-18. Applicant testified he was "numb about the situation", and so he does not remember everything that took place at the guilty plea hearing. Plea Hr. Tr. P. 15, lines 19-23. Applicant testified he likes and respects Plea Counsel, and Plea Counsel made a mistake in this instance of Applicant's case. Evid. Hr. Tr. P. 16. As to the colloquy with plea court, Applicant testified he was in shock when questions were being asked of him, and he cannot remember exactly what judge asked him. Evid. Hr. Tr. P. 16. Applicant testified he was satisfied with Plea Counsel's services prior to the State cross-examining Ms. Cordero. Evid. Hr. Tr. P. 16. However, Applicant testified he does not believe Plea Counsel adequately investigated Ms. Cordero prior to trial. Evid. Hr. Tr. P. 17.

Plea Counsel Kozelski testified next. He testified he informed jury they would be hearing from an alibi witness in his opening statement of Applicant's case. Evid. Hr. Tr. P. 18. Plea Counsel testified he checked with investigator prior to trial to see if Ms. Cordero was still a good witness, and the investigator told him, "she remembers it like it was yesterday". Evid. Hr. Tr. P. 18, line 14-25. Plea Counsel testified because of this assurance he mentioned Ms. Cordero as an alibi witness and used the same language the investigator used to describe Ms. Cordero's memory, which he ultimately regrets. Evid. Hr. Tr. P. 19. Plea Counsel testified Ms. Cordero was in her seventies when he originally spoke with her and testified Ms. Cordero refused to speak with the Solicitor prosecuting the case before she testified. Evid. Hr. Tr. P. 19. Plea Counsel testified his trial strategy was to argue Applicant did not commit this crime, using Ms. Cordero as an alibi witness to prove he was not there at the time of the bank robbery. Evid. Hr. Tr. P. 19.

Plea Counsel testified he never spoke with Ms. Cordero directly, but he did get a statement from her through his investigator. Evid. Hr. Tr. P. 19-20. Applicant informed Plea Counsel about Ms. Cordero, the investigator contacted Ms. Cordero, got a statement from her, and Plea Counsel sent the statement to David Osborne, the solicitor prosecuting Applicant's case. Evid. Hr. Tr. P. 20. The original prosecutor assigned to the case was Chad Simpson, but later switched to David Osborne, who Plea Counsel objected to because he had been a detective and previously arrested Applicant for other charges. Evid. Hr. Tr. P. 20. The case was then assigned to Richard Waring. Evid. Hr. Tr. P. 20, line 18-19.

Applicant testified Verdell Young was an investigator with the public defender's office. Evid. Hr. Tr. P. 20. Plea Counsel testified the cross-examination Ms. Cordero was a problem, testifying the State made it appear as if Plea Counsel had put Ms. Cordero up to making the

statement. Evid. Hr. Tr. P. 21. PCR Counsel referenced page 521, line 18, of the trial transcript as the problematic part of Ms. Cordero's cross-examination. Evid. Hr. Tr. P. 21, line 7-9:

Q. I understand that, but I guess what I'm asking you is, two months after the incident, how did you know that that happened on March the 4th?

A. Because I was told.

Q. Because you were told?

A. Yes.

Q. You were told by the investigator?

A. Yes.

Trial Tr. P. 521, line 18-25. Plea Counsel testified it is normal on cross-examination of witnesses for witness to be asked how they remember an event that happened years earlier. Evid. Hr. Tr. P. 21. Plea Counsel testified he believes Ms. Cordero testified she remembered the day in question because her moped was running hot that day. Evid. Hr. Tr. P. 21. When the solicitor was cross-examining Ms. Cordero, she could not tell the solicitor exactly why she remembered that day, and so when the solicitor pressed her she said the investigator told her. Evid. Hr. Tr. P. 22.

Applicant testified the solicitor made it seem as if the investigator wrote down Ms. Cordero's statement:

Q. But she told you that?

A. No. She didn't tell me my moped ran hot.

Q. And she told you that happened on March the 4th, correct?

A. She told me when -- I don't know the exact date, but it was written down, though.

Q. It's written down?

A. Yes.

Q. By the investigator?

A. Yeah. I signed it.

Trial Tr. P. 522, line 4-13. Ms. Cordero's testimony was she remembered the date because her moped ran hot, and when the solicitor asked her how she remembered, she responded the

investigator told her. Evid. Hr. Tr. P. 23. Plea Counsel testified the cross-examination changed his opinion on the outcome of the case, because it made it look like their alibi was lying. Evid. Hr. Tr. P. 23. Plea Counsel testified he did not work with Ms. Cordero much, because he had given the task of dealing with Ms. Cordero to his second chair, Susannah Know. Evid. Hr. Tr. P. 23. Plea Counsel testified he was the one who advised Applicant to plea because their defense relied on Ms. Cordero, and that defense had fallen apart at trial. Evid. Hr. Tr. P. 23-24. Plea Counsel testified he believed up to that moment they were winning the trial. Evid. Hr. Tr. P. 24. Plea Counsel testified he does not recall discussing the “hand of one, hand of all” theory with Applicant, because there was no co-defendant, but it was a possibility. Evid. Hr. Tr. P. 24.

Plea Counsel testified the State’s case against Applicant was essentially circumstantial, tying him to vehicle used in the robbery, which the owner frequently lent to people to go get drugs. Evid. Hr. Tr. P. 25. The State had a witness, Alonzo Green, who testified Applicant has borrowed the vehicle at some point, was going to get drugs for Mr. Green, and was gone for several hours. Evid. Hr. Tr. P. 25.

On cross-examination, Plea Counsel testified he has been practicing criminal law for about eleven years, and he was appointed four or five years to Applicant’s case before his trial. Evid. Hr. Tr. P. 26. Plea Counsel testified he met with Applicant about forty times before his trial, and those meetings surrounded his earlier charges of trafficking heroin, but after a suppression hearing Plea Counsel testified he switched gears for the current case. Evid. Hr. Tr. P. 26-27. Plea Counsel testified he reviewed discovery with Applicant and made sure to go over nature of charges against Applicant and possible punishments. Evid. Hr. Tr. P. 27. Applicant received a plea offer of ten years, but Applicant rejected the plea because the case against him was not very strong. Evid. Hr. Tr. P. 27-28.

Most of the investigation for Applicant's case happened two weeks after Applicant was arrested, and Plea Counsel met with the investigator and sorted out what needed to be investigated. Evid. Hr. Tr. P. 28. Plea Counsel testified they spoke with Ms. Cordero shortly after the incident took place, but there were not other witnesses. Evid. Hr. Tr. P. 28. Plea Counsel testified he talked with the State's witness, Mr. Green. Evid. Hr. Tr. P. 28. Plea Counsel testified he took a statement from Ms. Cordero close to the date of the arrest, and had not spoken with her until a few weeks before trial, to make sure she remembered her statement. Evid. Hr. Tr. P. 28-29. Plea Counsel testified his strategy was to move for a directed verdict, and he did actually move for a directed verdict during the trial. Evid. Hr. Tr. P. 29. Plea Counsel testified he had no reason to believe Ms. Cordero would give unfavorable testimony at the trial. Evid. Hr. Tr. P. 29.

On direct examination of Ms. Cordero, she testified she knew Applicant. Described the day in question, and testified Applicant helped her with her moped during the time of the incident. Evid. Hr. Tr. P. 30. It was not until cross-examination Ms. Cordero's testimony faltered and showed her diminished capacity, which Plea Counsel testified happens at times on cross. Evid. Hr. Tr. P. 30. Prior to plea, Plea Counsel testified he advised Applicant to cut his losses, that the cross-examination had put them in a bad position, but Applicant did not want to plea. Evid. Hr. Tr. P. 31. Plea Counsel testified that it was ultimately Applicant's decision to plea, but he had urged him to plea because of the risk of a life sentence. Evid. Hr. Tr. P. 31. Plea Counsel testified he spoke with Applicant briefly about bringing Investigator Verdell Young to testify but did not believe it would make a difference. Evid. Hr. Tr. P. 32.

Plea Counsel testified he believed Applicant was competent to enter a voluntary and knowing guilty plea, he understood the consequences of his plea, and Plea Counsel agreed with Applicant's decision to plea. Evid. Hr. Tr. P. 32. Plea Counsel testified he would not have put up

any evidence to combat's State's case if he had not called Ms. Cordero but would have simply put the State's case to the test. Evid. Hr. Tr. P. 33.

Susannah Knox, who acted in a second chair capacity, testified next. On direct examination, Ms. Knox testified she was tasked with preparing Ms. Cordero to testify as an alibi witness, and she spoke with Ms. Cordero over the phone within the week prior to trial. Evid. Hr. Tr. P. 34. Ms. Knox testified she made sure Ms. Cordero remembered the same details given in her statement five years ago, and made sure the story made sense and no details had changed. Evid. Hr. Tr. P. 34-35. Ms. Knox testified she prepared Ms. Cordero for cross-examination, but does not recall preparing Ms. Cordero for questioning about how she knew the date. Evid. Hr. Tr. P. 35. Lastly, Ms. Knox testified she agreed with Plea Counsel's assessment of how cross-examination affected the trial. Evid. Hr. Tr. P. 35.

On cross-examination, Ms. Knox testified her role in representation of Applicant was limited to trial preparation, reviewing evidence, and preparing Ms. Cordero for her direct testimony. Evid. Hr. Tr. P. 36. Ms. Knox testified Ms. Cordero's testimony on direct was expected, and she did not expect Ms. Cordero to give unfavorable testimony or get confused as to the date of the incident. Evid. Hr. Tr. P. 36-37. Ms. Knox testified Ms. Cordero was a bit quirky during her direct examination, becoming very animated when questioned about her moped, but it did not cause her to think Ms. Cordero would give unfavorable testimony. Evid. Hr. Tr. P. 37.

Ms. Knox testified she did not personally inform Applicant about potentially calling Investigator Verdell to testify, but she was present when Applicant decided to plea. Evid. Hr. Tr. P. 37. Ms. Knox testified the discussions surrounding Applicant's decision to plea were exactly the way Plea Counsel described, briefly mentioning Investigator Verdell, and discussing the two options, between pleading and finishing trial. Evid. Hr. Tr. P. 37. Ms. Knox testified Applicant

deciding to plea was a strategic decision, because it was unlikely they would be able to combat impression they had instructed Ms. Cordero on what to say. Evid. Hr. Tr. P. 38. Ms. Knox testified sometimes this happens on cross-examination, and it is the purpose of cross-examination to pick at witnesses direct testimony. Evid. Hr. Tr. P. 38. Lastly, Ms. Knox testified she would not have out Ms. Cordero on the stand if she believed Ms. Cordero would give unfavorable testimony. Evid. Hr. Tr. P. 38.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged he is entitled to post-conviction relief based on ineffective assistance of plea counsel. Following a thorough review of the entire record in this case (including the trial transcript, the plea transcript, the records from Applicant's underlying general sessions charges and convictions, and the records from this current action (including the PCR application and return to the application, as well as any other filed documents), this Court finds this claim to be without merit and that Applicant has failed to meet her burden of proof.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP.

Ineffective Assistance of Counsel and Involuntary Guilty Plea Standard

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction

or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). 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.

Strickland, however, “does not guarantee perfect representation[—]only a ‘reasonably competent attorney.’” Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is “no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” Harrington, 562 U.S. at 110.

Accordingly, “[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) (“The Sixth

Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed at the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Id.* The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.*

The *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and

raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added).

Because the Sixth Amendment right to counsel also applies to a defendant entering a guilty plea, Hill v. Lockhart extended the two-part Strickland test to challenge guilty pleas based on ineffective assistance of counsel. Hill, 474 U.S. 52; cf. Padilla, 559 U.S. at 373 (recognizing the guilty plea process is a "critical phase of litigation" for purposes of the Sixth Amendment right to effective assistance of counsel). A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance

was deficient; and second, evidence that counsel's deficient performance prejudiced the defendant by causing him to plead guilty rather than go to trial. Hill, 474 U.S. 52.

The analysis of counsel's performance under the first prong of Strickland remains unchanged—the applicant must show counsel's representation fell below the objective standard of reasonableness demanded of attorneys in criminal cases. Hill, 474 U.S. at 58–59; accord Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000). An applicant alleging his plea was induced by ineffective assistance of counsel must prove counsel's advice to plead guilty was not “within the competence demanded of attorneys in criminal cases.” Hill, 474 U.S. at 56.

The second, or “prejudice” prong, however, “focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.” Id. at 58–59. Specifically, when an applicant claims counsel's deficient performance caused him to accept a plea, the applicant “must show that there is a reasonable probability that, but for [plea] counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59. This inquiry “focuses on a defendant's decisionmaking” and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958, 1966 (2017). However, an applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. Padilla, 559 U.S. at 372. The question here is whether the applicant, if correctly informed of circumstances surrounding the plea, would have pleaded guilty—not whether counsel would have still advised him or her to plead guilty. Turner v. State, 335 S.C. 382, 385, 517 S.E.2d 442, 444 (1999).

Surmounting Strickland's high bar is never an easy task, and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” Lee, 582 U.S. ___,

137 S. Ct. at 1967 (internal citations and quotation marks omitted); cf. Hill, 474 U.S. at 58 (“[R]equiring a ‘prejudice’ showing from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel ‘will serve the fundamental interest in the finality of guilty pleas.’”). Reviewing “[c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Lee, 582 U.S. ___, 137 S. Ct. at 1967. Rather, judges should “look to contemporaneous evidence to substantiate a defendant’s expressed preferences. Id. In determining whether a guilty plea was taken in accordance with constitutional standards, the reviewing judge must analyze and consider the entire record, including the transcript of the plea and the evidence presented at the PCR hearing. Harres, 282 S.C. at 134, 318 S.E.2d at 361.

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Id. at 696. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” Id. at 697. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Allegation of Ineffective Assistance of Counsel Based on Advice of Plea Counsel to Plead Guilty

Applicant alleged his guilty plea was not voluntary because he plead based on advice of Plea Counsel. To find a guilty plea voluntary and knowing, the record must establish applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v.

Alabama, 385 U.S. 238, 89 S. Ct. 1709 (1969); Dover v. State, 304 S.C. 433, S.E.2d 391 (1991). It is proper for the court to consider the guilty plea transcript as well as evidence at PCR hearing when determining guilty plea issues. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Applicant must present a valid reason to depart from the truth of his statements in guilty plea hearing, as a guilty plea is a solemn, judicial admission of the truth of the charges against an individual. Blackledge v. Allison, 431 U.S. 63, S. Ct. 1621 (1977); Crawford v. United States, 519 F.2d 447 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 459 F.2d 328 (4th Cir. 1985).

An applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing trial counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, but for trial's errors, defendant would not have plead guilty, but insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). Therefore, a claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and will likely be treated as such. The knowing and voluntary waiver of the constitutional rights "may be accomplished by colloquy with the Court and the defendant, between the Court and defendant's counsel, or both". Pittman v. State, 337 S.C. 597, 599, S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Boykin requires defendant made aware of right to a jury trial, the privilege against self-incrimination, and right to confront one's accusers. Boykin, 385 U.S. 238, 89 S. Ct. 1709. Additionally, the South Carolina Supreme Court requires defendant made aware of nature and crucial elements of offense, the maximum and any minimum penalty, and the nature of the constitutional rights being waived. Pittman, 337 S.C. at 599, 524 S.E.2d at 624.

Applicant testified he plead guilty “because that was the advice of my attorney.” Evid. Hr. Tr. P. 10, line 15-16. However, Applicant has not presented any evidence of force or coercion to plea, only referencing a discussion during a recess at trial where Plea Counsel advised him it would be prudent to plea because of the effect of Ms. Cordero’s cross-examination. During this discussion, Plea Counsel urged Applicant to plea, but did not direct him to, letting Applicant know of his options, but making him fully aware of the risk of continuing with trial. Evid. Hr. Tr. P. 31, line 5-25—P. 32, line 1-14. Applicant understood the choice to plea was ultimately his.

Moreover, even if Plea Counsel did not apprise Applicant of all his options and constitutional rights, the Plea Judge accomplished this in his thorough colloquy with Applicant at his plea hearing. The Plea Judge apprised Applicant of his constitutional rights and made known the nature of the charges against Applicant and possible sentences that could be imposed on Applicant for these sentences. Plea Tr. P. 4-5. The Plea Judge even made reference to Ms. Cordero, informing Applicant he had the right to testify and present other witnesses or evidence, but Applicant affirmatively answered he did not want to exercise those rights. Plea. Tr. P. 6, line 9-20. Applicant stated he understood the decision to plea was his alone, and he wanted to give up his rights for the benefit he was receiving from the negotiated plea—a twenty-year sentence rather than life without parole, and dismissal of his other charges of armed robbery and possession of weapons. Plea Tr. P. 6, line 21-25—P. 7, line 1-17.

This Court finds testimony of Plea Counsel credible, and finds Applicant failed to prove Plea Counsel’s advise to plea made his plea involuntary. Applicant’s answers during his plea hearing indicate he voluntarily, knowingly, and intelligently plead guilty, and no evidence was presented to the contrary, effectively barring any claims he has of ineffective assistance of counsel. Plea Counsel’s advise was based on the precarious position Applicant after Ms. Cordero’s cross-

examination, but no where did Plea Counsel inform Applicant a plea was his only option. Applicant made the calculated decision to plea based on the risk of life without parole if he lost his trial, and knowingly gave up his rights without force or intimidation. Therefore, Applicant failed to show Plea Counsel was ineffective for advising Applicant to plea, and this court **DENIES** and **DIMISSES** his allegations with prejudice.

Allegation of Ineffective Assistance of Counsel for Plea Counsel's Failure to Investigate and Prepare Alibi Witness for Trial

Applicant alleged Plea Counsel was ineffective for failing to prepare Ms. Cordero, an alibi witness, for questioning at trial. Ineffectiveness claims based on counsel's failure to investigate or prepare for trial require applicant to present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when allegation is supported only by mere speculation as to the result). Relief will be denied where applicant does not present evidence at PCR hearing showing how additional preparation would have had any possible effect on the result at trial. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). Counsel has a duty to conduct reasonable investigation, and at a minimum, interview potential witnesses, considering favorability of witness's testimony, and make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 772 S.C. 318, 642 S.E.2d 590 (2007); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

Regarding the allegation concerning investigation of eyewitnesses, Plea Counsel testified the State only had circumstantial evidence against Applicant, and Applicant had provided Plea Counsel with a credible alibi witness; the only witness Applicant informed Plea Counsel of. The

State had one witness, Mr. Green, who was not an eyewitness. Mr. Green would have testified to the fact Applicant had borrowed his vehicle, which was used in the robbery, and did not return with the vehicle for several hours. Plea Counsel was aware of the testimony, and was prepared to counter it with Ms. Cordero's testimony she had been with Applicant at the time of the crime. Applicant did not present testimony of a potential eyewitness with helpful testimony at evidentiary hearing, or any other specific evidence or testimony showing how additional investigation into an eyewitness would have affected his decision to plea or changed the outcome.

Regarding the allegation concerning preparation of Applicant's alibi witness, Plea Counsel testified Ms. Cordero was interviewed and her statement was taken close to the time of the crime (about two weeks after the incident), which was five years prior to trial. Additionally, prior to trial, Ms. Knox, second chair to Plea Counsel, spoke with Ms. Cordero to ensure her testimony was the same, and prepared her for cross-examination. Based on both of these conversations with Ms. Cordero, Ms. Knox and Plea Counsel had no reason to believe Ms. Cordero would give unfavorable testimony or was incompetent to testify. Ms. Knox testified she did not recall specifically preparing Ms. Cordero how to answer questions concerning her knowledge of the date, but she had no reason to believe Ms. Cordero would have been confused by this line of questioning.

Additionally, Plea Counsel testified cross-examination significantly changed the outcome of Applicant's case, and he strongly advised Applicant to take a plea. Strickland requires trial counsel must be given leeway to make strategic reasonable decisions, and where counsel articulates a valid reason for his action or inaction, counsel's performance is not found ineffective. Strickland at 688-89; Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Plea counsel testified that prior to cross-examination he believed Applicant was winning his case. The State had only circumstantial evidence, no eyewitnesses, and Applicant had a strong alibi witness which had

been interviewed and prepared for trial. Ms. Cordero's testimony was unproblematic during direct examination but was problematic on cross-examination when she became frustrated and stated the defense investigator had told her the date of the incident, making it seem as if Plea Counsel and Ms. Knox had fed Ms. Cordero testimony. This was unexpected based in the defense team's prior interactions with Ms. Cordero, which did not given any inference that she would testify this way when challenged. It is expected on cross-examination that the opposing party will test a witness's credibility, or test the accuracy of the witness's testimony or recollection and extent of knowledge. Plea Counsel and Ms. Knox fulfilled their duty in investigating the facts and circumstances of Applicant's case, and interviewing Ms. Cordero, the only possible witness the could find. The cross-examination merely put Ms. Cordero to the test, a test she failed on her own.

This Court finds Applicant has failed to establish Plea Counsel was ineffective. Plea Counsel investigated witnesses to the extent they were available, and no eyewitnesses were available, as evidenced by fact the State had no eyewitnesses either. Plea Counsel made themselves aware of the facts and circumstances of Applicant's case, and were able to articulate strategic reasonable decisions, meaning Applicant cannot meet the first prong of Strickland.

Additionally, Applicant cannot show resulting prejudice. Plea Counsel interviewed Ms. Cordero near the time of incident, when it was fresh in her mind, and interviewed her a second time close to the time of trial, also preparing her for cross-examination. Applicant cannot claim prejudice as a result of Plea Counsel's performance when the State merely used cross-examination for its purpose with successful results. Therefore, this Court finds Applicant could not prove ineffective assistance of counsel, and **DENIES** and **DIMISSES** his claims with prejudice.

CONCLUSION

Based on all the foregoing reasons, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 31 day of March, 2023.

Monning, South Carolina

R. Ferrell Cothran, Jr.
R. FERRELL COTHRAN, JR.
Presiding Judge
Ninth Judicial Circuit

BCS/0302419
WITNESSES

Charleston City Police Department

Foreperson of Grand Jury

AGENCY CASE NUMBER

2015-03494

ARREST WARRANT NUMBER

K740317

DATE OF ARREST

03/06/2015

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2015-GS-10-04002

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

AUGUST TERM 2015

THE STATE

VS.

SYLVESTER DESMOND SCOTT

B/M DOB: [REDACTED]-1970

AUG 03 2015

Indictment for

ARMED ROBBERY

SC Code: § 16-11-0330(A)

CDR Code: 0139

FILED

8/18/2015 12:19:23 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

INDICTMENT

At a Court of General Sessions, convened on August 3, 2015, the Grand Jurors of Charleston County present upon their oath:

ARMED ROBBERY

That on or about March 4, 2015, in Charleston County, South Carolina, the Defendant, Sylvester Desmond Scott, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Jasmine Jenkins, an employee of the First Palmetto Savings Bank, with the intent to permanently deprive the victim of possession thereof, in violation of §16-11-330(A) of the South Carolina Code of Laws (1976) as amended.

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


BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

BCS/0302419
WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

2015-03494

ARREST WARRANT NUMBER

K740318

DATE OF ARREST

03/06/2015

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: AUG 03 2015

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2015-GS-10-04003

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

AUGUST TERM 2015

THE STATE

VS.

SYLVESTER DESMOND SCOTT
B/M DOB: [REDACTED]-1970

Indictment for

POSSESSION OF A WEAPON DURING
THE COMMISSION OF A VIOLENT
CRIME

SC Code: § 16-23-0490
CDR Code: 0549

FILED

8/18/2015 12:19:23 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA:

INDICTMENT

COUNTY OF CHARLESTON

At a Court of General Sessions, convened on August 3, 2015, the Grand Jurors of Charleston County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That in Charleston County, South Carolina, on or about March 4, 2015, the Defendant, Sylvester Desmond Scott, did possess a firearm or did visibly display what appeared to be a firearm or did visibly display a knife during the commission of or attempted commission of a violent crime, to wit: Armed Robbery, in violation of Section 16-23-490, Code of Laws of South Carolina, (1976, as amended).

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



BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR