

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Greenville County

William Jeffrey Young, Circuit Court Judge

---

**RECEIVED**

AUG 26 2013

**S.C. Supreme Court**

KENYA E. SPRY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO.. 2013-000911

---

APPENDIX

---

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STATE OF SOUTH CAROLINA )

IN THE COURT OF GENERAL SESSIONS  
INDICTMENT NO: 2009-GS-23-1437

COUNTY OF GREENVILLE )

STATE OF SOUTH CAROLINA, )

Plaintiff, )

-vs- )

KENYA EUGENE SPRY, )

Defendant. )

-----) )

TRANSCRIPT OF RECORD

JUNE 17, 2010  
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE EDWARD W. MILLER, JUDGE

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

WILLIAM JEFFREY WESTON, ASSISTANT SOLICITOR  
ATTORNEY FOR THE STATE

LARRY HOLMES COOKE, ESQ.  
COOKE LAW FIRM  
ATTORNEY FOR THE DEFENDANT

APRIL HERRON,  
CIRCUIT COURT REPORTER

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E X H I B I T S

NO EXHIBITS INTRODUCED

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THE COURT: Mr. Spry, how you doing?  
My name's Miller, Judge Miller, okay?  
You know why you're up here today on  
these two, these charges of assault on a correctional officer?  
You've got two counts. You understand that?

DEFENDANT SPRY: Yes.

THE COURT: Well, we've got a jury downstairs.  
We're gonna pick a jury and go with jury trial, okay? You  
understand?

DEFENDANT SPRY: (No response.)

THE COURT: And you're wearing your prison  
jumpsuit. Would you like to change into some clothes for the  
trial?

DEFENDANT SPRY: Well, can I talk to my lawyer  
right quick?

THE COURT: He's right there.  
(Defendant Spry and Mr. Cooke  
conferred off the record.)

MR. COOKE: My client says he wants to plead.  
We'll try to get through one.

THE COURT: Okay.  
Come on around, Mr. Spry.  
Give them just a second and let's get  
the paperwork together, okay?  
Where are you staying now?

1                   DEFENDANT SPRY:       In Columbia. In Columbia. At  
2 Kirkland.

3                   THE COURT:       Kirkland? All right.  
4                                    You doing all right today?

5                   DEFENDANT SPRY:       (Nods head.)

6                   THE COURT:       Okay. Good, good.  
7                                    Where you from originally? From  
8 Greenville?

9                   DEFENDANT SPRY:       Columbia.

10                   THE COURT:       Columbia?

11                   DEFENDANT SPRY:       Uh-huh.

12                   THE COURT:       Whereabout down there?

13                   DEFENDANT SPRY:       Broad River Road.

14                   THE COURT:       Okay.

15                                    I went to school down there. It's  
16 been a long time ago but I remember it, parts of it.

17                                    You were at Perry for awhile? Which  
18 one you like better? Perry or Kirkland? About the same?

19                   DEFENDANT SPRY:       Be a jail.

20                   THE COURT:       Yeah, a jail's a jail.

21                   CLERK:       Your Honor, this is case number 2009-GS-  
22 1437, The State versus Kenya Eugene Spry. He is indicted and  
23 pleading guilty to assault on a correctional facility  
24 employee. Consents to sentencing on this case.

25                   THE COURT:       All right.

1 KENYA EUGENE SPRY,  
2 first being duly  
3 sworn, testified as  
4 follows:

5 CLERK: State your full name for the record.

6 DEFENDANT SPRY: Kenya Spry.

7 CLERK: Thank you.

8 THE COURT: All right, Mr. Spry.

9 Let me ask you. In the last 24 hours  
10 have you had any drugs, alcohol or medication?

11 DEFENDANT SPRY: No.

12 THE COURT: No? Okay.

13 And I have read they sent you for a  
14 mental evaluation, okay? And I've made that report a part of  
15 the record. So I've read all that and I know you have a  
16 little, you know, maybe some issues, okay?

17 How you feeling today?

18 DEFENDANT SPRY: Doing all right.

19 THE COURT: Okay.

20 Do you understand what's going on?

21 DEFENDANT SPRY: He told me everything. He told  
22 me everything. Yeah.

23 THE COURT: Okay.

24 Can you just tell me in your own  
25 words what's going on here?



1                    DEFENDANT SPRY:        Yes, sir.

2                    THE COURT:            Okay.

3                                    All right, Mr. Spry, this indictment  
4                    is 09-1537 and it alleges that you did in Greenville County on  
5                    or about November 26, 2008, knowingly assault Sergeant Thomas  
6                    Lasley (ph.), an employee of Perry Correctional Institute,  
7                    while he was performing his job-related duties and this is  
8                    section 16 3 6 30 of our code of laws, lays out a punishment  
9                    of not less than six months nor more than five years and it  
10                   must be served consecutively to any other sentence. Do you  
11                   understand that?

12                   DEFENDANT SPRY:        I do.

13                   THE COURT:            Okay. All right.

14                                    Understanding the nature of the  
15                   charge against you and the maximum possible punishment, how do  
16                   you want to plead?

17                   DEFENDANT SPRY:        Want to plead guilty.

18                   THE COURT:            Okay.

19                                    Anybody forced you in any way to do  
20                   that?

21                   DEFENDANT SPRY:        No.

22                   THE COURT:            Anybody promised you anything to get  
23                   you to do that?

24                   DEFENDANT SPRY:        No.

25                   THE COURT:            Okay.



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THE COURT: Okay.

You got any complaints you want to make about the way you've been treated?

DEFENDANT SPRY: No.

THE COURT: Okay.

And have you had enough time to look at the evidence that The State has against you? You know what they got against you?

MR. COOKE: That's the report I read to you.

DEFENDANT SPRY: Yeah, yeah, yeah, yeah, you read report.

THE COURT: Okay.

So you understand what the evidence is?

DEFENDANT SPRY: (Nods head.)

MR. COOKE: You've got to speak.

DEFENDANT SPRY: Yeah, yeah.

THE COURT: Okay. All right. Thank you, Mr. Spry.

All right.

Listen, now, and The State, they gone give us a brief account of what they would prove at trial, okay?

All right, go ahead, Mr. Weston.

MR. WESTON: Thank you, Your Honor.



1 hand over the free hand so the officers could not see that he  
2 had his cuffs off and one handcuff was dangling down below.

3 As they went to escort him back to  
4 his cell they are walking behind him. This inmate, at some  
5 point, turned and swung at Officer Lasley, striking him in the  
6 head, the eye and the head and the handcuff went toward the  
7 top of his head.

8 I'm passing up two pictures. We  
9 provided, previously copies of the pictures to counsel that  
10 would have been introduced at trial. These are the pictures  
11 of the injuries received by Officer Lasley.

12 THE COURT: Okay.

13 MR. WESTON: Officer Lasley at that point struck  
14 the subject and Officer Hara got involved. They took him to  
15 the ground. They started wrestling.

16 The other charge against him involved  
17 during the struggle at some point this inmate struck Officer  
18 Hara in the head. He did not receive any significant injuries  
19 or any medical treatment, which is the reason The State is  
20 willing to allow him to plead to the one charge because,  
21 obviously, this is the more serious injury, although our  
22 position at trial would've been that the striking of the other  
23 officer in the head during the struggle to subdue him also  
24 constitutes a separate assault on a correctional officer.

25 But in any event, Your Honor, other

1 officers arrived on the scene. He was pepper-sprayed, finally  
2 subdued. The struggle lasted, probably, 10, 15, 20 seconds  
3 before he was finally subdued.

4 Officer Lasley suffered laceration to  
5 his -- right above his eye that required, I think, four to  
6 seven stitches and medical treatment at Greenville Memorial  
7 Hospital. To his credit, he returned to work that day.

8 THE COURT: Okay.

9 MR. WESTON: And that would be the evidence The  
10 State would present at trial, Your Honor.

11 THE COURT: Okay.

12 MR. WESTON: If you'd like his criminal record --

13 THE COURT: Not right yet.

14 MR. WESTON: All right.

15 THE COURT: Mr. Spry, is that substantially what  
16 happened? Is that true and correct, pretty much, what he told  
17 me?

18 DEFENDANT SPRY: Yeah.

19 THE COURT: It was?

20 DEFENDANT SPRY: Yeah, yes.

21 THE COURT: Okay. All right.

22 Well, Mr. Spry, I'm gone accept your  
23 guilty plea as being freely, voluntarily and intelligently  
24 made with the advice of a very competent attorney with whom  
25 you state you are well satisfied and there is a substantial

1 factual basis for the plea.

2 I also find that you are competent.  
3 You appear cleared-eyed and lucid to me and so I will accept  
4 the plea.

5 Now, if you want to tell me about the  
6 prior record.

7 MR. WESTON: All right.

8 Your Honor, he has a 2004 malicious  
9 injury to property greater than a thousand dollars; 2003,  
10 trespass.

11 The sentence that brings him, or  
12 brought him to the department of corrections is an armed  
13 robbery in which he received a 10-year sentence. The start  
14 date of that sentence was January 11 of 2005. I'm sorry,  
15 January 10 of 2004. His expected or projected release date,  
16 because it is a most serious offense he has an absolute  
17 release date of August 6, 2013.

18 THE COURT: Okay.

19 And he got it on January 10, '04,  
20 right?

21 MR. WESTON: Yes, sir, Your Honor.

22 THE COURT: All right.

23 Was all that true and correct?

24 DEFENDANT SPRY: Yes, sir.

25 THE COURT: Okay. All right.

1 I'll be happy to hear from the  
2 victim. Yes, sir, anything you want to tell me?

3 MR. LASLEY: Yes, sir. Mr. Spry has been a  
4 continuous disruptive behavior, poor influence from the time  
5 we've known him at Perry and previous to that. My assault is  
6 not the only one that he's been responsible for. He hit  
7 another sergeant with restraints prior to that.

8 He's also very good at destruction of  
9 handcuff keys, which he's made it very clear that he's passed  
10 that on, quite a few inmates, with the intent to harm officers  
11 as well.

12 We got incidents just recently of two  
13 inmates that came to Perry that were next to him who received  
14 tutorlage on how to do that and, matter of fact, came out of  
15 the leg irons in transport because of Mr. Spry.

16 He has constant disregard to  
17 authority. The fact that he had talked to me immediately  
18 after the incident told me that he did it for respect reasons,  
19 that - excuse my language - a shit-thrower but he's prepared  
20 to string out on our officers and he would instruct others to  
21 do the same.

22 We would hope he'd get a maximum  
23 sentence and then some.

24 THE COURT: Okay. All right. Thank you, sir.

25 All right, Mr. Cooke, anything you

1 want to tell me?

2 MR. COOKE: Yes. Just my client, actually, he  
3 went to school in Irmo, South Carolina. He's from down around  
4 Columbia.

5 Judge, he did get a sentence as Mr.  
6 Weston just indicated.

7 I was reading his background  
8 information from the department of mental health.

9 By the way, he was sent down for  
10 evaluation and they indicated in their report that he was not  
11 cooperative in that so they really couldn't do an evaluation.  
12 However, they did feel that there might be come psychotic  
13 problems there but they didn't know to what level because he  
14 just couldn't seem to cooperate with them.

15 But it did say, and I thought this  
16 interesting, that he's 23 years old but his dad had talked  
17 with them down there and said that as a young baby - I don't  
18 know if you saw that or not --

19 THE COURT: Yeah, I read it. I read the whole  
20 report.

21 MR. COOKE: Yeah, that he had fallen out of his  
22 crib and received a head injury which required, you know, an  
23 operation. You know, I don't know if that's had something to  
24 do with his -- because I've talked with him and, you know,  
25 he's hard to talk to at first. It just, really, didn't want

1 to respond to my questions but as we got to talking and he  
2 understood I was his friend, not his enemy, I mean, you know,  
3 he was very nice and I didn't see any, any rage in him at all.  
4 So I think he does have some psychotic problems but I don't  
5 think it reaches the level of not knowing right from wrong so  
6 I think that's where our hangup is.

7 THE COURT: Right.

8 MR. COOKE: I hope you take that in to  
9 consideration and he's been in jail long time and I hope you  
10 take that in to consideration, take in to consideration he is  
11 pleading guilty and not load him up with a lot of extra time.

12 THE COURT: All right.

13 Well, he did, he got a good benefit  
14 when they dropped the one.

15 Anything you want to tell me, Mr.  
16 Spry?

17 DEFENDANT SPRY: Once, you know, like I say, get  
18 this on over with. You know what I'm saying? I ain't really  
19 intend to get in to none of that, right? You know what I'm  
20 saying? Wasn't intention. I got stuck in a bad situation.  
21 You know what I'm saying? A lot of stuff happening and stuff  
22 like this happening and I got to deal with it. You know what  
23 I'm saying? Even though I might not be remember everything  
24 that happened, like before we came. You know what I'm saying?  
25 Told me what happened. You know what I'm saying? Pretty

1 much, that what it was. You know what I'm saying?

2 Apologize to the people. You  
3 know what I'm saying?

4 THE COURT: Okay.

5 Well, I'll tell you, you've got --  
6 You know, I don't know what you've got to do. You ought to  
7 cooperate with folks. Don't make enemies out of them, be  
8 better for you, okay? And maybe as you gain some -- you know,  
9 get a little older, get, maybe, better understanding you'll  
10 come to realize it's better to cooperate with these folks than  
11 it is to fight with them but this is a serious case and I'm  
12 gone give you five years consecutive and I wish you the best  
13 of luck, okay?

14 Good luck to you.

15 -- END OF TRANSCRIPT OF RECORD --

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STATE OF SOUTH CAROLINA )

CERTIFICATE OF TRANSCRIPTION

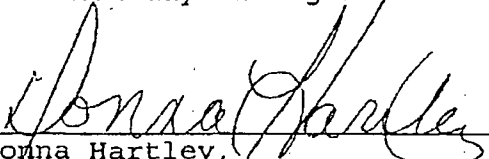
COUNTY OF GREENVILLE )

I, THE UNDERSIGNED, DONNA HARTLEY, do hereby certify that I transcribed the proceedings in the captioned case that were reported by April Herron, Circuit Court Reporter for the State of South Carolina, in the Court of General Sessions in and for the State of South Carolina on the seventeenth day of June, 2010

I FURTHER CERTIFY that the foregoing pages, numbered 3 through 4, constitute a true, accurate and complete transcript of said hearing.

I FURTHER CERTIFY that I am neither kin, counsel, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Beaufort County, this eleventh day of August, 2011.

  
Donna Hartley,  
Court Reporter and Notary Public  
for the State of South Carolina.  
My Commission expires  
April 23, 2017.

FORM 5

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

County of Greenville )

Kevin Eugene Spivey 30196 )  
Full name and prison number (if any) of Applicant )

State of South Carolina )

APPLICATION FOR

POST-CONVICTION RELIEF

2011-GP-23-04082

INSTRUCTIONS BE 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: Kirkland Correctional Inst. #17011

2. Name and location of Court which imposed sentence: 305 East North Street  
Greenville, SC, 29601

3. Name(s) of co-defendant(s) (if any): \_\_\_\_\_

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

(a) 1-521758 SC Case 960254

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) JUNE 17<sup>th</sup>
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty ✓
- (b) after a plea of not guilty \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_

7. Did you appeal from the judgment of conviction or the imposition of sentence?

No

8. If you answered Ayes@ to (7), list:

- (a) the name of each Court to which you appealed:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (b) the result in each such Court to which you appealed:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (c) the date of each such result:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

9. If you answered Ano@ to (7), state your reasons for not so appealing:

- (a) Dip not know how to

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

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

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

(a) infinite indirect assistance of Counsel

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

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

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

(a) Counsel ~~has~~ failed to over company evaluation

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

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

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

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

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

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

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

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. \_\_\_\_\_

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

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

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

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

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

iv. \_\_\_\_\_

(c) the disposition thereof:

i. \_\_\_\_\_

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

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

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. \_\_\_\_\_

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

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

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

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

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

iv. \_\_\_\_\_

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

\_\_\_\_\_  
\_\_\_\_\_

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

(a) which grounds have been presented:

i. \_\_\_\_\_

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

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

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

i. \_\_\_\_\_

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

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

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) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

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

- (a) the name and address of each attorney who represented you:
  - i. \_\_\_\_\_ Royce Poole \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_



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

I, Karla Eugene Spay, 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.

*Karla Eugene Spay*  
Applicant

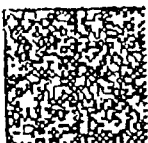
SWORN or affirmed to and subscribed before me this  
\_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

Kenya Sping # 306964  
K.C.T. M.S.U. # 9  
4344 Broad River Road  
Columbia, SC, 29210

PCR



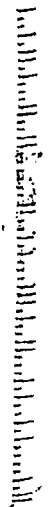
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Greenville, SC 29604

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2011-CP-23-4082
COUNTY OF GREENVILLE	)	
	)	
Kenya Eugene Spry,	)	
S.C.D.C. No. 306964,	)	
	)	
Applicant,	)	
	)	<b>RETURN</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed June 17, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the May 2009 term of General Sessions for assault on a correctional facility employee (2009-GS-23-01437). Larry H. Cooke, Esquire represented the Applicant.

On June, 17, 2010, the Applicant pled guilty. The Honorable Edward W. Miller sentenced the Applicant to a five (5) years imprisonment to run consecutive to the sentence he was already serving. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

## II.

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

1. Ineffective assistance of counsel.
  - a. Failure to order a competency evaluation.

## III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v.

State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,


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Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

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Assistant Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:   
Attorneys for Respondent

~~October~~ <sup>Nov.</sup> 1, 2011

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 )  
 )  
 KENYA EUGENE SPRY, 306964 )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

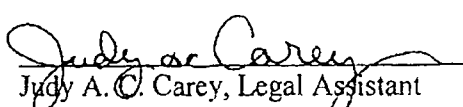
2011-CP-23-4082

AFFIDAVIT OF SERVICE BY MAIL

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

**Kenya Eugene Spry, 306964**  
**Kirkland Correctional Institution**  
**4344 Broad River Road**  
**Columbia SC 29210**

DATED this 1st day of November, 2011.

  
 Judy A. Carey, Legal Assistant  
 For Respondent

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Kenya Eugene Spry,	)	
Applicant,	)	TRANSCRIPT OF RECORD
-vs-	)	2011-CP-23-4082
	)	
The State,	)	
	)	February 13, 2013
Respondent.	)	Greenville, South Carolina

B E F O R E:

HONORABLE WILLIAM JEFFREY YOUNG, JUDGE

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

CAROLINE M. HORLBECK, ESQUIRE  
Attorney for the Applicant

KAREN C. RATIGAN, ESQUIRE  
Attorney for the Respondent

Margaret A. Woods  
Circuit Court Reporter

**ORIGINAL**

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Cross-examination by Ms. Horlbeck

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Certificate of reporter

29

## MOTIONS AND MATTERS

1 THE COURT: Ms. Ratigan.

2 MS. RATIGAN: Thank Your Honor, may it please the Court.  
3 The next case is Kenya Spry vs. the State of South Carolina,  
4 the Doc Number is 2011-CP-23-4082. It's my understanding  
5 Mr. Spry wishes to withdraw but I'll go ahead and put the the  
6 brief procedural history on the record just to make sure we're  
7 all on the same page. Mr. Spry was indicted for assault on a  
8 correctional facility employee, he was represented on that  
9 charge by Mr. Cooke. On June 17th of 2010 he pled guilty  
10 before Judge Miller, he received a 5-year sentence to run  
11 consecutive to the sentence he was already serving, he did not  
12 file an appeal. Again, I've been advised by Ms. Horlbeck that  
13 he wishes to withdraw at this time.

14 THE COURT: Ms. Horlbeck.

15 MS. HORLBECK: Judge, that's correct he does wish -- wish  
16 to withdraw and he's prepared to answer questions of the Court  
17 about that.

18 THE COURT: Alright, please place the plaintiff under  
19 oath.

20 KENYA EUGENE SPRY, having been  
21 first duly sworn, testified as follows:

22 EXAMINATION BY THE COURT:

23 Q. Alright, you are Kenya Eugene Spry?

24 A. Kenya.

25 Q. Kenya.

## MOTIONS AND MATTERS

1 A. Yeah.

2 Q. Okay, Eugene or is it Eugene or somethin' el ---

3 A. Eugene Spry.

4 Q. Spry. Now, Mr. Spry, it's my understanding that after  
5 conferring with your attorney today or before today that you  
6 now wish to withdraw your petition for post-conviction relief,  
7 is that correct?

8 A. Um-hum.

9 Q. Yeah, is that a yes?

10 A. Yes.

11 Q. Okay. Are you under the influence of alcohol or drugs  
12 today?

13 A. No, no, sir.

14 Q. Are you taking any medications that would cloud your  
15 judgment?

16 A. No.

17 Q. Are you aware of any physical, emotional or nervous  
18 condition that would keep you from understanding what's  
19 happening in this courtroom today?

20 A. No.

21 Q. Alright. Now you understand that if you withdraw your  
22 petition for post-conviction relief that the only way your  
23 sentence will be completed will be within the Department of  
24 Corrections for the State of South Carolina; in other words,  
25 you're gonna have to serve your sentence and that's how you'll

## MOTIONS AND MATTERS

1 finish it up.

2 A. Yeah.

3 Q. Okay. And you have no other avenues to proceed in state  
4 court or federal court to have you released other than by what  
5 the Court Order says.

6 A. So you sayin' like if I, if I, if I terminate this PCR,  
7 you sayin' I ain't got no no other way, no ---

8 Q. There's no other way that you'll be released other than  
9 by finishing your sentence.

10 A. I mean, you understand, I pretty much made my mind up  
11 today, right, you understand, uh, ---

12 Q. Well that's what I'm sayin'. Once you make up your mind  
13 today and tomorrow you decide you made the wrong decision then  
14 you're gonna finish up your sentence in the Department of  
15 Corrections, you understand that?

16 A. Ain't aint no goin' through the Court, ain't no other  
17 way, you understand, ---

18 Q. There's no other ways to go through.

19 A. You know, I mean, I I didn't know all that right.

20 Q. Okay, you wanna take a few minutes to talk to your  
21 attorney about that?

22 (Attorney/client discussion held off the record.)

23 THE COURT: Do ya'll need to confer in private?

24 MS. HORLBECK: If you don't mind, ---

25 THE COURT: I'll ---

## KENYA EUGENE SPRY - DIRECT EXAMINATION BY MS. HORLBECK

1 MS. HORLBECK: --- Judge.

2 THE COURT: --- step out. Thank you. We'll take a  
3 10-minute recess.

4 MS. HORLBECK: Okay.

5 (Whereupon, a recess was taken.)

6 THE COURT: Please take your seats. Yes, ma'am, I  
7 understand your client now wants to go forward.

8 MS. HORLBECK: Yes, sir.

9 THE COURT: Alright, you may call your first witness.

10 MS. HORLBECK: Judge, we would call Mr. Spry to the  
11 stand.

12 THE COURT: Okay, Mr. Spry, come forward, you're already  
13 under oath.

14 THE BAILIFF: Yes, sir, this way.

15 (Whereupon, the applicant came forward.)

16 THE BAILIFF: Stand right there.

17 (Whereupon, a discussion was held off the record.)

18 KENYA EUGENE SPRY, having been  
19 first duly sworn, testified as follows:

20 THE CLERK: Please state your full name for the record.

21 THE APPLICANT: Kenya Eugene Spry.

22 DIRECT EXAMINATION BY MS. HORLBECK:

23 Q. Mr. Spry, who represented you on this charge?

24 A. Uh, Cooke.

25 Q. Alright, and did this -- was this charge did did it go to

1 a jury trial or did you plead guilty?

2 A. I pled guilty.

3 Q. Alright. When was Mr. Cooke appointed to represent  
4 you?

5 A. I don't even remember, I can't, I can't even recall. I  
6 couldn't ---

7 Q. Alright, ---

8 A. --- um, ---

9 Q. --- did you and Mr. Cooke talk about getting a, getting  
10 you evaluated by Department of Mental Health in Columbia?

11 A. Yeah, think so, yeah, yeah.

12 Q. Alright, did Mr. Cooke fill out the necessary paperwork  
13 and schedule a hearing in front of the judge and get a get an  
14 Order to have you evaluated for competency and capacity?

15 A. Think so, yeah.

16 Q. Alright, and what was the result of that Order? Did you,  
17 did you go down to Department of Mental Health for evaluation?

18 A. I remember goin' down there but when I went down there,  
19 you understand, well I didn't know I was goin' anywhere,  
20 right, you understand, I was in the, I was still at Perry, you  
21 understand. Uh, when I was in a room, they came to get me,  
22 you understand, and I was in a, I I I was kinda confused as to  
23 what was goin' on and and asked me to strip strip search and  
24 c'mon out your cell and I I I didn't know what he was talkin'  
25 about. The man gassed me, right, you understand, a man shot a

KENYA EUGENE SPRY - DIRECT EXAMINATION BY MS. HORLBECK

1 bunch a chemical munition [sic] at me, you understand, and  
2 then it turned to a a big altercation with the officer. Man,  
3 I was, I was rolled on, I wa -- you understand, I had got hit  
4 with a shield, you understand, been fightin' with the police,  
5 had a lotta gas in my eyes, all over my body, I was burnin'  
6 and when I got down to the, uh, you understand, to the, uh,  
7 place that they do the mental evaluation I think, you  
8 understand, when I got there I couldn't even see, I couldn't  
9 e -- yes, I had gas all in my eyes, you understand, they had  
10 me restrained, all kinda, you understand, I had restraints on  
11 me extremely tight, you understand; I couldn't even use the  
12 restroom, you understand, I was mad, I was hysterical, you  
13 understand, so they they didn't really get to do an evaluation  
14 on me, you understand, they they just got mad and said we  
15 can't even talk to him and that was it, it wasn't evaluation  
16 done, you understand, I wasn't even in shape to be evaluated.

17 Q. Okay, alright, but an evaluation was scheduled, is that  
18 correct?

19 A. Yeah.

20 Q. Did Mr. Cooke come to you, uh, and you you mentioned you  
21 were incarcerated at Perry at the time?

22 A. Um-hum.

23 Q. Okay, and did anyone, did Mr. Cooke or his investigator  
24 travel to Perry to discuss the evaluation with you?

25 A. No.

1 Q. Did anyone, Mr. Cooke or someone from his office discuss  
2 with you that you would be transported on a certain day to  
3 Department ---

4 A. No.

5 Q. --- of Mental Health? Alright.

6 A. No.

7 Q. Did anyone tell you what would happen during the  
8 evaluation?

9 A. No, ---

10 Q. Alright.

11 A. --- I mean, I mean, at any time somebody come to see you  
12 in prison it's got to be documented, understand, far as for  
13 like a visit, you understand, full documents and it got to be,  
14 it it it, they got to have that stuff on record, ain't nobody  
15 ever came talk to me about nothin'.

16 Q. Alright, and the morning or the day you went to Columbia  
17 you testified that that you were in a cell by yourself in  
18 Perry and they came in and strip searched you?

19 A. Yeah, they just ran in there and they sprayed gas on me,  
20 you understand, they they ---

21 Q. Who who ---

22 A. --- ran ---

23 Q. --- did?

24 A. The officers that was on, it was Sergeant, uh, Sergeant,  
25 dude name, uh, Lieutenant, uh, Lieutenant, uh, I mean, they --

1 it was a bun -- the same officers that brought me down there  
2 pretty much are the same officers that rolled on me 'cuz I got  
3 transferred to McCormick that same day, right, you understand,  
4 I was confused and I didn't know what was goin' on ---

5 Q. Okay, ---

6 A. --- and they sprayed with gas.

7 Q. --- alright, and the officers that sprayed you with gas  
8 were they corrections officers from Perry?

9 A. Yes, ma'am.

10 Q. Alright. Alright, and when you you you got on the bus  
11 and you were transported down to Columbia for your evaluation,  
12 is that correct?

13 A. Yes, ma'am.

14 Q. Alright, and when you arri -- arrived you testified  
15 previously that you had gas in your eyes?

16 A. I mean, I had, I I couldn't even see. I didn't know  
17 where I was at and I that had been assaulted, you understand,  
18 and they had all these restraints on, you understand,  
19 extremely tight, I couldn't use the restroom, I didn't know  
20 where I was at, ya know.

21 Q. Alright, and you indicate you testified previously that  
22 you were hysterical when you arrived in Columbia for your your  
23 evaluation?

24 A. Yes, ma'am.

25 Q. Alright, and tell me what happened during the evaluation

1 if anything happened.

2 A. Uh, o -- the only thing I know is, right, you understand,  
3 when we got down there, I was screamin' 'bout let me use the  
4 restroom, you understand, and and somebody was like no, I  
5 mean, 'cuz I couldn't see nuttin' down there. I remember  
6 standin' by a wall and then going' in some room and then when  
7 I got in that room, you understand, somebody had asked me my  
8 name and all the stuff right here and, uh, you understand, uh,  
9 I don't, I don't, uh, and, uh, now I don't know even know what  
10 happened that -- after that, I mean, I was just, you  
11 understand, they they -- I had officers holdin' on me, you  
12 understand, you understand, make sure I wouldn't do nuttin'  
13 and all type of stuff, you know, I I I didn't really get to  
14 talk nobody, I mean, I I I was on fire, you know, I had, I had  
15 all kinda chemicals on me, man, I I didn't know ---

16 Q. Alright, ---

17 A. --- what was goin' on.

18 Q. --- did any of the doctors evaluate you?

19 A. No.

20 Q. Alright, and when you returned from your evaluation, did  
21 you discuss what happened or what didn't happen with your  
22 attorney?

23 A. After that?

24 Q. Yes.

25 A. After that I didn't get to talk with nobody else, ---

KENYA EUGENE SPRY - DIRECT EXAMINATION BY MS. HORLBECK

1 Q. Okay.

2 A. --- that was it.

3 Q. Alright, tell the Court how an evaluation at DMH would  
4 have changed this case or the outcome of a guilty plea. What  
5 what would you have done differently if you'd been properly  
6 evaluated?

7 A. Well, I mean, I mean, I really I don't know, you  
8 understand, I I've only had one evaluation done before, you  
9 understand, and, uh, I don't even know what happened to that  
10 charge, you understand, I never heard nuttin' else from it.

11 Q. Okay. Alright, and did you raise your concerns with the  
12 judge, your your -- when I say concerns, I mean your concerns  
13 about the way the evaluation was performed and the fact that  
14 the doctors didn't really talk to you, did you raise any a  
15 that with your attorney or with the judge during your guilty  
16 plea?

17 A. Tryin' to remember right. Uh, I don't know I, I mean, if  
18 I, I didn't really get to read the transcript or that or that  
19 plea or that plea, uh, that plea deal whatnot, you understand,  
20 uh, I ain't really get to read tran -- I mean, I really don't  
21 know what all was said but, uh, I know that they didn't re --  
22 they didn't do evaluation on me, I I mean, far as you just  
23 bringin' somebody in the room in that state, you understand,  
24 it just shouldn't have gone like that's not evaluation, man, I  
25 mean, that that ain't a professional evaluation as far as I

1 can see, you understand.

2 Q. Alright, what other complaints or what other things do  
3 you think Mr. Cooke should have done that he didn't do when he  
4 represented you?

5 A. I mean, one thing, one thing I I don't think he did  
6 right, you understand, and and this is a fact now, when, uh,  
7 like I said, the man never came down to no institute to talk  
8 to me after or before the mental evaluation except for when we  
9 came to court. Now after the evaluation the only time I seen  
10 that man is when I got, was a year later I got a letter in the  
11 mail when I got to Supermax in Columbia, you understand, at  
12 Kirkland, you understand, sayin' I was goin' to trial so when  
13 I seen the trial slip, you understand, first thing came to my  
14 mind was like ho, ho, you know, I I wasn't even ready for no  
15 trial so when I came in here, you understand, I I pretty much  
16 feel like I was forced to take a plea 'cuz I I wasn't even  
17 prepared to go to trial 'cuz when I was tryin' to talk to the  
18 man, he was, all he was talkin' about was I ready to go to  
19 trial, I mean, it -- I got witnesses, you understand, he  
20 didn't ask me did I have any witnesses or, you understand, he  
21 didn't ask me did, uh, you understand, pretty much witnesses,  
22 what happened or with this, that, I mean, I pretty much -- he  
23 pretty much said to me, Man, hey, we goin' to trial, I mean,  
24 how how do you take somebody to trial you don't even ask 'em  
25 questions, you don't even see 'em, you wasn't prepared no

KENYA EUGENE SPRY - DIRECT EXAMINATION BY MS. HORLBECK

1 trial, man.

2 Q. Was there a recommendation from the State in your case?

3 A. Talkin' about like for far as that plea deal?

4 Q. Both -- yes, a plea deal.

5 A. I mean, far as I understand, man man said if I plead to  
6 one charge they'll drop one but, you know, far as I understand  
7 it was two charges at the same time, two, it was two officers  
8 that got attacked, you understand, you understand, two  
9 officers got attacked so that was the same incident, you know,  
10 I don't see how you charge a person twice for one incident so  
11 basically if I went with a trial, you understand, and both of  
12 'em woulda been done at the same time so it it really didn't,  
13 I mean, pretty much what I was sayin' I wasn't really prepared  
14 go to no trial or anything, I I wa -- I didn't know what was  
15 goin' on. The man started talkin' about the plea deal and,  
16 you understand, when I seen trial on the paper, I knew I  
17 wasn't ready to go to no trial, knew that, ---

18 Q. Okay.

19 A. --- you understand, and he pretty much told me I didn't  
20 have no choice but to go to trial.

21 Q. Alright, the only plea deal from the State was just to  
22 dismiss a charge and let you -- and have you plead to the  
23 other?

24 A. Yeah.

25 Q. Okay, alright, and you mentioned earlier that you had

1 some witnesses that you wanted to, um, well let me, let me  
2 back up. As far as that recommendation from the State or plea  
3 deal, uh, what was your decision? Did you accept that plea  
4 deal or did you tell Mr. Cooke no, I don't wanna accept that  
5 plea deal?

6 A. I'm sayin', you understand, I took the plea deal, you  
7 understand. Yeah, I took the plea deal. I mean,...

8 Q. Okay, well how did your case get scheduled for trial?

9 A. I don't know know, man, I mean, pretty much about, pretty  
10 much this this how I see it, right, 'cuz I done been through  
11 the situation once. They use the trial thing as a scare  
12 tactic, you understand. They they they they say, Oh, man, we  
13 goin' to trial or you aint got no choice to go to trial, you  
14 understand, you can't, you can't get me off your case, you  
15 can't fire me or none a that, you you ain't got no choice but  
16 to go to trial knowin' you gonna get, you understand, the the  
17 the max if you ain't prepared but far as I, man, this man  
18 wasn't prepared, he he didn't ask me nothin', all he, all he  
19 was talkin' about was takin' a a deal, you understand, ---

20 Q. Okay, ---

21 A. --- taking a plea deal, you understand, so I ---

22 Q. --- and did you, ---

23 A. --- I took that.

24 Q. --- did you decide you did not wanna take that plea deal,  
25 is that how your case got scheduled for trial?

KENYA EUGENE SPRY - DIRECT EXAMINATION BY MS. HORLBECK

1 A. I'm sayin' we never got to talk before that, you  
2 understand, pretty much after after they did their little fake  
3 mental evaluation, you understand, where they, where they  
4 didn't even do nothin' ---

5 Q. Um-hum.

6 A. --- well they got angry and say, Oh, he's competent, ---

7 Q. Um-hum.

8 A. --- you understand. What happened is I didn't see  
9 Mr. Cooke again till like a year later, you know.

10 Q. Who who reviewed the plea deal with you Mr. Cooke or  
11 someone else?

12 A. Mr. Cooke, you understand, on the same day of the  
13 trial.

14 Q. Oh, okay, so the plea deal was never reviewed with you  
15 until the day of trial.

16 A. Yeah, yeah, as soon as I got the paper in the mail and we  
17 came ridin' down here ---

18 Q. Okay.

19 A. --- from Supermax, you understand, this officer right  
20 here (indicating), the same officer right here brought me down  
21 here, that's the same day I got that plea was the same day I  
22 was scheduled for trial, I got the paperwork and everything,  
23 you understand, so ---

24 Q. Okay.

25 A. --- I feel like I was, you understand, I I was forced to

1 go to trial, I I was gonna be forced to go to trial unprepared  
2 with this unprofessional, you understand, public defender, you  
3 know, he don't even get paid nuttin', man, you understand, ---

4 Q. Okay, ---,

5 A. --- the dude's a chump, man.

6 Q. --- when you, when you got your letter in the mail from  
7 Mr. Cooke, did you write him back and by letter, ---

8 A. No, ---

9 Q. --- I mean, ---

10 A. --- I -- see, I I didn't get ---

11 Q. --- I mean, let -- hang hang -- by letter, I mean, letter  
12 talking about the trial and how it was scheduled.

13 A. I'm I'm gonna say this one time, right, the man never  
14 wrote me. I got what you call it's it's it's like a slip,  
15 right, it's a little square slip ya'll sent out and it said on  
16 thing on such and such date you are goin' to trial, you goin'  
17 to trial in Greenville County, it it was a slip came in, it  
18 was -- was not a letter, it was just a somethin' to inform you  
19 that you goin' to trial and that's what I got, I didn't, I  
20 didn't get a letter from that clown, man.

21 Q. Okay, alright. Did you talk to him about the names of  
22 your witnesses or was that impossible too?

23 A. I mean, he never gave me the opportunity to talk to him.  
24 When I started talkin' to him, only thing he talked about  
25 5 years and 10 years, oh, you gonna get and better take the

KENYA EUGENE SPRY - CROSS-EXAMINATION BY MS. RATIGAN

1 plea, he he ---

2 Q. Okay.

3 A. --- didn't, he didn't, he he he did not represent me,  
4 man, as a lawyer, this man represented me as like a street  
5 dealer, you understand, somebody sellin' bootleg products on  
6 the street, man, c'mon get this, man, this what it's goin'  
7 for, that's how he, that's how he represented me, he ---

8 Q. That's ---

9 A. --- he ---

10 Q. --- that's ---

11 A. --- he didn't get ---

12 Q. --- all the questions, I have. Please answer any  
13 questions that the State has.

14 THE COURT: Ms. Ratigan.

15 MS. RATIGAN: Thank Your Honor.

16 CROSS-EXAMINATION BY MS. RATIGAN:

17 Q. So I just wanna make sure we have all your issues.

18 You're upset that Mr. Cooke did not tell you that you were  
19 gonna even be evaluated, that no one had ever told you they  
20 were comin' to get you for an evaluation, they just ---

21 A. No.

22 Q. --- kinda showed up?

23 A. No.

24 Q. Okay. And your testimony is that, um, you never got a  
25 chance to talk to Mr. Cooke about what had happened when they

1     came to get you and and you had the gas in your eyes, ya'll  
2     never got a chance to talk about that either?

3     A.    No, ---

4     Q.    Okay.

5     A.    --- and all that could be documented.

6     Q.    Okay.

7     A.    If he woulda came up there at Green -- if he would came  
8     Perry Correctional Institution, he would have to sign  
9     paperwork sayin' I'm coming to visit such and such such, he  
10    didn't do that.

11    Q.    Okay. Now when they picked ya up from Supermax and  
12    brought ya here, um, to the courthouse did you know that you  
13    were comin' to plead guilty or did you not know why you had  
14    been transported?

15    A.    I knew why I was bein' transported, it say I was goin' to  
16    trial today, that's what ---

17    Q.    Okay.

18    A.    --- it say, you goin' to trial today.

19    Q.    And then you spoke to Mr. Cooke here in the courthouse  
20    and that's when he told you about this plea deal?

21    A.    Yeah, that that was it. He didn't talk about a trial, he  
22    just ta -- he he he wasn't talkin about, Hey, man, you ready  
23    to go to trial, you got to suit up, you understand, you got  
24    any witnesses, that that stuff you do before, ---

25    Q.    Right.

1 A. --- you understand, you get into a courtroom, you  
2 understand, ---

3 Q. Okay.

4 A. --- so he brought me in here to take the the the, to take  
5 a plea.

6 Q. Okay. Now I know you you said you hadn't had a chance to  
7 look at the transcript but Judge Miller asked you at some  
8 point if you were satisfied with Mr. Cooke, do you remember  
9 him asking you about that?

10 A. Yeah.

11 Q. Okay, and you remember tellin' him that you you were  
12 satisfied with him?

13 A. Yeah.

14 Q. And clearly you were not satisfied with him, why did you  
15 not take the opportunity to tell Judge Miller about all these  
16 different things you thought Mr. Cooke hadn't done for you?

17 A. Well, I'm I'm I'm be real with you right now. I I had  
18 got into a little situation, uh, before with a charge, you  
19 understand and, uh, I went through that same little thing, uh,  
20 I was pretty much forced to take a, take a, take a deal, you  
21 understand, I didn't take a deal so I went in front of the  
22 judge and I told the judge this that and third, you  
23 understand, this that and third. I told him I wasn't  
24 satisfied and this, that and third and I wanted him off my  
25 case and all this stuff right here and I was forced to go to

1 trial with the dude, you understand, they didn't care. Man,  
2 go ahead, we gonna send you on out there, go ahead but but  
3 that, I mean, it -- that aint really the excuse, you  
4 understand, I told the judge yeah, I was satisfied, ---

5 Q. Okay.

6 A. --- I wanna take that plea 'cuz I aint wanna go to trial,  
7 get punished with this dude that wasn't even, you  
8 understand, ---

9 Q. Okay, ---

10 A. --- wasn't even gonna re ---

11 Q. --- so based on that prior experience you decide just to  
12 go in there and agree to everything and just get it done?

13 A. Yeah, I just wanna take the plea, I aint wanna get slayed  
14 no trial, I wasn't prepared. That that day I was not prepared  
15 that day.

16 Q. And and for that same reason of you having gotten burned  
17 before is that why you didn't tell the judge, You know I feel  
18 forced, Mr. Cooke is not prepared, is that why you didn't tell  
19 him any a that stuff?

20 A. Uh, yeah, uh, yeah, yes, ma'am.

21 MS. RATIGAN: Okay, hat's all I have, Judge.

22 THE COURT: Any redirect?

23 MS. RATIGAN: No, Your Honor.

24 THE COURT: Thank you, you may step down.

25 (Whereupon, the applicant left the stand.)

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MS. RATIGAN

1 MS. HORLBECK: Judge, that's all we have.

2 THE COURT: Alright, thank you. Ms. Ratigan.

3 MS. RATIGAN: Thank Your Honor, we'd call Mr. Cooke.

4 THE COURT: Mr. Cooke, come forward and be sworn for this  
5 hearing.

6 (Whereupon, the witness came forward.)

7 LARRY HOLMES COOKE, having been  
8 first duly sworn, testified as follows:

9 THE CLERK: Thank you, you may be seated. Please state  
10 your full name for the record.

11 THE WITNESS: Larry Holmes Cooke.

12 DIRECT EXAMINATION BY MS. RATIGAN:

13 Q. Mr. Cooke, do you recall representing Mr. Spry on these  
14 charges?

15 A. I do.

16 Q. And were you in fact appointed, uh, through the c --  
17 through the contract system with the PD's office?

18 A. Yes, I was appointed through the contract.

19 Q. And did you file the usual, uh, *Brady* and Rule 5  
20 discovery motions?

21 A. Uh, correct.

22 Q. When you were appointed to Mr. Spry, was he up there at  
23 the Detention Center or was he already in SCDC, do you  
24 remember?

25 A. Um, I think the first time I saw him was here, uh, I was

1 appointed to represent, we opened this file on 6/1 of '09 and,  
2 uh, I would've seen him here first. I never went to Perry or  
3 anywhere outside of of this courthouse to see him no, I never  
4 did.

5 Q. Okay. And at some point did you get an Order for a  
6 evaluation?

7 A. Well what happened is we came to court on 9/1 of '09 and,  
8 uh, just based on the way he acted and, uh, Judge Welmaker  
9 ordered a, uh, evaluation over the objection of the solicitor.  
10 Apparently the solicitor knew something about his background  
11 and felt like he was malingering and and, uh, playin' games  
12 and so anyhow, Judge, uh, Judge Welmaker sent him down, uh,  
13 just to be sure.

14 Q. Okay. Now did you ever get any kind of or an evaluation  
15 or report back?

16 A. I did and, uh, basically that's exactly what they said.  
17 He wouldn't cooperate, he wouldn't answer questions, he  
18 wouldn't, he wouldn't do anything and, uh, they said really  
19 they couldn't, uh, that they couldn't really evaluate him to  
20 be fair about it. Uh, ---

21 Q. Did you ever have a chance to discuss, um, both the  
22 evaluation process and the report with ---

23 A. Right.

24 Q. --- Mr. Spry?

25 A. Well I don't know if I went into great details but I, all

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MS. RATIGAN

1 I did is told him, uh, and he he's he's nice fella but he's  
2 hard to deal with a little bit, he he he just didn't wanna  
3 answer questions, uh, but the evidence through discovery was  
4 so overwhelming that he had done these things, uh, uh, I  
5 thought they made him a pretty good offer and he agreed to,  
6 uh, he agreed to plead guilty, he got a 5-year sentence  
7 consecutive.

8 Q. But did you ever get a chance to talk about the eval with  
9 him either maybe over the phone or in a letter or when they  
10 brought him back from Supermax, do you recall?

11 A. Just when they brought him back here.

12 Q. Okay. And Mr. Spry testified that they brought him back  
13 from Supermax and you told him about the offer that day, does  
14 that sound accurate?

15 A. That that's usually how they do a lotta of these, yes.

16 Q. And did you explain to him kinda the pros and cons of of  
17 pleading under this offer versus goin' to trial on these  
18 facts?

19 A. Well I'm sure I did, I mean, I always do that. I mean,  
20 if you --they're gonna dismiss one of 'em and and then we're  
21 just faced with with one charge and I think yeah, certainly I  
22 did.

23 Q. Did you share with Mr. Spry your concerns that this was  
24 not a a winnable case at trial?

25 A. I I don't believe, um, I don't believe anybody coulda won

1 this case based on the evidence I had in the file and the  
2 officers by the way who were there to, who were there to  
3 testify, I mean, they were, they were hot, I mean, they were  
4 hot with with, uh, the way they had been treated, ---

5 Q. Did M ---

6 A. --- spoke out.

7 Q. Okay, did Mr. Spry ever tell you he wanted a trial or  
8 that he wanted you to talk to some witnesses or do some more  
9 investigation?

10 A. Never mentioned any of that.

11 Q. Did you in any way pressure or intimidate or force him to  
12 take that plea offer, did you leave it up to him?

13 A. I never, no, I I never intentionally intimidate anybody,  
14 I just tell 'em what they're facing if they convicted and what  
15 their options are and and whether in my opinion based on the  
16 evidence that I've seen whether it's a a decent offer or  
17 not.

18 MS. RATIGAN: That's all I have, Your Honor.

19 THE COURT: Any redirect?

20 MS. HORLBECK: Just briefly, Your Honor.

21 CROSS-EXAMINATION BY MS. HORLBECK:

22 Q. Does your, Mr. Cooke, does your file reflect just how  
23 many times you would've met with Mr. Spry to discuss the case?

24 A. Not many.

25 Q. Okay. Alright, and would -- is it fair to say that since

LARRY HOLMES COOKE - CROSS-EXAMINATION BY MS. HORLBECK

1 he was incarcerated most of your discussions with Mr. Spry  
2 woulda taken place at the courthouse?

3 A. That, yeah, that's exactly right.

4 Q. Okay. Alright, and, uh, you said you discussed the  
5 evaluation, do you recall when you discuss -- discussed the  
6 results of the evaluation with Mr. Spry?

7 A. To be -- the only indication I -- the day that they  
8 probly brought him up here which woulda been on a, on a  
9 Thursday, it looks like June the 17th, um, I guess is when, is  
10 when I talked with him, I I really, I I don't know, some  
11 reason I don't have much in here.

12 Q. Okay, uh, the offer to have Mr. Spry spl -- plead to one  
13 charge when when was that generated by the State?

14 A. Uh, the day of trial ---

15 Q. Okay.

16 A. --- or or the day we -- or that that we were gonna go to  
17 trial.

18 Q. Was that the only offer in the case? Were there any  
19 others?

20 A. I'll have to look through here. Honestly I don't  
21 remember, uh, whether Mr. Weston had made me an offer, they  
22 usually do. I was just havin' a hard time, uh, from the  
23 get-go. First time I talked with him I just, I mean, we just  
24 had a communication problem, I mean, and I never did really, I  
25 don't see anything in here, I'm sure there's one in our

1 computer downstairs if there was one, all I have is the  
2 discovery and the pictures of the injuries, etc.

3 Q. Okay, ---

4 A. Uh, ---

5 Q. --- to your knowledge, just based on your memory, do you  
6 think there were any other author -- offers in this case  
7 besides the one that was taken the day of trial?

8 A. Uh, I don't know, I don't think so.

9 Q. Okay.

10 A. As I say, I I'll be glad if the judge wants to hold hold  
11 it open, I'll be glad to get the secretary to look in there  
12 and see.

13 Q. Okay, and and you you previously stated there was  
14 definitely a communication problem with Mr. Spry, ---

15 A. Yeah.

16 Q. --- between Mr. Spry and yourself?

17 A. Oh, yeah.

18 MS. HORLBECK: Okay, that's all I have, Judge, thank you.

19 THE COURT: Anything further?

20 MS. RATIGAN: No further questions, the State would rest.

21 THE COURT: Thank you.

22 THE WITNESS: Thank you.

23 (Whereupon, the witness left the stand.)

24 THE WITNESS: Judge, I have a trial, can I be excused?

25 MS. RATIGAN: Please.

1 THE COURT: Alright, um, I'll take this matter under  
2 advisement. I'll give you my ruling when I know.

3 MS. RATIGAN: Thank you, Judge.

4 MS. HORLBECK: Thank Your Honor.

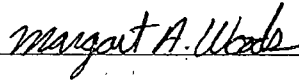
5 MS. RATIGAN: Thank you, Mr. Cooke.  
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1 CERTIFICATE OF REPORTER  
2

3 I, Margaret A. Woods, Court Reporter in and for the State  
4 of South Carolina at Large, hereby certify that I reported the  
5 preceding case on February 13, 2013 at the time and place  
6 heretofore set forth; and that the foregoing pages numbered  
7 from 3 through 28, inclusive, constitute a true and accurate  
8 transcription of my stenographic notes of the said proceeding.

9 I further certify that I am neither attorney nor counsel  
10 for, nor related to or employed by any of the parties  
11 connected to the action, nor am I financially interested in  
12 the action.

13 July 6, 2013  
14

15 

16 Margaret A. Woods, Court Reporter

17 in and for the State of South Carolina at Large.  
18  
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25

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kenya Eugene Spry, )  
 S.C.D.C. No. 306964, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2011-CP-23-4082

**ORDER OF DISMISSAL**

FILED CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSHAMER  
 2013 APR -2 P 1:5

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 17, 2011. The Respondent made its return on November 1, 2011. An evidentiary hearing into the matter was convened on February 13, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Larry H. Cooke, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the May 2009 term of the Greenville County Grand Jury for assault on a correctional facility

employee (2009-GS-23-01437). He was represented by Larry H. Cooke, Esquire.

On June 17, 2010, the Applicant pled guilty.<sup>1</sup> The Honorable Edward W. Miller sentenced the Applicant to a five (5) years imprisonment to run consecutive to the sentence he was already serving. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
  - a. Failure to order a competency evaluation.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under

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<sup>1</sup> A second count of assault on a correctional facility employee was dismissed.

prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated plea counsel obtained an order for a competency evaluation. The Applicant stated, however, that plea counsel did not tell him that he was going to have this evaluation so he fought with the officers when they came to transport him. The Applicant stated the officers used some sort of gas that got into his eyes and that, as a result, he did not cooperate with the actual evaluation process itself. The Applicant stated he and plea counsel did not discuss the fact that he was never actually evaluated. The Applicant stated he had witnesses in his case but plea counsel never gave him the opportunity to discuss this. The Applicant stated he had to plead guilty because plea counsel was not prepared for trial but said the State would drop one of the counts if he entered a guilty plea. The Applicant admitted he did not mention any of his concerns to the plea judge (and actually said he was satisfied with plea counsel's representation) because he had balked at plea before and was forced to go to trial. The Applicant stated he pled guilty just to get it over with.

Plea counsel testified he filed discovery motions after he was appointed in this case. Plea counsel testified that, based on the Applicant's actions in court on September 1, 2009, Judge Welmaker ordered a competency evaluation over the State's objection. Plea counsel testified, however, that he received a report that the Applicant did not cooperate with the evaluation or

answer any questions. Plea counsel testified he told the Applicant about the report when he was brought back from SuperMax to enter this guilty plea. Plea counsel testified there was overwhelming evidence against the Applicant, so the State's offer to dismiss one of the counts was a good one. Plea counsel testified he explained – on the day of the hearing – the advantages and disadvantages of pleading guilty and the Applicant chose to enter a guilty plea. Plea counsel testified the Applicant never mentioned that he wanted to go to trial.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.8; p.12). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.7-8).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he discussed with the Applicant the fact that there was no competency evaluation performed because he was uncooperative. Plea counsel testified he explained to the Applicant the advantages and disadvantages of entering a guilty plea in this case. This Court finds plea counsel's testimony is credible and that he properly reviewed both the case and plea offer with the Applicant. This Court finds the Applicant made a knowing and voluntary choice to enter a guilty plea. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969) (holding that, to be knowing and voluntary, a plea must be entered with a full

understanding of the charges and the consequences of the plea). The Applicant was informed of the sentence range for the charge, admitted he was guilty, and stated he had not been coerced into entering a plea. (App.pp.7-8). The Applicant did not avail himself of the opportunity to tell the plea judge about either his relationship with plea counsel or the circumstances behind the failed evaluation in this case.

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective in failing to investigate potential witnesses. As these alleged witnesses did not testify at the evidentiary hearing, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

**CONCLUSION**

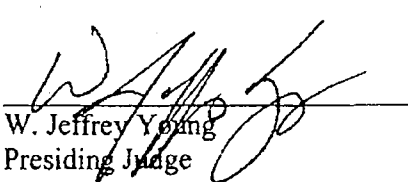
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of March, 2013.

  
W. Jeffrey Young  
Presiding Judge

Sumter, South Carolina.

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2011CP2304082

FILED-CLEER (COURT)  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2013 APR - 2 11:00

Kenya Eugene Spry vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a decision rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
  - Affirmed;  Reversed;  Remanded;
  - Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:  
Dated at Greenville, South Carolina, this 2nd day of April, 2013.

Court Reporter:

PRESIDING JUDGE - W Jeffrey Young

This judgment was entered on the 2nd day of April, 2013, and a copy mailed first class this 2nd day of April, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck 101 Whitsett Street  
Greenville, SC 29601

Karen Christine Ratigan PO Box 11549 Columbia,  
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

WITNESSES

J M Shugart

*Jamerson Shugart*

Greenville County Sheriffs Office

12/10/2008

DOCKET NO. 2009-GS-23-

W/JW

The State of South Carolina

County of Greenville

001437

COURT OF GENERAL SESSIONS

*6/17/10* May

TERM 2009

THE STATE

PLEAD GUILTY

VS.

KENYA EUGENE SPRY

ARREST WARRANT NUMBER

1521758

ACTION OF GRAND JURY  
TRUE BILL

FOREMAN GRAND JURY

*Jamerson Shugart*  
Foreperson of Grand Jury  
VERDICT

2525

Indictment for

ASSAULT ON A CORRECTIONAL FACILITY  
EMPLOYEE

VIOLATION § 16-03-0630

Foreperson of Petit Jury

Date:

