

# RICHEY AND RICHEY

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August 23, 2013

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

Re: Fred Douglas Downer, SCDC 346507 vs. The State of South Carolina  
Case No: 2012-CP-23-2383

Dear Mr. Shearouse:

Please find enclosed a Notice of Appeal and a Proof of Service for the same. Also, I have enclosed a copy of the Order from which the appeal is taken. Thank you for your help and if you should have any questions please feel free to call me.

RICHEY AND RICHEY, P.A.

Yours truly,

  
\_\_\_\_\_  
Rodney Richey

RWR/tlg  
enclosures

cc: Karen Batigan, Esquire

**RECEIVED**

AUG 28 2013

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE D. GARRISON HILL

2012-CP-23-2383

Fred Douglas Downer, SCDC 346507,

APPELLANT,

against

STATE OF SOUTH CAROLINA,

RESPONDENT.

**RECEIVED**

AUG 28 2013

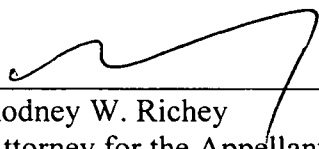
**S.C. SUPREME COURT**

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**NOTICE OF APPEAL**

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Fred Downer appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable D. Garrison Hill, Circuit Judge on June 18, 2013 and Order issued on August 12 2013 and filed on August 21, 2013. The Appellant received notice of the judgment on August 23, 2013.



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Attorney for the Appellant  
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(864) 467-0503

Other Counsel of Record:  
Karen Ratigan, Esquire  
Office of Attorney General State of SC  
Post Office Box 11549  
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

HONORABLE D. GARRISON HILL

2012-CP-23-2383

Fred Douglas Downer, SCDC 346507,

against

STATE OF SOUTH CAROLINA,

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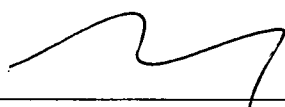
**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on August 26, 2013, addressed to their attorney of record, Karen Ratigan, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Dated: August 26, 2013

RICHEY & RICHEY, P.A.



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Greenville, South Carolina 29603  
(864) 467-0503

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2012CP2302383

FILED CLERK OF COURT  
GREENVILLE CO S.C.  
PAUL B. WICKENSIMER  
2013 AUG 21 PM 3:08

Fred Downer 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 verdict 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):**  
SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Rule 12(b), SCRCP;  Rule 41(a),  
 Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_  
 Rule 40(j) SCRCP;  Bankruptcy:
- 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 21st day of August, 2013.

Court Reporter:

**PRESIDING JUDGE - D Garrison Hill**

This judgment was entered on the 21st day of August, 2013, and a copy mailed first class this 21st day of August, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Rodney Wade Richey PO Box 10916 Greenville,  
SC 296030916

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

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Fred Douglas Downer, )  
 S.C.D.C. No. 346507, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2012-CP-23-2383

**ORDER OF DISMISSAL**

FILED - CLERK OF COURT  
 GREENVILLE CO S.C.  
 PAUL S. WICKENBACH  
 2013 AUG 21 PM 3:08

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed April 5, 2012. The Respondent made its return on July 31, 2012. An evidentiary hearing was convened on June 18, 2013 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Rodney W. Richey, 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 were Fred Downer, Sr., Ashley Glenn, and the Applicant's plea counsel, Richard H. Warder, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the 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 July 2010 term of the Greenville County Grand Jury for assault and battery with intent to kill (ABIK) (2010-GS-23-3341), assault and battery of a high and aggravated nature (ABHAN)

(2010-GS-23-3342), three (3) counts of kidnapping (2010-GS-23-3343, -3344, -3345), possession of a weapon during the commission of a violent crime (2010-GS-23-3407), and conspiracy (2010-GS-23-3408). He was represented by Richard H. Warder, Esquire.

On June 15, 2011, the Applicant pled guilty. The Honorable G. Edward Welmaker levied concurrent sentences of one hundred and seventy-two (172) months for ABIK, ten (10) years for ABHAN, one hundred and seventy-two (172) months for each count of kidnapping, five (5) years for possession of a weapon during the commission of a violent crime, and five (5) years for conspiracy. 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. Failed to properly challenge deficient arrest warrant affidavits.
  - b. Failed to advise Applicant he could proceed to trial and challenge arrest warrant affidavits
2. Involuntary guilty plea.

The Applicant, through counsel, submitted an amendment to his application filed January 28, 2013, in which he alleged the following:

1. Ineffective assistance of counsel:
  - a. Failed to conscientiously discharge professional responsibilities.
  - b. Failed to effectively challenge search and seizure.
  - c. Failed to act as a diligent and conscientious advocate.
  - d. Failed to give complete loyalty.
  - e. Did not have Applicant's best interest in mind.
  - f. Failed to serve the cause in good faith.
  - g. Neglected necessary investigations and preparation.
  - h. Did not do necessary factual investigations.
  - i. Did not do necessary legal research.
  - j. Did not conscientiously gather information to protect rights.
  - k. Did not try to have the case settled in a manner that would have been to my best advantage.

- l. Did not advise me of all my rights or take any of the actions that were necessary to protect and preserve them.
- m. Never properly ascertained whether or not I actually understood or comprehended all of the issues involved in the case.
- n. Never properly consulted with me or kept me informed.
- o. Never explained to me or discussed with me any of the elements.
- p. Never made any attempt to ascertain whether or not I actually knew the elements of the crime charged or whether or not I understood exactly what "criminal element" meant.
- q. Never explained or discussed with me how the elements of the crime charged and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.
- r. Never informed me of any of the defenses that were available to me.
- s. Never intended to offer any defense to the court on my behalf.
- t. Never explained to me or discussed with me any kind of defense strategy.
- u. Never explained to me or discussed with me any of the tactical choices that were made or planned to be made.
- v. Dictated to me exactly how my case was going to be handled and offered no alternative options.
- w. Failed to properly acquaint herself with the law and facts surrounding my case and, as a result, there was a very serious error in the assessment of both the law and the facts.
- x. No defense at all was put in issue for me during the Court proceedings.
- y. Did not subject the prosecution's case to any adversarial testing.
- z. Failed to oppose the prosecution's case with any adversarial litigation.
- aa. Failed to function as the government's adversary in any sense of the word.
- bb. Failed to pursue any of the legal recourse that was available.
- cc. Failed to function as the counsel that the Constitution's Sixth Amendment guarantees.
- dd. Failed to call alibi witnesses on my behalf.
- ee. Failed to appeal my case.

### **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/Involuntary Guilty Plea**

The Applicant alleges his guilty plea was involuntary and that 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 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).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing.



Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

The Applicant stated on the day of the guilty plea hearing, plea counsel twice promised that he would receive a ten year sentence if he pled guilty. The Applicant stated he never saw a written ten-year recommendation from the State. The Applicant admitted the State told the plea judge there was no sentence recommendation but stated he did not object to this because plea counsel told him not to say anything. The Applicant stated his guilty plea was involuntary because of “trickery” and ineffective assistance of plea counsel.

Fred Downer, Sr. (the Applicant’s father) and Ashley Glenn (the mother of the Applicant’s child) stated they met with the Applicant and plea counsel in counsel’s office on the day of the plea hearing. Downer and Glenn stated plea counsel told them the Applicant would receive a ten year sentence if he pled guilty. Downer and Glenn stated plea counsel restated this when they met at the courthouse later that day.

Plea counsel testified he was retained to represent the Applicant on March 9, 2011, but that there had been a previous attorney on the case. Plea counsel testified the previous attorney obtained a ten-year sentence recommendation from the State but that the Applicant refused it and hired him. Plea counsel testified he received a letter from the assistant solicitor dated April 11, 2011 stating the discovery materials would be re-sent to him and that the plea offer had expired because the previous attorney had informed him that the Applicant rejected it. Plea counsel testified the State did not make any plea offers during his representation, as the case was on the trial docket when he was retained. Plea counsel testified he was certain he did not tell the Applicant he would receive a ten-year sentence and that he had explained to the Applicant that there was no recommendation.

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.11; p.14). 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.12-14). This Court finds the Applicant entered a knowing and voluntary guilty plea. See Boykin v. Alabama, 395 U.S. at 243-44, 89 S. Ct. at 1712.

This Court finds the Applicant failed to meet his burden of proving plea counsel promised he would receive a ten-year sentence if he pled guilty. Plea counsel testified he never made any such promise to the Applicant. Plea counsel testified the Applicant had rejected a ten-year offer when he was represented by previous counsel and that the case was on the trial docket by the time he was retained. Plea counsel testified he had explained to the Applicant that he was pleading guilty without a sentence recommendation. This Court finds plea counsel's testimony is credible. This Court finds the guilty plea transcript refutes the Applicant's allegation because it was noted at the plea hearing there was no sentence recommendation and the Applicant did not object. (Plea transcript, p.14). See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007) (citing also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994)). The Applicant also told the plea judge he had not been promised anything in exchange for his guilty plea. (Plea transcript, p.14). See id. This Court further notes the Applicant signed the

sentencing sheets in this case, all of which are clearly marked that the plea is being entered “Without Negotiations or Recommendation.” Even assuming arguendo that plea counsel improperly advised the Applicant, any alleged error was cured by the plea colloquy. See Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011). Further, as the Applicant pled guilty without a recommendation, was advised of the sentence ranges for the offenses, and was sentenced within those ranges, he cannot prove any prejudice.

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. This Court also concludes the Applicant has failed to meet his burden of proving his guilty plea was not knowing and voluntary. 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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not

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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. Furthermore, the Applicant's guilty plea was entered knowingly and voluntarily within the mandates of Boykin. 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 12<sup>th</sup> day of August, 2013.



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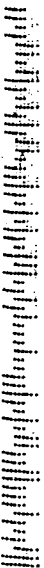
D. Garrison Hill  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

AUG 26 2017  
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The Honorable Daniel E. Shearouse  
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