

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED

SEP 03 2013

S.C. Supreme Court

JUSTIN A. AUSTIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-00094

APPENDIX

LANELLE CANTEY DURANT
Appellate Defender

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

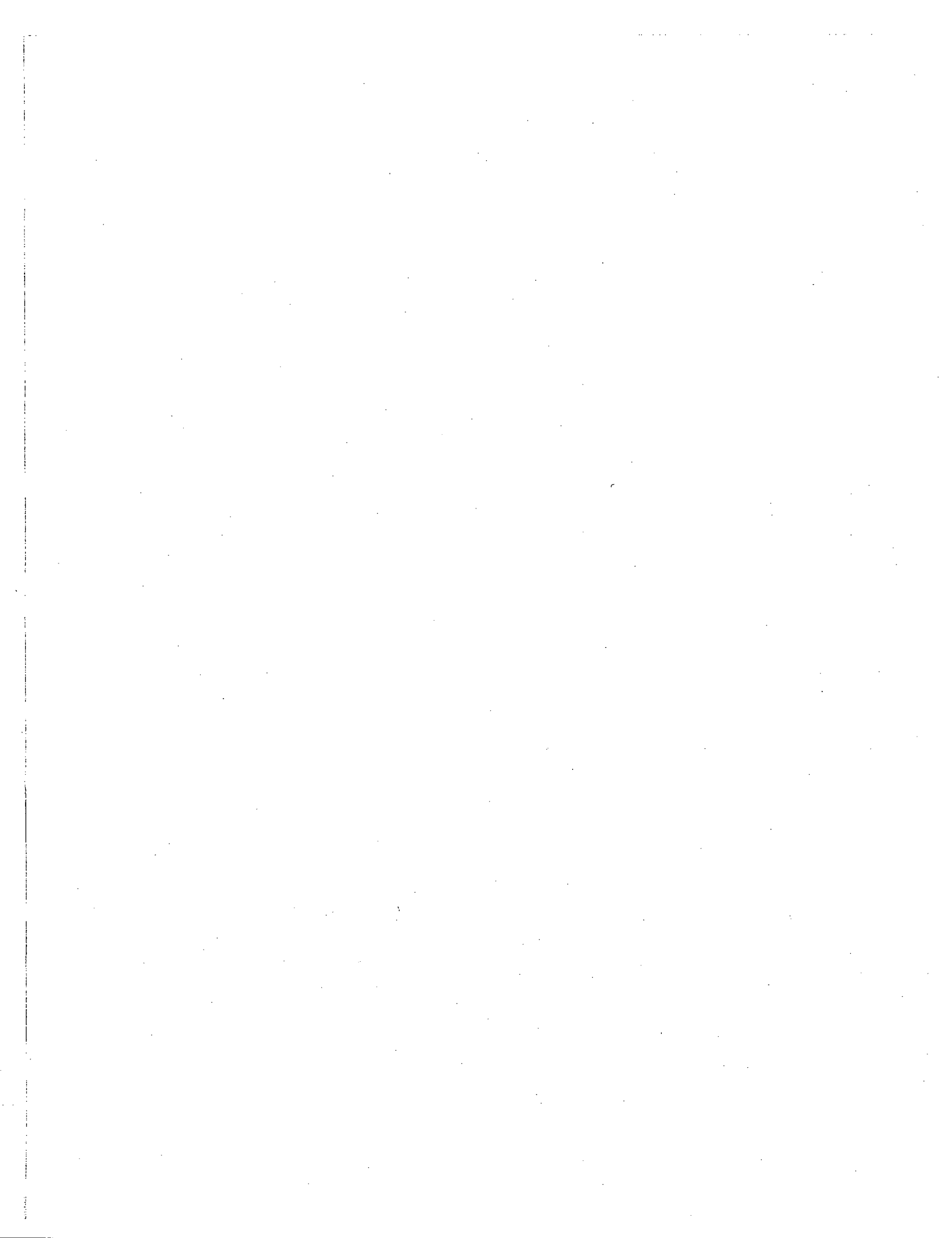
ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT



INDEX

INDEXi

GUILTY PLEA HEARING TRANSCRIPT (JANUARY 5, 2012)1

APPLICATION FOR POST-CONVICTION RELIEF27

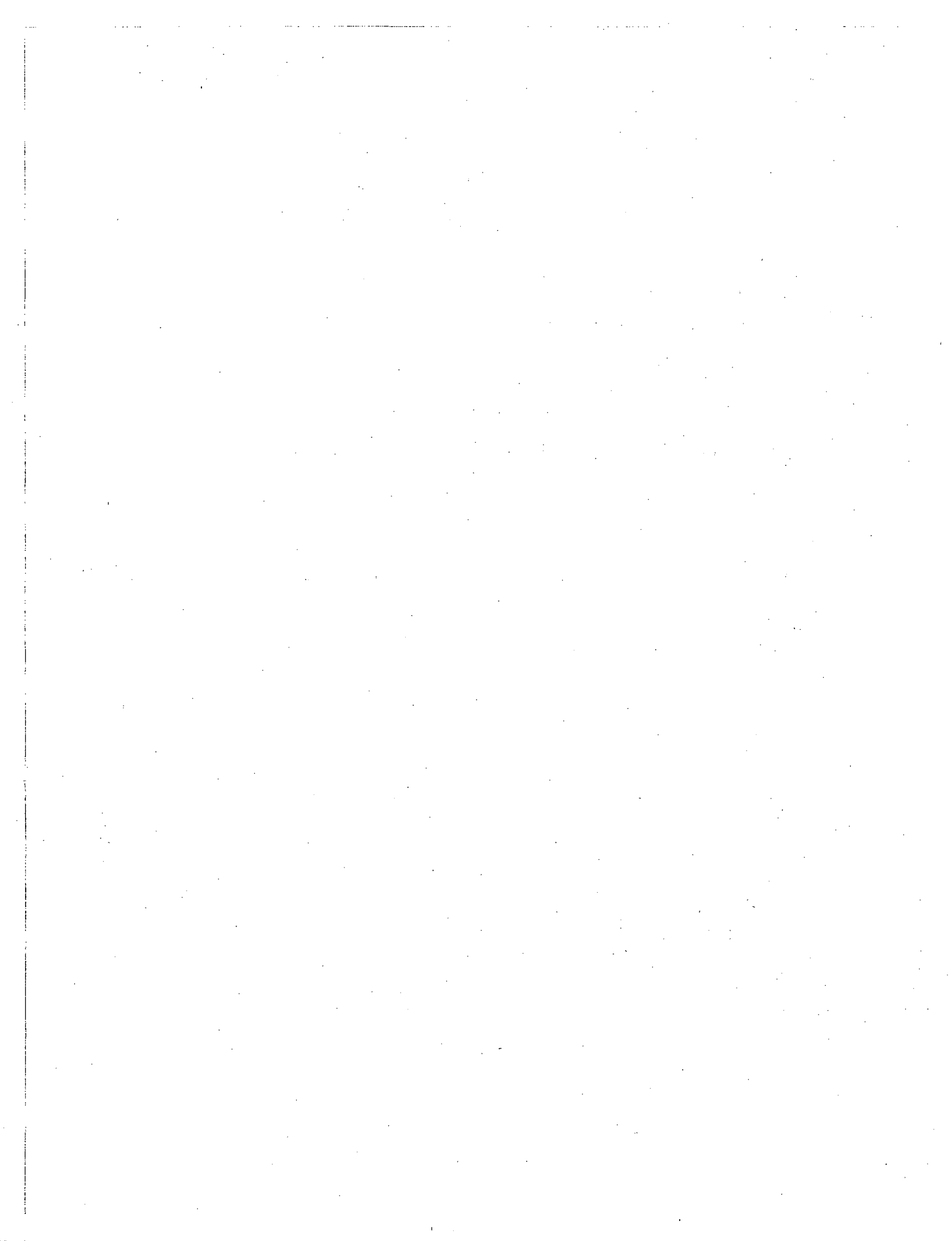
RETURN32

POST-CONVICTION RELIEF HEARING TRANSCRIPT (DECEMBER 3, 2012).....38

ORDER OF DISMISSAL70

INDICTMENT79

SENTENCE SHEET81



ORIGINAL

STATE OF SOUTH CAROLINA)
) COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)

State of South Carolina,)
)
) PLAINTIFF,) GUILTY PLEA
) 2010-GS-40-12260
) -VS-)
)
Justin A. Austin,)
)
) DEFENDANT.)
_____)

BEFORE THE HONORABLE DeANDREA GIST BENJAMIN, JUDGE

JANUARY 5, 2012

COLUMBIA, SOUTH CAROLINA

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

Dolly Garfield, Esq.
For the State

Renee Lipson, Esq.
For the Defendant

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

	PAGE NO.
Exhibit List	3
Opening Remarks.	4
Sentence of the Court.	24
Court Reporter's Certification	25

E X H I B I T S

THERE WERE NO EXHIBITS MARKED TO THIS PROCEEDING.

(The defendant, together with counsel, was personally present in the courtroom.)

MS. GARFIELD: The State calls Justin Austin.

(The witness was sworn.)

MS. GARFIELD: May it please the Court, Your Honor?

THE COURT: Yes, ma'am.

MS. GARFIELD: Before you is Justin Austin with his attorney, Ms. Renee Lipson of the Public Defender's Office. Your Honor, Mr. Austin is here today on a guilty plea to voluntary manslaughter that has been reduced from the charge of murder.

This is a negotiated plea. The State and the defense have entered into negotiations of an 18-year sentence. Present in the courtroom, Your Honor, is the victim, Tavaris Tucker's, mother and other family members of Ms. Tucker.

THE COURT: All right, is that correct, Ms. Lipson?

MS. LIPSON: Yes, Your Honor.

THE COURT: And you represent Mr. Justin Austin?

MS. LIPSON: Yes, Your Honor.

THE COURT: And have you explained to your

client the charge contained in the indictment, the possible punishment, and his constitutional rights?

MS. LIPSON: Yes, Your Honor.

THE COURT: And how does he wish to plead?

MS. LIPSON: Guilty, Your Honor.

THE COURT: And do you agree with his decision to plead guilty?

MS. LIPSON: Yes, Your Honor.

THE COURT: All right.

And you are Justin Austin?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, you're pleading guilty to voluntary manslaughter, is that correct?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, how old are you?

MR. AUSTIN: I'm 29.

THE COURT: Twenty-nine. How far did you go in school?

MR. AUSTIN: I went to the 10th grade.

THE COURT: And, sir, I know you're incarcerated. But what kind of work do you?

MR. AUSTIN: I wasn't doing none at the time.

THE COURT: Are you married?

MR. AUSTIN: No, ma'am.

THE COURT: Do you have children?

MR. AUSTIN: Five.

THE COURT: Their ages?

MR. AUSTIN: Ten, nine, eight, six, and one.

THE COURT: And, sir, are you on probation or parole?

MR. AUSTIN: Probation.

THE COURT: All right. And what are you on probation for?

MR. AUSTIN: For unlawful carrying of a stolen pistol.

MR. LIPSON: Okay, and also burglary and receiving stolen goods, as well?

MR. AUSTIN: Yes, burglary.

THE COURT: For what, now?

MS. LIPSON: Burglary third and receiving stolen goods, as well.

THE COURT: Okay. Sir, you understand that by entering this plea that this will serve as a violation of your probation. Do you understand that?

MR. AUSTIN: Yes, ma'am.

THE COURT: Knowing that, you still wish to plead guilty to this charge?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right, sir, have you ever been treated for the abuse of alcohol, drugs or for mental illness?

MR. AUSTIN: Early in my younger life, when I was young, yes, ma'am.

THE COURT: Which one -- drugs, alcohol, or mental illness?

MR. AUSTIN: Mental illness.

MS. LIPSON: And, Your Honor, if I may approach, I had Mr. Austin evaluated by the Department of Disabilities and Special Needs back in 2010, and he was deemed to be competent.

THE COURT: And do you feel that he's competent to go forward with this plea today?

MS. LIPSON: Yes, ma'am.

THE COURT: All right, sir, within the last 24 hours have you taken any medication, drugs, or alcohol?

MR. AUSTIN: No, ma'am.

THE COURT: And are you aware of any physical, emotional, or nervous problem that might keep you from understanding what you're doing here today?

MR. AUSTIN: No, ma'am.

THE COURT: All right, listen closely to the Solicitor as she states the facts.

MS. GARFIELD: Thank you, Your Honor. This incident occurred November 24, 2009. The victim in this case was Tavaris Tucker. This happened at the Dora Randall Apartments in the City of Columbia here in Richland County.

That particular evening, the defendant, Justin Austin, along with two co-defendants, Tron Harrison and Marvin Archie, were all hanging out at the Dora Randall Apartments. The defendant's cousin was residing there. The defendant had been staying with him there for the last several weeks.

He's originally from Orangeburg. At any rate, they're at these Dora Randall Apartments, and the victim comes into the neighborhood driving a car that resembled an old police car.

They thought he may have been undercover police who had began to ride around. This had infuriated the defendant and the co-defendants because they thought he was pretending to be undercover and, quite frankly, Judge, was interrupting drug sales in the neighborhood.

At that time, they got into an altercation with the victim and told him he didn't need to be

driving in the neighborhood, he had no reason to be in the neighborhood, and instructed him to leave and not come back.

The victim did leave the neighborhood. And at some point after he left, the victim was stopped with two other individuals by law enforcement. And I tell you all this, Judge, because this is going to be relevant in why we've reduced the charge.

He was stopped by law enforcement, and the other two individuals were found to be armed, but Tavaris Tucker was not found to be armed. The other two individuals were arrested.

A very short period of time later, Tavaris Tucker did go back to the neighborhood, to Dora Randall Apartments. This, of course, infuriated the defendant and his co-defendants because they had told him to stay away.

The victim came up, and he began to get into an argument with Marvin Archie. While Marvin Archie is arguing with him, Tron Harrison walks up and proceeds to do some type of hand sign.

It was law enforcement's belief that this hand sign is some type of code to say go on down with the shooting, at which point Justin Austin

approached the victim and did shoot him with a 9-millimeter approximately six times, six gunshot wounds to his back.

The victim collapsed, and all three fled. There's very little evidence other than the co-defendants' testimony. There's also some witnesses in the neighborhood who corroborated the murder had occurred but did not actually see it one on one.

When law enforcement arrived, the victim was laying on the ground. He did have a pistol in his pocket, but the pistol was sticking out of his pants pocket, as well, Judge, that was loaded with 13 rounds, and there was one round in the chamber.

The victim was obviously pronounced dead. He was taken to the hospital and while being treated at the hospital, a nurse found another gun in a back waistband. So the victim was armed. Because of this and with the new emerging self-defense issues that are arising in a lot of our cases, Ms. Lipson and I did engage in negotiations.

Your Honor, I have had extensive discussions with family members on the telephone, many telephone calls, many one-on-one visits. There are members in the courtroom. And I can't say that all family members certainly agree on what we're

doing today.

But Ms. Tucker and, the victim's grandmother, who could not be present today because she's ill, when she called me this morning, they understand what we're going forward with. And I know that the grandmother, Ms. Allen, is in agreement with these terms.

We are asking for the negotiated 18 years to be adopted. And, Your Honor, his prior record is a 2002 burglary second -- I'm sorry, I'm looking at the wrong one -- 2000 drug distribution and resisting arrest, 2006 criminal domestic violence, and 2007 convictions that he just reported being on probation for. He also has a pending drug charge in Orangeburg County that would be dealt with at a separate time outside this list.

THE COURT: Are we doing a probation violation for this?

MS. GARFIELD: Your Honor, I don't think we got that packet, but it could be -- at a later date.

THE COURT: Okay, all right. So do you agree with the facts as stated by the State?

MR. AUSTIN: Yes, ma'am.

THE COURT: And are you in fact guilty of

these charges?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, you understand that the minimum sentence is two years, the maximum is thirty. You understand that, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: Knowing that, do you still wish to plead guilty to these charges?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right. And, sir, you understand that you also have the probation violation and I think the charges in Orangeburg?

MS. GARFIELD: Orangeburg.

THE COURT: They could run consecutive to this sentence. You understand that?

MR. AUSTIN: Yes, ma'am.

THE COURT: Knowing that, sir, you still wish to plead guilty to this charge?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, you understand that this offense is classified as violent, most serious, meaning that it will serve as a strike -- first strike -- out of two for you. You understand that, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: If you were to get another, that the State could proceed with the case of life without parole against you, you understand that, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: Knowing that, you still wish to plead guilty to these charges?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, you may have discussed parole or parole eligibility with your lawyer or with other people. But until I sentence you, no one can tell you when, if ever, you will be eligible for parole or under what conditions.

You should assume that you will serve the entire time in jail that I sentence you to. Do you understand this, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, do you fully understand the nature of the charges against you and the range of possible punishment?

MR. AUSTIN: Yes, ma'am.

THE COURT: And, sir, you understand when you're pleading guilty, you waive your right to a jury trial. You understand that, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: And at a jury trial, the State would have to prove you guilty beyond a reasonable doubt. You would be presumed to be innocent. The burden would be solely upon the State to prove you guilty beyond a reasonable doubt.

You and your attorney would have the opportunity to cross-examine any witnesses that they would present. Sir, you would have the right to remain silent. You would not have to say anything.

You would not have to testify. And the burden would be solely upon the State to prove you guilty beyond a reasonable doubt. But by pleading guilty, sir, you waive your right to a jury trial and give up those important constitutional rights. Is that what you wish to do?

MR. AUSTIN: Yes, ma'am.

THE COURT: Any other plea negotiations other than the --

MS. GARFIELD: Just the reduction and the negotiation.

THE COURT: The negotiated sentence of 18 years is what your attorney and the Solicitor have negotiated. Is that your understanding of the negotiations, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right. And so you understand I do not have to follow the negotiations. However, if I am not going to, I will let your attorney know and give you an opportunity to withdraw your plea. You understand that, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right. And, sir, you're represented by Ms. Renee Lipson with the Richland County Public Defender's Office. Are you satisfied with her representation?

MR. AUSTIN: Yes, ma'am.

THE COURT: Have you talked with your lawyer as often and for as long as you feel is necessary for her to properly represent you?

MR. AUSTIN: Yes, ma'am.

THE COURT: Do you need any more time to talk with her?

MR. AUSTIN: No, ma'am.

THE COURT: Have you understood your talks with her?

MR. AUSTIN: Yes, ma'am.

THE COURT: And has she done everything for you that you feel she could have done or should have done?

MR. AUSTIN: Yes, ma'am.

THE COURT: Is there anything that your lawyer has done in this case that you feel that she should not have done?

MR. AUSTIN: No, ma'am.

THE COURT: And are you completely satisfied with her services?

MR. AUSTIN: Yes, ma'am.

THE COURT: Has anyone promised you anything or held out any hope of reward to get you to plead guilty today?

MR. AUSTIN: No, ma'am.

THE COURT: Is anyone threatening you or forcing you to plead guilty?

MR. AUSTIN: No, ma'am.

THE COURT: Are you pleading guilty of your own free will?

MR. AUSTIN: Yes, ma'am.

THE COURT: And you're pleading guilty because you are, sir?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right. And have you understood my questions, sir?

MR. AUSTIN: Ma'am?

THE COURT: Have you understood my questions?

MR. AUSTIN: Yes, ma'am.

THE COURT: Have you answered them truthfully?

MR. AUSTIN: Yes, ma'am.

THE COURT: Has anyone suggested to you how to answer my questions?

MR. AUSTIN: No, ma'am.

THE COURT: All right. And have you been absolutely truthful in each and every answer that you have given?

MR. AUSTIN: Yes, ma'am.

THE COURT: Sir, you understand you have the right to appeal the guilty plea and the sentence of this Court within ten days of today's date. You understand that?

MR. AUSTIN: Yes, ma'am.

THE COURT: All right. I find that there is a substantial factual basis for this plea. I also find the defendant's decision to plead guilty is freely, voluntarily, knowingly, and intelligently made, that he is represented by counsel with whom he's indicated to me he is completely satisfied. I will accept your plea.

The victims, would they like to speak?

MS. GARFIELD: I will inquire.

MS. MANSFIELD: My name is Laquisha Mansfield. I am Tavaris' auntie. He is my nephew from my deceased older brother. I just want to say that he is missed and he has been missed.

And I feel like that he wasn't intentionally killed. After the first gunshot was shot, he just kept shooting. And I want to thank the Solicitor for what they have done.

But at the end of the day, the lawyer is going to do what he needs to do. And also I want to say that when Tavaris was killed, he was kind of aware that he had a child on the way, and now he does have an 18-month-old son whom he never met.

And Tavaris was probably about 18 months old when his father passed. So it's like a repeat of the same. And it's hard for the family to deal with. My mother is not here, which is Tavaris' grandmother.

She has been very, very, very ill since this has happened, being that my brother, you know, who was killed, that was her son. The family has had a lot of tragedy going on. And I just want to thank for the Solicitor for what they have done.

THE COURT: I appreciate you all being here, ma'am, and I am sorry for your loss.

Did anyone else from the family want to speak?

MS. CRAWFORD: Yes, ma'am. My name is Danita Crawford. At this point in time, I was in a relationship with Tavaris. I grew up without my father, and he grew up without his. The very night that -- we had -- (crying.)

He said he would always be there for me. He had to take care of all the -- was trying to get a job to help me out. And trying to show him how to be a daddy. This is the hardest thing I've had to go through in my life. And if even if he was dead, the person that did it, why did he shoot him six times?

Even if they're dead. And he was a really good person.

THE COURT: All right, thank you, ma'am.

Yes, ma'am?

MS. GARFIELD: Your Honor, I just want to put on the record I notified Investigator Menendez, the chief officer in this case, and she indicated she would be present. I guess something came up. I just wanted to put on the record that she's in agreement with the negotiations.

THE COURT: All right, yes, Ms. Lipson,

I'll be glad to hear from you.

MS. LIPSON: Beg the Court's indulgence for a moment. All right, Your Honor, thank you, may it please the Court. Your Honor, you heard a little bit from Justin about himself. I just also would like to let you know that he did go through the Job Corps where he trained for brick masonry and carpentry.

Your Honor, he has been in jail since the date of his arrest on December 8, 2009, a little over two years now, Your Honor. Your Honor, this is his first time coming into the Richland County Courthouse.

He did not come for a bond or come for any appearance, any motions or anything. He has been sitting at Alvin S. Glenn just being extremely patient in this matter. The majority of the time at Alvin S. Glenn, he has been in protective custody due to this incident and due to people being upset about it, obviously.

Your Honor, I'm very sorry for Mr. Tucker's family's loss. I don't wish to disrespect them or say anything of ill will. Your Honor, as you heard from the State, there were some issues with their case that we could have gone through at

trial and, you know, potentially have argued.

But Mr. Austin has wanted to take care of this case for a while now. The main fact that he disputes through all of this is he maintains that Tron Harrison was not involved at all. Tron is supposedly who told him to shoot, but he maintains that that is not the true.

Tron had absolutely nothing to do with it, Your Honor. Your Honor, I would like to point out for the record that Justin's mother is sitting in the gallery, Ms. Wanda Samuels. She's here today. We would just respectfully request that you go along with the negotiation.

I have met with Ms. Samuels on a few occasions. I've also spoken to her on the phone many times. She's been very proactive and involved in Justin's case. Every time I've met with Justin at Alvin S. Glenn, he has been very easy to deal with.

We've never had any issues. We've gone through his discovery. We've discussed his case. But this has always been a very -- this has always been a case that we have wanted to dispose of in this type of manner, Your Honor.

Your Honor, I believe at the appropriate

time that Mr. Austin would like to address the Court.

THE COURT: All right. His mother wants to speak?

MS. LIPSON: And also Ms. Samuels would like to speak.

THE COURT: All right, I'll be glad to hear from her.

MS. LIPSON: This is Wanda Samuels, for the record.

MS. SAMUELS: Good afternoon. I'd like to give my condolences to the family on your loss. This is a tragic case that I face every day in my job working with the community. These two young men -- have questioned -- have insisted that they are solely unaware.

This is a sad outcome that we've been facing on a regular basis with our youth today. Justin, like Ms. Lipson said, has taken responsibility for this tragic case, and he has been willing and really waiting to have due justice done with this case.

And I applaud him for manning up and taking responsibility. He also has he said five children that will grow up. When or if eligible for

parole to get out, his kids will be 27, 26, and so on. They are in my care that I take care of.

And I'd just like to see that this not be a repetition like modern standards. I do hope he will see his family.

So this is a sad case that we are faced with every day, sadly, throughout the community. But Justin will pay for what he has done, and serve his time, and do justice. And, again, my condolences to the family. Thank you.

THE COURT: Thank you.

Yes?

MR. AUSTIN: Your Honor, I would like to say a little, you know, something to the family, if it's possible.

THE COURT: All right. The officers are not going to let you look at them.

MR. AUSTIN: Yes, ma'am.

THE COURT: But I will let you all know he's talking to me, but the officers will not allow him to look at you all, okay.

All right, yes.

MR. AUSTIN: It's kind of hard, you know, to -- you know, for me to do this, but it's not -- you know what I'm saying, it's right for me to do

it. And I apologize. You know, I just hope that y'all find it deeply in your heart that y'all can, you know, have mercy on me.

But, you know, I took someone's life that was very vital to y'all. And I can never give back. You know, I just want to say I apologize. And, you know, to the one young one that lost his father, you know, I think about that every day, now that my five younguns done lost theirs, you know, for 18 years.

I'd just like to say I apologize, you know. I'm just sorry, you know. I mean, I know sorry can't bring the dead back. That's all I can say.

THE COURT: All right.

Yes, ma'am?

MS. LIPSON: Your Honor, we would just respectfully request that you go along with the negotiated sentence of 18 years, Your Honor.

THE COURT: All right, is there anything else from the State?

MS. GARFIELD: No, ma'am.

SENTENCE OF THE COURT

THE COURT: All right, on Indictment Number 2010-GS-40-12260, sir, you will be sentenced to the State Department of Corrections for 18 years.

You will be given credit for the 738 days that you have served at the Alvin S. Glenn Detention Center.

All right, thank you. Good luck to you, sir.

MS. LIPSON: Thank you, Your Honor.

MS. GARFIELD: Thank you, Your Honor.

THE COURT: Good luck to you all. Thank you.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON JANUARY 5, 2012, IN COLUMBIA, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE TENTH DAY OF JUNE, 2012.



REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

544 R

2012040209

STATE OF SOUTH CAROLINA

County of Juster A. Austin 286474

In the Court of Common Pleas

Full name and prison number (if any) of Applicant,

vs.

The State of South Carolina Richland County
Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2012 MAR -2 AM 10:43
JEANNETTE W. RICEBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

INSTRUCTIONS — READ CAREFULLY

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

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Kirkland Reception and Evaluation Center SCDC 4434 Broad River Road
Columbia South Carolina 29204

2. Name and location of Court which imposed sentence Richland County Court of General
Sessions 1701 Main Street Columbia SC 29201

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

(a) Arrest Warrant to 13844 Indictment # 12-65-40-12260 ^{Murder} ^{fees include offense} Voluntary Manslaughter

(b) _____

(c) _____

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

(a) January 5, 2012

(b) _____

(c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? None
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? None
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? None
- (d) any other petitions, motions or applications in this or any other Court? None

12. If you answered "yes" to any part of (11); list with respect to each petition, motion or application:

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____ *N/A*
- (b) _____
- (c) _____

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

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

17. If you answered "yes" to one or more parts of (16), list:

- (a) the name and address of each attorney who represented you:
 - i. *Rence Lipson Richland County Public Defenders Office*
 - ii. _____
 - iii. _____

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

- i. *plea*
- ii. _____
- iii. _____

18. State clearly the relief you seek in filing this application.

Dismissal of judgment and sentence under lack of subject matters and personal jurisdiction or trial under involuntarily plea and ineffective assistance of counsel

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

STATE OF SOUTH CAROLINA

VERIFICATION

County of Richland

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

Justin Antwon Austin

SWORN to and subscribed before me this 4th

day of April, 2012

[Signature] (L.S.)
Notary Public

My Commission Expires

My Commission Expires: October 8, 2014

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

I, Justin Antwon Austin, 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 therefor.

Justin Antwon Austin
Applicant

SWORN or affirmed to and subscribed before me this

4th day of April, 2012

[Signature]
Notary Public

My Commission Expires

My Commission Expires: October 8, 2014

RICHLAND COUNTY
FILED
2012 MAR -2 AM 10:43
JEANNETTE W. JACOBRIE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTH JUDICIAL CIRCUIT)

AUSTIN Justin A -)
00286474,)

2012CP4002609

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)
_____)

The Respondent, making its Return to the application for post conviction relief (PCR) filed April 12, 2012, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was indicted at the June 2010 term of the Richland Grand Jury for Murder - (2010-GS-40-12260).² He was represented by Renee Lipson, Esquire, on the charge(s). On January 5, 2012, the Applicant appeared before The Honorable DeAndrea G. Benjamin where he entered a negotiated plea to the lesser included Voluntary Manslaughter and was sentenced to eighteen (18) years imprisonment.

Direct Appeal

The Applicant did not appeal his conviction or sentence .

¹<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2012CP4002609&CourtType=G&CaseType=Civil&CourtAgency=40002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00286474>

The application for post conviction relief (PCR) was filed April 12, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript.³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

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

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

- (a) involuntary guilty plea
- (b) Ineffective assistance of Counsel
- (c) Lack of Subject's personal Jurisdiction

IV.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Even with respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985)

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that 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, 305 S.E.2d 247 (1983).

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Patrick M. Killen, Esquire regarding when the hearing should be set.⁴

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

ROBERT D. CORNEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

June 11, 2012

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

AUSTIN Justin A -)
00286474,)

2012CP4002609

Applicant,)

v.)

CERTIFICATE OF SERVICE


State of South Carolina,)

Respondent.)
_____)

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

Patrick M. Killen, 5 Law Range Post Office Box 1268, Sumter, SC 29151-1268

DATED June 12, 2012.



Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
County of Richland)	2012-CP-40-02609
)	
JUSTIN A. AUSTIN,)	
)	
APPLICANT,)	
)	
vs.)	TRANSCRIPT OF RECORD
)	
STATE OF SOUTH CAROLINA,)	
)	
RESPONDENT,)	

December 3, 2012
Columbia, South Carolina

BEFORE:

THE HONORABLE J. ERNEST KINARD, JR., JUDGE.

APPEARANCES:

PATRICK KILLEN, ESQ.
Attorney for the Applicant

ROBERT CORNEY, ASSISTANT ATTORNEY GENERAL
Attorney for the Respondent

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S
INDEX OF WITNESSES:

JUSTIN AUSTIN

Direct By Mr. Killen 5

Cross By Mr. Corney 16

RÉNEE LIPSON

Direct By Mr. Corney 20

Cross By Mr. Killen 25

Redirect By Mr. Corney 29

> > > < < <

(No exhibits were introduced.)

CERTIFICATE OF REPORTER 33

1 MR. CORNEY: May it please the Court. Your Honor,
2 the State would call the PCR of Justin A. Austin at this
3 point. It is docket number 2012-CP-40-2609.

4 Mr. Austin was true bill indicted at the June 2010
5 term of the Richland County grand jury for murder. He
6 pled guilty January 5th, 2012 for Judge Benjamin to the
7 lesser included voluntary manslaughter as part of the
8 negotiated plea sentence -- or plea offer from the State.

9 He was sentenced to 18 years pursuant to those
10 negotiations. He did not have a direct appeal but filed a
11 timely PCR application March 2nd, 2012.

12 He is represented today by Mr. Patrick Killen. The
13 witness that we have here today is Ms. Renee Lipson. She
14 represented Mr. Austin at his plea.

15 THE COURT: Okay.

16 MR. KILLEN: Thank you, Your Honor. Patrick Killen
17 here for the Applicant, Justin Austin.

18 I would call Mr. Austin to the stand.

19 THE COURT: All right.

20 JUSTIN AUSTIN, after being duly sworn,
21 testified as follows:

22 THE CLERK: Have a seat in the witness box. State
23 your name for the record, full name.

24 THE BAILIFF: Watch your step. Watch your step.

25 THE COURT: If -- if you don't mind, you being an

1 attorney of long stand and so forth, you understand I
2 don't know anything about the cases when I get up here.

3 MR. KILLEN: Yes, sir.

4 THE COURT: He can testify to anything, but if you
5 would just briefly tell me what his main areas of concern
6 are, then I can follow the testimony, you know, a little
7 better because he could be talking about what happened to
8 him in grade school. That won't matter.

9 THE WITNESS: Yeah.

10 MR. KILLEN: Yes, sir.

11 Briefly, Your Honor, he has -- he has alleged in his
12 PCR application that he received ineffective assistance of
13 counsel from Ms. Lipson, and as a result of that, that his
14 guilty plea to the involun--- or to the manslaughter
15 charge was not knowingly and voluntarily given. He also
16 put in there his application -- subject matter personal
17 jurisdiction. I told him that's not something we can go
18 forward on, so we're going to abandon that.

19 THE COURT: All right. So, basically, he says his
20 attorney didn't explain to him the consequences of his
21 plea?

22 MR. KILLEN: Yes, sir, that sort of thing.

23 THE COURT: Okay. All right. Go ahead.

24 DIRECT EXAMINATION:

25

1 BY MR. KILLEN:

2 Q Mr. Austin, you recall the events of, I think it's
3 January 5th, 2012?

4 A Yes.

5 Q What happened that day?

6 A (There was no response).

7 Q You're going to have to speak up so everybody can
8 hear you.

9 A I was sentenced to 18 years to the Department of
10 Corrections, the South Carolina Department of Corrections,
11 for voluntary manslaughter.

12 Q The original charge was what?

13 A The original charge was murder.

14 Q And it was reduced to voluntary manslaughter?

15 A Yeah.

16 Q And you received 18 years?

17 A Yes.

18 THE COURT: How about tell Mr. Dye --

19 (complies.)

20 There you go.

21 BY MR. KILLEN:

22 Q You pled guilty that day on the advice of your
23 attorney?

24 A Yeah.

25 Q And your attorney was Ms. Lipson?

1 A Right.

2 Q She was with the Public Defender's Office in Richland
3 County?

4 A Correct.

5 Q Before you pled guilty, had you talked about your
6 case with Ms. Lipson?

7 A We talked. Yeah, we talked about it.

8 Q Where were you? Were you out of jail or in jail
9 during that time?

10 A I was -- I was incarcerated.

11 Q So you never got out on bond?

12 A I never -- I never had a bond. I asked them for --
13 to take me up for a bond. She told me that I wouldn't be
14 able to get a bond, but my codefendants had got a bond.
15 But I had stayed in the county two years and never
16 received a bond.

17 Q Okay. All right. So Ms. Lipson would come to the
18 Richland County jail to speak with you about the case?

19 A Yeah. The number of times that she did, yes.

20 Q Well, how many times did she do it?

21 A Probably four to five.

22 Q Four?

23 A About four to five out of the two years that I was
24 there.

25 Q Four or five?

1 A Yeah.

2 Q Okay. And each time she would come, how long would
3 she spend with you?

4 A I'd say about at least 20, 20 minutes, 25 minutes.

5 Q Twenty to 25 minutes?

6 A Yeah.

7 Q Each time?

8 A Uh-huh.

9 Q Yes. Was it sometimes more than that, sometimes less
10 or was that an average?

11 A The more -- the more -- when she came, when she
12 brought me my motion of discovery and went over my motion
13 of discovery. She probably stayed about 45 minutes.

14 Q The first time you saw her, did you have your -- was
15 it when she came to discuss the discovery information with
16 you?

17 A No. The first time I saw her was when she came to
18 let me know that she was my attorney.

19 Q Okay. Eventually she came and showed you the
20 discovery material?

21 A Yeah.

22 Q And what -- do you remember what that consisted of?

23 A No.

24 Q Was it papers?

25 A Yeah.

1 Q Stuff like that?

2 A Case.

3 Q All right. When she brought the discovery material
4 with her, how many -- how long was she with you on that
5 visit?

6 A Probably for about an hour because the -- my motion
7 of discovery is very thick.

8 Q It was a -- it was a lot of papers?

9 A Yeah, a lot of papers.

10 Q Okay. And at that time, you were still -- you were
11 still -- you were still facing a murder charge; is that
12 right?

13 A Right.

14 Q Okay. At any time while you were in the jail, did
15 she discuss with you plea negotiations with the
16 Solicitor's Office?

17 A Not until like a couple weeks before, before I pled
18 guilty.

19 Q Was that at the jail, or was that here in the garage
20 downstairs?

21 A That was -- that was at the jail the first time.

22 Q All right. And that was the first time you had heard
23 about a possible -- a possible deal --

24 A Yeah.

25 Q -- where the charge would be dropped?

1 A Yeah.

2 Q Okay. How long did she meet with you on that
3 occasion?

4 A Fifteen minutes.

5 Q Fifteen minutes?

6 A Yeah.

7 Q All right. Did you fully understand what was going
8 on as a result of that meeting?

9 A Not exactly.

10 Q What grade did you finish?

11 A I finished ninth.

12 Q You read pretty good?

13 A So -- I was in -- I was -- I was always learning
14 slower than the others in school so...

15 Q You've been treated for mental illness in the past?

16 A Yeah.

17 Q What kind of mental illness?

18 A ADHD, that's about it.

19 Q So when Ms. Lipson left the jail the day that she
20 discussed with you the possible plea, did you understand
21 what was going on?

22 A No. I asked her to call my mother because it's kind
23 of hard for me to comprehend, so when my mother kind of
24 like breaks it down for me, I can -- I can get a better
25 understanding.

1 Q All right. Did you talk to your mother after that?

2 A No, because she -- she works for the State. You
3 know, she is constantly busy.

4 Q Were you eventually brought over here to this
5 courthouse for a possible trial? Was there a -- was there
6 a day when it came to a head, is that January 5th?

7 A Yeah. When I was in bond of this courthouse, I was
8 told that my plea would not go down any further. If I
9 didn't take the plea, I would be going to trial.

10 Q Okay. Ms. Lipson passed that on to you?

11 A Yeah.

12 Q Okay. Did you want to go to trial?

13 A Yes.

14 Q Why?

15 A Because I feel like they didn't have substantial
16 evidence against me. Now, I didn't do the crime that I've
17 been sentenced for.

18 Q Did you convey that all to Ms. Lipson?

19 A Huh?

20 Q Did you tell Ms. Lipson that, what you just said?

21 A Yeah.

22 Q Okay. And it was still her advice that you take this
23 deal?

24 A Yeah.

25 Q Okay. The day that you pled guilty and she met with

1 you downstairs, how long was that meeting?

2 A About 20 minutes.

3 Q So how much time total did you have to discuss this
4 possible deal to which you would receive substantial jail
5 time?

6 A Not long at all because when she came to the county
7 jail and explained to me what Ms. Garfield and the family
8 was requesting, I was -- I was kind of startled because
9 she -- she was my attorney at the time.

10 I wouldn't -- I didn't think that my attorney would
11 come at me the way that she did with the plea that
12 Ms. Garfield -- Darlene [sic] Garfield, the solicitor and
13 the family -- victim's family had agreed to.

14 Q Did you feel as if you were getting pushed into this
15 or shoved into this guilty plea?

16 A Correct, yes.

17 Q By your attorney?

18 A Yes.

19 Q Okay. Were you confident that she had prepared in an
20 adequate manner, was ready to go to trial?

21 A No.

22 Q Why did you feel that way?

23 A Because she was ready to -- I mean, she was actually
24 getting ready to -- she was in the process of switching
25 jobs.

1 Q Who, Ms. Lipson?

2 A Ms. Lipson.

3 Q What do you mean by that, she was switching jobs?

4 A The day of the -- the day of -- my sentencing day was
5 exactly her last day of being a public defender to go
6 to -- you know, the new job where she is at now.

7 Q What's the significance of that?

8 A Excuse me?

9 Q What does that mean to you, that that was her last
10 day on the job?

11 A I felt like I was pushed into a plea, and if -- I
12 feel like if it wasn't -- if she was still working for the
13 public defender, we could have gone to trial. She -- she
14 could have done better.

15 Q Did you freely and voluntarily plead guilty that day,
16 Mr. Austin?

17 A I was confused, so I mean, I felt like I was being
18 pushed to take that plea, so I took it.

19 Q Did you feel like you had to plead guilty because you
20 didn't have confidence in your attorney?

21 A Right.

22 Q You've seen the transcript when you pled guilty on
23 January 5th, didn't you?

24 A Yeah.

25 Q You understand what that is? That's a verbatim

1 transcript of what was said in the court that day?

2 A Yes.

3 Q You know that the judge asked you were you satisfied
4 with Ms. Lipson, don't you?

5 A Yes.

6 Q All right. Why did you tell the judge that day you
7 were satisfied with Ms. Lipson if you feel like Ms. Lipson
8 didn't represent you adequately?

9 A Because I didn't want them -- I didn't want to handle
10 the situation at that time, but then I was pushed into --
11 I was pushed into taking this plea by her and Ms. Darlene
12 Garfield because I was sentenced. I was getting ready to
13 be sentenced for a crime that I didn't do, I didn't
14 commit. I wasn't really capable of just taking the plea
15 offer, ready to go to trial.

16 Q If you knew today, Mr. Austin, what you know -- if
17 you knew then what you know today, would you have pled
18 guilty on January 5th, 2012?

19 A No.

20 Q Do you feel like you know more about it now than you
21 did then?

22 A Yes.

23 Q What, have you educated yourself on it?

24 A Just -- just by reading my case over and over trying,
25 trying to comprehend, you know, what I can comprehend. I

1 wouldn't have taken the plea back then.

2 Q What are you asking Judge Kinard to do for you today?

3 A To give me a chance to prove that I was -- I was
4 being misled into a plea.

5 Q You want a new trial?

6 A Yeah.

7 Q Now, I've got a couple more questions, Mr. Austin,
8 were you prescribed some medication for your mental
9 illness, your psychological condition?

10 A Yes.

11 Q What kind of medication?

12 A Zoloft.

13 Q And that's for your psychological condition?

14 A Yeah.

15 Q Prescribed by a doctor?

16 A Yes.

17 Q Were you on Zoloft the day that you pled guilty?

18 A Yes. I took it that morning before I left the
19 holding cell.

20 Q Did they give it to you at the jail, the nurse out
21 there?

22 A Yeah.

23 Q The nurse was administering that to you on a daily
24 basis out there?

25 A Yeah.

1 Q On January 5th, 2012, you had taken Zoloft?

2 A Yeah.

3 Q Do you think that affected your ability to analyze
4 the situation that day?

5 A Yes.

6 Q Well, again, you told the judge that day you weren't
7 on prescription drugs?

8 A Yes.

9 Q Why did you tell the judge that when you were on
10 Zoloft?

11 A Because I was -- at the time, I was confused of --
12 being on medication and being pushed into a plea that I
13 wasn't confident in going to.

14 MR. KILLEN: All right. Thank you, Mr. Austin.
15 That's all I have right now. Answer any questions the
16 Attorney General has for you. Okay.

17 CROSS-EXAMINATION:

18 BY MR. CORNEY:

19 Q Mr. Austin, your attorney touched on it a couple of
20 times before, but you have seen the plea transcript from
21 the day you entered your guilty plea, correct?

22 A Correct.

23 Q Okay. In there, right out of the gate, the very
24 first thing in there, the solicitor says we're entering
25 this -- Mr. Austin is entering this plea today pursuant to

1 State negotiations for 18 years, correct?

2 A Right.

3 Q So right from the very outset of the plea hearing, at
4 least you knew if you pled guilty that day, you were
5 getting 18 years in prison, correct?

6 A No, because at the same time -- like I just got
7 through explaining, I'm on a daily basis of taking Zoloft.
8 So at that time, I mean, if I was out of -- I don't know
9 if I was misunderstanding or understanding what I was --
10 what I was negotiating, but I was trying to get an
11 understanding, but by the time I was getting sentenced and
12 it was practically still too late because I was still on
13 medication.

14 Q Okay. It's because you were on that medication, you
15 didn't understand what was going on that day?

16 A Right. I was trying to act like I was understanding,
17 but I wasn't fully capable of understanding what was going
18 on.

19 Q Okay. Well, when the Court said, "Are you aware of
20 any physical, emotional or nervous problems that might
21 keep you from understanding what you're doing here today?"
22 You said, "No, ma'am", correct?

23 A Correct.

24 Q You were under oath that day when you went before
25 Judge Benjamin entering your plea?

1 A Sir?

2 Q You were under oath that day when you went in front
3 of Judge Benjamin to enter your plea, correct?

4 A Yeah.

5 Q Okay. So you swore to the truth of everything you
6 were answering the judge that day, correct?

7 A Yeah.

8 Q All right. And you are guilty of this crime,
9 correct?

10 A No.

11 Q You're not. You told Judge Benjamin that day you
12 were guilty, didn't you?

13 A Yeah, I did. But I was -- like I said, I was under
14 the medication Zoloft.

15 Q Okay. So the Zoloft is what -- made it so you
16 couldn't understand anything that was going on that day?

17 A I mean, it doesn't make me steady. You know, it's a
18 down, it's a down appeal.

19 Q Okay. So when Judge Benjamin asked you on page 17 of
20 that line -- of the transcript, "You've been absolutely
21 truthful in each and every answer that you've given." You
22 said, "Yes, ma'am." That was a lie?

23 A I mean, yes. It is a lie but, you know...

24 Q "Yes, it was", is that your answer?

25 A At the time, I was under medication. I was getting

1 ready to get sentenced. My life, my freedom, was getting
2 ready to be taken away from me.

3 Q Okay.

4 A I still wasn't understanding.

5 Q All right. And you did tell Judge Benjamin you were
6 satisfied with Ms. Lipson's representation of you,
7 correct?

8 A Because I forced -- I felt like I was forced into
9 taking a plea instead of -- instead of going to trial.
10 That's the way I wanted to go.

11 Q There's just -- you wanted to go to trial, but this
12 plea transcript of roughly 26 -- or 25 pages saying that
13 you want to plead guilty, that's -- this doesn't count for
14 anything. You want to go to trial?

15 A I mean, yes, I wanted to go to trial.

16 Q And you understand today, just to make sure the
17 record is clear, if you were to be granted relief and you
18 go back on the original indictment, you'll be facing a
19 murder charge up to which -- on which you would be facing
20 a life sentence, correct?

21 A Yes, I fully understand that.

22 Q And you understand the State is not in any way bound
23 to offer you another plea deal? They might take you to
24 trial on another charge?

25 A I understand that.

1 MR. CORNEY: That's all the questions I have, Your
2 Honor.

3 MR. KILLEN: Nothing further, Judge.

4 THE COURT: You can step down.

5 MR. KILLEN: Judge, that's the applicant's case.

6 THE COURT: Okay.

7 MR. CORNEY: Your Honor, the State would call
8 Ms. Renee Lipson, please.

9 RENE LIPSON, after being duly sworn,
10 testified as follows:

11 THE CLERK: Have a seat in the witness box. State
12 your full name for the record, please.

13 THE WITNESS: Yes, ma'am.

14 Renee Anastasia Lipson.

15 DIRECT EXAMINATION:

16 BY MR. CORNEY:

17 Q Ms. Lipson, do you recall your representation of
18 Mr. Austin on the underlying charges?

19 A Yes, sir.

20 Q And you've been in the courtroom this morning and
21 heard his testimony, correct?

22 A Yes, sir.

23 Q Okay. Do you recall how you became involved in
24 Mr. Austin's case?

25 A Yes, sir, that's December 10th of 2009.

1 Q And that was in your capacity as an assistant public
2 defender for Richland County?

3 A Yes, sir.

4 Q Have you had the opportunity to review your file and
5 the transcript of the plea before coming to court today?

6 A Yes, sir.

7 Q Do you recall meeting with Mr. Austin to discuss the
8 charges that he was facing?

9 A Oh yes, sir.

10 Q All right. During those meetings, were you able to
11 review the indictments with him that he was facing, the
12 potential sentences, his constitutional rights, those
13 underlying things with his charges?

14 A Yes, sir.

15 Q At any point during those discussions, did you have a
16 feeling that Mr. Austin had a -- anything -- problems
17 understanding your discussions or participate in those
18 discussions?

19 A No, sir. I did -- it did come to my attention that
20 he did have some mental health or mental retardation
21 issues.

22 THE COURT: How about slow it down.

23 THE WITNESS: Sorry.

24 THE COURT: I know you're all excited.

25 THE WITNESS: Sorry.

1 It did come to my attention he had some mental
2 retardation issues and some possible mental health issues.

3 We subpoenaed school records, and we also had him
4 evaluated by the Department of Disabilities and Special
5 Needs and everything came back as competent and able to go
6 forward.

7 BY MR. CORNEY:

8 Q Okay. And in your discussions with him and knowing
9 that kind of -- his mental health background --

10 A Uh-huh.

11 Q -- did you tailor your conversations to him with that
12 knowledge, kind of talk through things more extensively
13 with him?

14 A I don't know if I consciously did that, but I know
15 that I spoke to him on numerous occasions. I never felt
16 that there was a misunderstanding. If he did ask for
17 clarification, I'm sure that I did clarify.

18 Q So in your discussions, you were of the opinion that
19 he understood what you were talking about?

20 A Oh yes, sir.

21 Q And do you remember receiving discovery files in this
22 case?

23 A Yes, sir.

24 Q And did you have the opportunity to review that with
25 Mr. Austin?

1 A Yes, sir, and I believe that I also gave him a copy
2 of it, as well, that he kept at the jail for quite a
3 while.

4 Q And again, in reviewing that file, did he seem to
5 understand everything what was contained in there and what
6 implications those had on his case?

7 A Yes, sir.

8 Q Based on your discussions with Mr. Austin and your
9 review of the discovery and whatever independent
10 investigation you did, were you able to start to develop a
11 theory of the State's ability to prove his guilt beyond a
12 reasonable doubt in the trial?

13 A Yes, sir. I believe that the State did have some
14 issues with their case, but I did believe that they --
15 they would have had a likelihood of getting a guilty
16 verdict.

17 Q Were you able to discuss those potential triable
18 issues with Mr. Austin?

19 A I believe so. Honestly, looking at my notes, going
20 to trial was never an issue with Mr. Austin, according to
21 my notes. It was -- it was always a potential plea. It
22 was always a probable plea.

23 Q And do you recall entering plea negotiations with the
24 State?

25 A Yes, sir.

1 Q All right. And do you recall the outcome of those
2 plea negotiations?

3 A Yes, sir. When I was getting ready to leave the
4 Public Defender's Office, I got in contact with
5 Ms. Garfield a few weeks before that.

6 She originally did give me an offer of voluntary for
7 20 to 30 years. I brought that to Mr. Austin at the jail
8 on December 21st of 2011 and he turned that down, but he
9 did say that he would take 15 years violent.

10 So I then came back to the office and got in contact
11 with Ms. Garfield. She contacted the victim's family, and
12 they wanted him to do 15 years day for day. So when we
13 did the math, that totaled the 18 years.

14 We then brought Mr. Austin back over to the
15 courthouse on January 3rd so that I could meet with him in
16 holding and discuss this offer with him, because 18 was
17 obviously not what we had discussed since we previously
18 discussed 15. We discussed it in holding for quite a bit,
19 and he then accepted the 18-year negotiated plea. He was
20 brought back over on the 5th to go forward with that.

21 Q In his discussions, did Mr. Austin ever display to
22 you a misunderstanding or any confusion as to what the
23 plea negotiations were?

24 A No, sir.

25 Q And when you entered court on January 5th with

1 Mr. Austin for him to enter a guilty plea, did he at any
2 time indicate to you that he was confused or didn't
3 understand what was going on?

4 A No, sir.

5 Q Okay. Did you have any reason to believe that the
6 medication he was on at that point in time or anything had
7 affected his ability to understand the plea?

8 A No, sir. I don't -- I don't believe that I knew that
9 he was on medication at the time.

10 Q I'm sorry. You said you didn't have indication that
11 he was on medication at the time?

12 A No, sir.

13 Q Did he seem coherent and able to understand what was
14 going on during the plea hearing?

15 A Yes, sir.

16 MR. CORNEY: That's all the questions I have, Your
17 Honor. Thank you.

18 CROSS-EXAMINATION:

19 BY MR. KILLEN:

20 Q Ms. Lipson, how many times did you meet with
21 Mr. Austin before the -- before the plea deal?

22 A According to my notes, I can do a quick count: One,
23 two, three, four, five, seven, eight -- my notes say 12.

24 Q Twelve times?

25 A Yes; yes, sir.

1 Q Okay. Do your notes say how long you met with him
2 each time?

3 A No, sir. I do know that some of them were brief, but
4 I don't keep notes as to the amount of time.

5 Q So you wouldn't be able to contradict what Mr. Austin
6 said about 20 minutes per?

7 A No. I think that sounds about right with a couple of
8 longer ones when we went through the discovery and things
9 like that, but I would say probably, that's probably about
10 right.

11 Q You believe that's adequate for a murder charge?

12 A Each time saw him, I would go in. If I didn't have
13 any more information for him, I would just tell him. He
14 was -- he was content to just sit and get some time. I
15 would ask him if there were any further questions to go
16 forward with. If he said no. I moved forward.

17 Q Have you reviewed the transcript of the guilty plea?

18 A Yes, sir.

19 Q At one point in there on page 20, you say something
20 to the effect of, "There were some issues with this case
21 that we could have brought out at trial."

22 A Yes.

23 Q What were those issues?

24 A I believe that Ms. Garfield actually brought them up,
25 as well: The fact that the victim had two guns on him

1 himself. Although there was that, there was the fact that
2 he was speeding through the neighborhood. There were some
3 character issues that we could have brought forward with
4 the victim, I believe.

5 Q Did you discuss with -- those issues with Mr. Austin?

6 A I believe so.

7 Q But you're not sure?

8 A I know -- I mean, I know we discussed the fact that
9 the victim had two guns on him. I mean, that was a major
10 issue.

11 Q Did you -- considering that the victim had two guns
12 on him, did you discuss with Mr. Austin the changes in the
13 law with regards to self-defense?

14 A I don't know if I -- I don't know. I'm sorry. I
15 can't answer that.

16 Q Okay. Did you speak with witnesses?

17 A My private investigator did, spoke with some.

18 Q Do you know how many witnesses you spoke with?

19 A I know -- he didn't speak with the actual witnesses
20 in the file. It was witnesses that Mr. Austin had brought
21 forward for a possible defense, and it did not work out.
22 The investigator did not give me a written report. I did
23 not ask for one.

24 Q But you spoke with the investigator?

25 A Yes, sir.

1 Q Did -- did your -- did either you or your
2 investigator speak with the individual that's identified
3 in the warrant as being the photo lineup, the individual
4 identified in the photo lineup?

5 A No, sir.

6 Q You did not speak to that individual?

7 A No, sir.

8 Q You didn't think that was something you should have
9 looked into given that that's how -- that's what led to
10 the arrest of Mr. Austin?

11 A No, sir. We investigated more so -- another thing
12 that Mr. Austin had brought forward is -- I mean, that
13 would have been something if we wanted to go to trial
14 that, obviously, we could have looked into.

15 Q Did you feel, Ms. Lipson, as if you were prepared to
16 go to trial had they called it for trial that day?

17 A Had they called it for trial that day, no, sir,
18 because it was -- after my conversations with Mr. Austin,
19 this was -- this was never a trial.

20 Q Why did they bring him over from the jail to here
21 that day?

22 A For his plea.

23 Q Oh, okay. So at that point, you had already
24 consummated it?

25 A Yes.

1 Q But I thought you testified that you went and talked
2 with him about the 15 versus 18 and all that the day that
3 he was here.

4 A We did that on January 3rd. They brought him over so
5 that I didn't have to go to the jail, and they brought him
6 back on the 5th. He accepted the plea on the 3rd, and
7 then they brought him back on the 5th for the actual plea.

8 MR. KILLEN: I understand. All right. That's all I
9 have right now, Solicitor.

10 Thank you, Ms. Lipson.

11 MR. CORNEY: Briefly, Your Honor.

12 REDIRECT EXAMINATION:

13 BY MR. CORNEY:

14 Q Ms. Lipson, was Mr. Austin's case scheduled for trial
15 at the time he pled guilty?

16 A No.

17 Q Fair to say, that there would have been more
18 investigation and preparation done had he decided at that
19 point in time that he did want to go to trial?

20 A Absolutely.

21 MR. CORNEY: That's all the questions I have.

22 MR. KILLEN: Nothing from me, Judge.

23 THE COURT: Just one thing was mentioned about the
24 Applicant. What's this about you were changing jobs? You
25 went from the Public Defender's Office to Ambassador of

1 England or something?

2 THE WITNESS: Yes, sir. I was leaving the Public
3 Defender's Office, and this was one of the cases that I
4 was hoping that we could get solved because I thought this
5 could come to an amicable resolution as opposed to it
6 having to start all over with a new public defender.

7 So I got in contact with the solicitor who I was on
8 good terms with and said, "I'm going to be leaving the
9 job. Is this something that we could potentially move
10 before I leave?" That's why we worked on getting it done
11 then. It wasn't a rush that I not -- had this not been
12 resolved, it just would have gone -- would have been
13 resigned to another public defender.

14 THE COURT: Been reassigned to another one.

15 THE WITNESS: Yes.

16 THE COURT: And the State couldn't have called it
17 immediately?

18 THE WITNESS: Oh, no.

19 THE COURT: Okay. That's all I have.

20 MR. KILLEN: I'm sorry, Judge?

21 THE COURT: She can step down.

22 THE WITNESS: Oh.

23 MR. CORNEY: No more witnesses on behalf of the
24 State.

25 MR. KILLEN: All right. That's it, Your Honor. I

1 don't know how you...

2 THE COURT: You can make a statement if you would
3 like.

4 MR. KILLEN: I would state just for the record, my
5 client has testified. It's pretty clear that he didn't
6 enter into the guilty plea knowingly and voluntarily.

7 He had trouble with the preparation or his -- lack
8 thereof on the part of his trial attorney. He also
9 indicated that he was on Zoloft that day when he
10 testified.

11 I think counsel admitted that he had some mental
12 illness and mental retardation issues. When you couple
13 all of that, put all that stuff together, you get an
14 involuntary guilty plea. I would ask, Your Honor, to
15 grant the application at this time.

16 MR. CORNEY: Your Honor, the State would rest on the
17 testimony that's presented and the thorough plea hearing
18 that Judge Benjamin did.

19 THE COURT: Yeah. I read the 25-page transcript
20 pretty thorough. It was a negotiated plea. It was in his
21 best interest to accept it.

22 He had two weapons, neither one of them were in the
23 victim's hand. The victim was shot six times in the back.
24 Even with self-defense, it's almost impossible to get
25 self-defense when somebody is shot six times in the back.

1 The only thing is about Zoloft, but there's no
2 indication that it impacted his ability to understand. In
3 addition, the attorney met with him 12 times.

4 He basically got what he asked for, negotiated down
5 to 15 years; 18, 85 percent comes out to about 15, which
6 is pretty good under the facts of this case, especially
7 with his prior record which wasn't substantial, but he did
8 have burglaries, criminal domestic violence, and all kinds
9 of stuff in the background.

10 I see no reason to set it aside. In fact, I feel
11 like it's in his best interest to deny his application.
12 He has, of course -- can appeal. It will be in the order.
13 You can discuss it with him about his appellate rights and
14 so forth.

15 MR. KILLEN: I will, Your Honor. Thank you.

16 THE COURT: All right.

17 MR. CORNEY: I'll draft a proposed order, Your honor.
18 Thank you very much.

19 (Whereupon, the proceedings were concluded.)
20
21
22
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Justin A. Austin, #286474,

2012-CP-40-02609

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

RICHLAND COUNTY
FILED
2013 JAN - 7 PM 12:11
JEANETTE W. McBRIDE
C.C.P. & GS

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 2, 2012. An evidentiary hearing into the matter was convened on Monday, December 3, 2012, at the Richland County Courthouse. The Applicant was present at the hearing with counsel, Patrick Killen, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former plea attorney, Renee Lipson, Esquire (hereafter "counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the June 2010 term of the Richland County Grand Jury for Murder (2010-GS-40-12260). He was represented by Renee Lipson, Esquire, on the charge. On January 5, 2012, Applicant appeared before the Honorable DeAndrea Benjamin where he pled guilty to the lesser included Voluntary Manslaughter pursuant to a negotiated plea

offer with the state. Judge Benjamin accepted the negotiations, imposing the agreed upon eighteen (18) year term of imprisonment. Applicant did not appeal the plea or sentence.

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

- 9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) involuntary guilty plea
 - (b) Ineffective assistance of Counsel
 - (c) Lack of Subject Matter and personal Jurisdiction
- 10. State concisely and in the same order the facts which support each of the grounds set out in (9):
 - (a) _____
 - (b) _____
 - (c) _____

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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Involuntary Guilty Plea

Applicant alleges his guilty plea was entered unintelligently and involuntarily due to, at least in part, counsel's ineffective representation. Applicant also alleged he was "confused" during the plea due to the medication he was on at the time, which rendered his plea unintelligently entered.

Applicant testified he pled guilty on the advice of his defense attorney at the time, Assistant Public Defender Renee Lipson. He said counsel met with him to discuss the charge

roughly four (4) or five (5) times for twenty (20) to twenty-five (25) minutes each time. Applicant said he was never released on bond prior to the plea, so the majority of their meetings were at the jail. Applicant went on to say counsel brought and reviewed the evidence contained in the discovery file during one meeting which lasted about an hour, but said he did not recall the exact items in the file because the file was "very thick". Applicant testified counsel discussed plea negotiations and the resulting plea offers extended by the state a couple of weeks prior to the entry of his plea, which included the murder charge being dropped to voluntary manslaughter. Applicant said from the time the plea offer was extended until he pled, he was unable to discuss it with his mother and didn't exactly understand what it meant as he only has a ninth grade education. He also noted he suffers from Attention Deficit and Hyperactivity Disorder (ADHD), which he received treatment for earlier in his life.

Applicant went on to say on the day of his plea, counsel approached him with the plea offer for an eighteen (18) year sentence for Voluntary Manslaughter, at which time he was told if he didn't enter the plea his case would be called to trial. Applicant stated he wanted to go to trial, which he told counsel, because he didn't believe the state had strong evidence against him. Applicant testified he felt like he was being pushed into pleading guilty and was "confused" at the time of his plea as he had been given Zoloft by the Department of Corrections. Applicant finished by saying he felt counsel was pushing him to plead guilty because it was her last day as a public defender.

On cross-examination, Applicant readily admitted the plea transcript reflects he told the court he was *not* on any prescription drugs at the time of the plea, he was entering the plea freely and voluntarily, he was completely satisfied with counsel's representation and he was fully aware of the plea he was entering including the negotiations. Applicant denied his actual guilt to

the charge, despite recognizing he had told the plea judge he was in fact guilty while under oath at the plea hearing. Applicant readily admitted he lied to the plea judge under oath by affirming that his answers had been "absolutely truthful" as he had actually lied in several answers to the court.

Counsel testified she recalled Applicant's case and had reviewed her defense file in the matter prior to the PCR hearing. She stated she took over Applicant's appointment December 10, 2009, in her capacity as an Assistant Public Defender for Richland County at the time. Counsel said Applicant did have some mental retardation issues she became aware of early on in her representation, but stated she investigated that issue by subpoenaing Applicant's school records and ultimately having Applicant mentally evaluated. Counsel noted the evaluation found Applicant fully competent. Counsel said she met with Applicant roughly twelve (12) times, during which she was able to review the charge set forth in the indictment, the potential sentences, Applicant's constitutional rights and the entirety of the discovery file with Applicant. She explicitly testified Applicant never seemed to have any problems comprehending or participating in those conversations. Counsel said from the outset of her representation, Applicant wanted to pled guilty and never made any indication thereafter that he wanted to challenge the charge at trial.

Regarding plea negotiations, counsel testified she entered into plea negotiations on Applicant's behalf and was first able to obtain an offer from the state for Voluntary Manslaughter for twenty (20) to thirty (30) years imprisonment. When reviewing that offer with Applicant, counsel said, Applicant stated he would accept a plea offer for Voluntary Manslaughter for a fifteen (15) year sentence if extended by the state. Counsel went on to say the victim's family wanted Applicant to serve fifteen (15) years "day-for-day", so the state offered

Applicant a Voluntary Manslaughter plea for an eighteen (18) year sentence under which he would serve roughly fifteen (15) years before being parole eligible after 85% service. Counsel said Applicant accepted this plea offer after she presented and explained it to him. Counsel stated on the day of the plea, Applicant never indicated he was on any type of medication and did not seem confused. Rather, counsel said, Applicant seemed fully coherent and able to understand the nature of the plea hearing.

On cross-examination, counsel testified Applicant was "content" to serve time prior to the plea rather than being released on bond, so he could start to satisfy some of the sentence to come. Counsel noted there were some potential issues that could have been raised at trial regarding victim's possession of firearms at the time of the shooting, but said she and Applicant discussed that issue in their meetings. She also stated her private investigator was able to interview several potential witnesses requested by Applicant, but that none of those witnesses would have been very beneficial to Applicant's case so she didn't request a written report of their interviews. Counsel said she was not fully prepared for the matter to be called to trial the day of the plea, but noted on re-direct examination that Applicant's case was not yet set for trial and there were additional preparations for trial she would have undertaken had Applicant decided not to plead guilty that day.

After a thorough review of the record and the testimony presented at the evidentiary hearing, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective. As a preliminary note, this Court finds counsel's testimony to be very credible, while conversely finding Applicant's testimony to be not credible.

First, the plea hearing transcript introduced as part of the record in this matter is extremely thorough and clear in advising Applicant of his rights, the nature of the charge, the

potential consequences carried by the charge, the negotiations entered into by the state, and other relevant matters pertaining to the plea. Applicant provided a brief review of his mental health status, at no time advising the plea judge of the alleged medication he is taking or his inability to comprehend the nature of the proceedings. Applicant went on to readily admit his guilt to the charges to the plea judge and explicitly set forth his satisfaction with counsel's representation of him in the matter. This Court can see no portion of the plea which fails to meet the requirements for an intelligent and voluntary plea as set forth in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

Further, Applicant has failed to establish how counsel's performance was deficient in any way or how such ineffectiveness improperly induced Applicant's decision to plead guilty. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, [he] would not have pled guilty but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 418 (2001). Applicant has failed to convince this Court counsel's performance fell below an objective standard of reasonableness in any regard. In fact, the credible testimony before this Court, in accordance with the record, indicates counsel undertook thorough and diligent preparations of Applicant's case, and sufficiently advised Applicant of all relevant issues as necessary to allow Applicant to make an informed and voluntary decision whether to plead guilty or proceed to trial.

Finally, Applicant has failed to prove that but-for counsel's alleged errors, he would not have pled but rather gone to trial to challenge the charges. The credible testimony presented at the PCR hearing reflects Applicant wanted to plead guilty from the outset of counsel's

representation and at no point prior to the plea gave any indication that he desired a trial. Applicant's testimony to the contrary is not credible and wholly unsupported by the record. Therefore, Applicant failed to meet his burden and the current request for relief is denied.

CONCLUSION

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

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

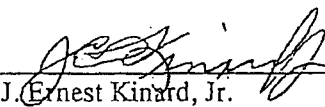
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR

counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 31 day of Dec, 2012.



J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

WITNESSES

(S) MENENDEZ - Columbia Police Department

DOCKET NO. 2010-GS-40-12260

The State of South Carolina

County of

Richland

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

JUNE TERM 2010

87

Defendant

ARREST WARRANT NUMBER

K613844

Witness:

C.C.C. PLS. AND G.S.

THE STATE

vs.

JUSTIN ANTWON AUSTIN

ACTION OF GRAND JURY

TRUE BILL

Deputy of Grand Jury JUN 16 2010
Date

VERDICT

Indictment for
MURDER

SC Code: 16-03-0010

CDR Code: 0116

Foreperson of Petit Jury

Date:

CERTIFIED TRUE COPY
OF ORIGINAL FILED,
Jeanette Williams
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JUNE 16, 2010, the Jurors of Richland County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That JUSTIN ANTWON AUSTIN did in Richland County, on or about NOVEMBER 24, 2009, willfully, feloniously, and intentionally kill the victim, TAVARES TUCKER, with malice aforethought, either express or implied, by means of GUNSHOT WOUND, and the victim did die as a proximate result thereof on or about NOVEMBER 24, 2009 in Richland County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

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

W. B. Giese

WARREN B. GIESE, SOLICITOR.

CERTIFIED TRUE COPY
ORIGINAL FILED
with W.M. Giese
S.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS.

INDICTMENT/CASE#: 2010-GS-40-12260

Justin Antwon Austin

A/W#: K613844

AKA:

Date of Offense: 11/24/2009

Race: B Sex: M Age: 29

S.C. Code § : 16-03-0010

DOB: 09 SS#: _____

CDR Code #: 0116

Address: _____

City, State, Zip: _____

DL#: _____ SID#: _____

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was
TO: Voluntary Manslaughter

in violation of § 16-3-50 of the S.C. Code of Laws, bearing CDR Code # 0217

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

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)

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

ATTEST

J. Garfield
GARFIELD, JOLLY

13433
SC Bar#

Justin Austin
Defendant

Renel
Attorney for Defendant

73948
SC Bar#

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

for a determinate term of 18 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 750 days

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

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

SPECIAL CONDITIONS:

RESTITUTION; Deferred Def. Waives Hearing Ordered

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

Payment Terms: _____

Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5%)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County.. (if paid in installments)		\$
TOTAL		\$

Clerk of Court/ Deputy Clerk
Court Reporter:

Jacquette W. McBride

PTUP _____

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling

Random Drug/Alcohol testing

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition

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

Presiding Judge

Judge Code: 2161

Sentence Date: 1-5-12