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SC Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Colleton County

D Craig Brown, Circuit Court Judge

DONOVAN HENDERSON,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M PACHAK
Appellate Defender

ALAN WILSON
Attorney General

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

JOHN W MCINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Senior Assistant Deputy Attorney General

ATTORNEY FOR PETITIONER

MATTHEW J FRIEDMAN
Assistant Attorney General

P O Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA) IN THE FOURTEENTH JUDICIAL CIRCUIT
)
 COUNTY OF COLLETON) CASE NO 2008-GS-15-295

STATE OF SOUTH CAROLINA,)
)
 STATE,)
)
 v) TRANSCRIPT OF RECORD
)
 DONOVAN HENDERSON,)
)
 DEFENDANT)
)

JANUARY 27th, 2009
 COLLETON COUNTY, SOUTH CAROLINA
 BEFORE THE HONORABLE PERRY M BUCKNER, III, JUDGE

APPEARANCES

MR SEAN THORNTON, ESQUIRE
 DEPUTY SOLICITOR
 FOURTEENTH CIRCUIT SOLICITOR'S OFFICE
 POST OFFICE BOX 1725
 WALTERBORO, SC 29488
 Attorney for the State

MR EVERETT W BENNETT, JR , ESQUIRE
 POST OFFICE BOX 693
 WALTERBORO, SOUTH CAROLINA 29488
 Attorney for the Defendant

Rebecca H Hill
 Official Court Reporter
 Walterboro, SC 29488

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EXHIBITS

NONE

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3

1 **THE COURT** Call your case, Solicitor

2 **DEP SOL THORNTON** Thank you, Your Honor May it
3 please the Court? The State is ready to proceed in the case
4 of the State v Donovan P Henderson Mr Henderson is here
5 and he is charged in 2008-GS-15-295 with burglary in the
6 first degree He was our number one trial, Judge He is
7 represented by Mr Eddie Bennett of the Colleton County Bar
8 Your Honor, there are negotiations in this case He was
9 also charged with attempted armed robbery in 2008-GS-15-294
10 The State is not pressing that

11 However, the State will leave that open to restore,
12 Your Honor, if Mr Henderson does not testify truthfully in
13 accordance with his videotape and written statements against
14 any co-defendants In other words, we're not holding any
15 sentence in abeyance on this one, Judge I've got another
16 charge on him I can bring back if he chooses not to
17 cooperate at a later date

18 He will be pleading, Judge It's a negotiated
19 sentence, as indicted, it is violent, most serious The
20 negotiated sentence, Judge, is 18 years

21 **THE COURT** Pleading as indicted?

22 **DEP SOL THORNTON** Pleading as indicted, Your Honor,
23 burglary, first

24 **THE COURT** Very well Mr Bennett, do you represent
25 Mr Henderson?

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1 **MR BENNETT** I do, Your Honor

2 **THE COURT** Has the Solicitor accurately stated for the
3 record any and all negotiations -- just a moment Yes, sir?

4 **DEP SOL THORNTON** I apologize, Judge I did want to
5 put one more thing on the record because I know Your Honor
6 is going to read the indictment to the defendant

7 **THE COURT** Yes, but Ms Stilley has already read this
8 indictment

9 **DEP SOL THORNTON** The indictment is correct, Judge
10 However, the defendant in this case disputes whether or not
11 he was, in fact, armed with a handgun, but it's not
12 necessary for the factual basis of the plea because the
13 entering occurred -- the entering occurred in the nighttime,
14 Your Honor

15 **THE COURT** Because you have another factual basis ---

16 **DEP SOL THORNTON** Yes, sir I just wanted that ---

17 **THE COURT** --- to support burglary, first

18 **DEP SOL THORNTON** Yes, sir I just wanted the Court
19 to be aware of that It's a dispute, but I don't think it
20 affects the plea, Judge

21 **THE COURT** All right You advised me of that and I
22 appreciate you doing so

23 **DEP SOL THORNTON** Yes, sir

24 **THE COURT** Because the indictment alleges "armed with
25 a handgun" and "during the nighttime "

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1 **DEP SOL THORNTON** It does, Your Honor

2 **THE COURT** All right Mr Bennett, I ask you now, has
3 the Deputy Solicitor accurately stated for the record any
4 and all negotiations in connection with this matter?

5 **MR BENNETT** He has, Your Honor

6 **THE COURT** Very well Madame Clerk, please swear the
7 defendant

8 **MADAME CLERK** Please raise your right hand

9 WHEREUPON, Mr Donovan Henderson was duly sworn

10 **THE COURT** I need you to speak up like I'm doing
11 right now There's not a person in this courtroom that
12 can't hear me, even on the back row back there I want you
13 to talk just like me so that we can hear you Do you
14 understand?

15 **DEFENDANT** Yes, sir

16 **THE COURT** And, Fran, you can roll your eyes all you
17 want to, but I want him to speak up so that everybody can
18 hear what's going on Don't shake your head, don't nod your
19 head Say "yes" or "no", so the court reporter can take
20 down what you say Do not say "uh-huh" or unh-unh", so that
21 she can accurately take down your answers, and speak up so
22 that everyone in this courtroom can hear what you're saying
23 Have you understood what I've just told you?

24 **DEFENDANT** Yes, sir

25 **THE COURT** Very good State your full name for the

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1 record
2 **DEFENDANT** Donovan Henderson
3 **THE COURT** Thirty-three
4 **DEFENDANT** How old?
5 **THE COURT** Thirty-three How far have you gone in
6 school?
7 **DEFENDANT** Eleventh
8 **THE COURT** Why did you quit school?
9 **DEFENDANT** I kept getting in trouble
10 **THE COURT** You got kicked out?
11 **DEFENDANT** Yes, sir
12 **THE COURT** Do you have your GED?
13 **DEFENDANT** No, sir
14 **THE COURT** What kind of work do you do?
15 **DEFENDANT** Home improvement, everything in a house
16 **THE COURT** Are you married?
17 **DEFENDANT** No, sir
18 **THE COURT** Do you have any children?
19 **DEFENDANT** Yes, sir
20 **THE COURT** How many?
21 **DEFENDANT** Four
22 **THE COURT** Four How old?
23 **DEFENDANT** Nine, six, and like seven months
24 **THE COURT** That's three Nine, six, and ---
25 **DEFENDANT** No, I got two six year olds I mean, two

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1 seven years old -- two seven years old

2 **THE COURT** All right Have you ever been treated in
3 the past for drug abuse, alcohol abuse, or mental illness?

4 **DEFENDANT** No, sir

5 **THE COURT** Have you taken any drugs, alcohol, or
6 anything else within the past 24 hours that might keep you
7 from understanding what you're doing in Court today?

8 **DEFENDANT** No, sir

9 **THE COURT** Do you pay child support for these children
10 or do they live with you?

11 **DEFENDANT** I been paying child support

12 **THE COURT** You pay it through the family court or you
13 pay it directly to the momma?

14 **DEFENDANT** I had just got put on child support before
15 I got locked up

16 **THE COURT** You've just been ordered to pay it by the
17 Family Court?

18 **DEFENDANT** Yes, sir

19 **THE COURT** Okay So you're paying now, supposedly,
20 before you were locked up through the family court?

21 **DEFENDANT** Yes, sir

22 **THE COURT** Mr Bennett, I understand you represent Mr
23 Henderson, is that correct?

24 **MR BENNETT** That's correct, Your Honor

25 **THE COURT** Have you advised him of the charge in this

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1 indictment, the maximum penalty or punishment, and its
2 direct consequences, and have you advised him of all of his
3 constitutional rights?

4 **MR BENNETT** I have, Your Honor

5 **THE COURT** In your opinion, counsel, does he
6 understand the charge, the penalty, and its direct
7 consequences, as well as his constitutional rights?

8 **MR BENNETT** He does, Your Honor

9 **THE COURT** And how does he indicate to you that he
10 desires to plead, guilty or not guilty?

11 **MR BENNETT** Guilty, Your Honor

12 **THE COURT** Mr Henderson, you've just heard your
13 lawyer tell me that he's advised you of the charges, the
14 maximum penalty or punishment of the charge, and its direct
15 consequences, and he's advised you of your constitutional
16 rights, and according to your attorney, you understand the
17 charge, the penalty and your rights, is that correct?

18 **DEFENDANT** Yes, sir

19 **THE COURT** I've been handed by the Solicitor,
20 Indictment 2008-GS-15-0295, the State v Donovan Henderson,
21 indictment for burglary, first degree This indictment has
22 been true billed by the Colleton County Grand Jury This
23 indictment alleges that you did in Colleton County on or
24 about March the 8th, 2008, that you, Mr Donovan P
25 Henderson, did enter the dwelling of David Pinckney, located

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1 at 8546 Charleston Highway in Walterboro, without consent
2 and the intent to commit a crime therein, during the
3 nighttime hours, and armed with a handgun Do you
4 understand that charge against you in the indictment for
5 burglary, first degree?

6 **DEFENDANT** Yes, sir

7 **THE COURT** Do you understand that burglary, first
8 degree, is both a violent and a most serious offense Have
9 you advised him of that, Mr Bennett?

10 **MR BENNETT** I have, Your Honor

11 **THE COURT** Do you understand that because it is
12 violent, that you would have to assume that you would not be
13 eligible for any type of probation, parole, or early release
14 program until you have served at least 85 percent of any
15 type of sentence of imprisonment I might impose, and because
16 it is most serious, if you are to be convicted at a later
17 point in time of a most serious offense, or under our
18 statutes in South Carolina, a combination of serious
19 offenses, that you could, in the future, if convicted, face
20 the possibility of life imprisonment without any possibility
21 of parole Do you understand that, Mr Henderson?

22 **DEFENDANT** Yes, sir

23 **THE COURT** Have you advised him of both of those
24 matters, Mr Bennett?

25 **MR BENNETT** I have, Your Honor

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1 **THE COURT** You understand, Mr Henderson, I accept
2 your plea to the offense of burglary, first degree, that I
3 could sentence you to not less than 15 years in jail, up to
4 life imprisonment

5 **DEFENDANT** Yes, sir

6 **THE COURT** You understand as to any sentence of
7 imprisonment I might impose, that you would have to assume
8 that you would have to serve day for day as to any sentence
9 of imprisonment I might impose?

10 **DEFENDANT** Yes, sir

11 **THE COURT** Any other direct consequences of the plea
12 in which counsel from the State is aware?

13 **DEP SOL THORNTON** None, Your Honor

14 **THE COURT** Any other direct consequences of the plea
15 in which counsel for the defendant is aware?

16 **MR BENNETT** None, Your Honor

17 **THE COURT** All right Mr Henderson, understanding
18 the charge against you, understanding the maximum penalty or
19 punishment for that charge and its direct consequences, I
20 ask you now, how do you wish to plead, guilty or not guilty?

21 **DEFENDANT** Guilty, Your Honor

22 **THE COURT** Do you understand by pleading guilty you're
23 giving up your constitutional right to remain silent?

24 **DEFENDANT** Yes, sir

25 **THE COURT** Do you understand by pleading guilty you're

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1 giving up your constitutional right to a trial by jury?

2 **DEFENDANT** Yes, sir

3 **THE COURT** Do you understand if you had a jury trial,
4 you would have the right to confront any witnesses or
5 evidence which the State may have against you, and if you
6 had a jury trial, the State would be required and have the
7 burden of proving your guilt beyond a reasonable doubt, and
8 if you had a jury trial, you could put up any witnesses or
9 evidence in your defense, if you so chose Do you
10 understand you have each of those rights as to a jury trial?

11 **DEFENDANT** Yes, Your Honor

12 **THE COURT** Understanding your rights as to a jury
13 trial, do you now want a jury trial or do you wish to plead
14 guilty?

15 **DEFENDANT** Plead guilty, Your Honor

16 **THE COURT** Now, you heard the Solicitor tell me at the
17 outset of this hearing, and it was confirmed to me by your
18 attorney that there are negotiations in regards to your
19 plea Those negotiations were published to me as a sentence
20 of 18 years imprisonment for the burglary, first, with the
21 factual basis of the burglary, first, entering during the
22 nighttime, is that right, Solicitor?

23 **DEP SOL THORNTON** It is, Your Honor, and the co-
24 defendants were armed

25 **THE COURT** And also that you would testify in other

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1 matters, truthfully, according to both a written statement
2 that you've given to law enforcement or to the Solicitor,
3 and to a video statement that you have given Is that your
4 understanding, Mr Henderson of any and all negotiations in
5 connection with your plea?

6 **DEFENDANT** Yes, sir, Your Honor

7 **THE COURT** You understand negotiations are a contract
8 between the Solicitor and your attorney? I cannot change
9 those negotiations, but I do not have to accept your plea

10 **DEFENDANT** Yes, sir

11 **THE COURT** Other than the negotiations which I've
12 placed on the record of this hearing, has anybody promised
13 you anything in order to try to get you to plead guilty?

14 **DEFENDANT** No, sir, Your Honor

15 **THE COURT** Has anybody threatened you in any manner in
16 order to get you to plead guilty?

17 **DEFENDANT** No, sir

18 **THE COURT** Are you fully satisfied with the services
19 of your attorney?

20 **DEFENDANT** Yes, sir

21 **THE COURT** Has he done everything in your behalf that
22 you feel like he should or could have done?

23 **DEFENDANT** Yes, sir

24 **THE COURT** Have you had enough time to talk with your
25 lawyer?

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13

1 **DEFENDANT** Yes, sir

2 **THE COURT** Have you understood all of your talks with
3 your lawyer?

4 **DEFENDANT** Yes, sir

5 **THE COURT** Are you completely satisfied with your
6 lawyer's services?

7 **DEFENDANT** Yes, sir

8 **THE COURT** Do you have any complaints against any law
9 enforcement officers, court officials, or members of the
10 Solicitor's Office?

11 **DEFENDANT** No, sir

12 **THE COURT** Are you pleading guilty to this offense of
13 your own free will and your own accord?

14 **DEFENDANT** Yes, sir

15 **THE COURT** You understand you have the right to appeal
16 my sentence and this plea, but you must do so within 10 days
17 of today by filing a Notice of Intention to Appeal?

18 **DEFENDANT** Yes, sir

19 **THE COURT** You understand that as to any sentence of
20 imprisonment I might impose, if I accept your plea, that you
21 would have to assume that you would have to serve day for
22 day as to any sentence of imprisonment?

23 **DEFENDANT** Yes, sir

24 **THE COURT** Have your answers to my questions been
25 truthful answers?

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1 **DEFENDANT** Yes, sir

2 **THE COURT** Have they been your own answers and not

3 suggested to you by anyone else?

4 **DEFENDANT** Yes, sir

5 **THE COURT** Your own answers?

6 **DEFENDANT** Yes, sir

7 **THE COURT** Have you understood each of my questions?

8 **THE COURT** Are you, in fact, guilty of burglary, first

9 degree, in Colleton County, South Carolina, on or about

10 March 8th, 2008, involving the dwelling of David Pinckney at

11 8546 Charleston Highway?

12 **DEFENDANT** Yes, sir

13 **THE COURT** Solicitor?

14 **DEP SOL THORNTON** Judge, as you have already

15 indicated, this occurred at 8546 Charleston Highway, which

16 is in the County of Colleton It was March 8th, 2008 Your

17 Honor, at that residence, Mr Henderson, along with Ronell

18 Brown, and we believe two other co-defendants that are as of

19 yet have not been arrested, basically, Judge did a home

20 invasion at that residence The problem that they ran into

21 was that they did a home invasion with 9 mm, and the

22 homeowner was armed with an AK47, and they came out on the

23 short end of the stick Mr Henderson was shot twice He

24 was found a short distance away from the scene He had a

25 gun, I believe, near him, as well as a mask near him That

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15

1 was recovered He subsequently confessed to officers as to
2 his involvement and the involvement of the people that he
3 actually knew their identities, which is what he would have
4 to testify to if Ronell Brown decides to go to trial and not
5 plead this case out Your Honor, I would also like to state
6 for the record before I get into his rap sheet that this is
7 the case, Judge, where we had actually notified him because
8 of his rap sheet, for life without parole, pursuant to the
9 LWOP statute And as Your Honor knows, once I do that, I
10 don't normally offer any deal, and the only reason I did it
11 in this case was because Mr Bennett interceded on his
12 behalf I know that there had been a motion earlier that
13 there might be a cop plea, but I wanted to state for the
14 record that Mr Bennett has done his client a good job today
15 because I could have LWOPP'd him on this case, but I chose
16 not to because Mr Bennett interceded on his behalf His
17 prior record, Your Honor, is an armed robbery from 1993, for
18 which somehow he got a YOA I guess the law ---

19 **THE COURT** That's not an eligible offense

20 **DEP SOL THORNTON** I know it isn't, Judge, but he got
21 it anyway

22 **THE COURT** Well, Mr Alexander's taught me in the
23 past, that sometimes cases get confused

24 **DEP SOL THORNTON** He has a possession of stolen
25 vehicle, Judge, from 1996 He's got a distribution of drugs

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1 from '97 He has a second degree burglary for which he got
2 one year for in 2001 He has a trafficking of cocaine, for
3 which he was convicted and got three years, and he has --
4 that was in 2002, Your Honor And he has a failure to stop
5 for a blue light, also, it appears in 2002 He has a
6 resisting arrest conviction in 2005 and a failure to stop
7 for a blue light, 2006 He has an extensive criminal
8 record, Your Honor

9 **THE COURT** He certainly does

10 **DEP SOL THORNTON** Which is, again, why he is very
11 lucky that Mr Bennett has interceded on his behalf, but,
12 obviously, Judge, the one and two years of time didn't get
13 it done, which is why I'm insisting -- I did insist on a 18
14 year sentence in this case He, obviously, has not learned
15 his lesson and needs to go away for some time

16 **THE COURT** Very well Solicitor, I find that there is
17 a sufficient factual basis for the plea Mr Henderson, I
18 find that your decision to plead guilty is freely,
19 voluntarily, knowingly, and intelligently made, that you've
20 had the advice and counsel of a competent attorney, with
21 whom you tell this Court you are totally and completely
22 satisfied I'll accept your plea of guilty Mr Bennett,
23 this is a negotiated plea, you want to talk me out of it?

24 **MR BENNETT** No, sir, just wanted to ask that you
25 accept the negotiated sentence and sentence him in

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17

1 accordance with 18 years And the other thing I wanted to
2 ask, Judge, is that he be given for his jail time, credit,
3 and ---

4 **THE COURT** Is he in custody now, Mr Bennett?

5 **MR BENNETT** Yes, sir He has been in custody
6 continuously

7 **THE COURT** On this charge?

8 **MR BENNETT** Yes, sir And there was one issue I'm
9 not sure if it's going to come up, Judge He was
10 immediately taken to the hospital because he was shot three
11 times on March the 8th, and he was in the hospital for 11
12 days

13 **THE COURT** That's going to be up to the Department of
14 Corrections

15 **MR BENNETT** Okay I didn't know whether we needed to
16 ---

17 **THE COURT** The credit he gets is pursuant to the
18 statute and up to the Department of Corrections I'm not
19 going to interfere with that, because obviously he was not
20 free to leave the hospital, but I realize that's medical
21 treatment, so you're going to have to let them decide that

22 **THE COURT** Yes, sir, Solicitor?

23 **DEP SOL THORNTON** For the record, Your Honor, the
24 victims were in agreement with this plea and they told me
25 they did not want to be here as long as the plea went

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1 forward

2 **THE COURT** Very well Mr Henderson, is there
3 anything you would like to tell the Court before sentencing?

4 **DEFENDANT** I just apologize for anything what
5 happened

6 **THE COURT** Mr Henderson, I'm going to tell you, I
7 don't normally, and I've accepted your plea, so I'm going to
8 follow the negotiations once I accept it, but the Solicitor
9 is right, you deserve every day of the 18 years With your
10 record, it's amazing that you didn't get hurt more seriously
11 or that somebody else didn't when you were breaking in I'm
12 going to tell you that And you could be looking at life,
13 do you understand that?

14 **DEFENDANT** Yes, sir

15 **THE COURT** You're very fortunate that you're not
16 being put away for life with the record you have Make
17 sure you thank your lawyer on the way out Do you
18 understand?

19 **DEFENDANT** Yes, sir

20 **THE COURT** Anything else you want to tell me?

21 **DEFENDANT** No, sir, just thank you

22 **THE COURT** On Indictment 2008-GS-15-0295, the State v
23 Donovan Henderson, the sentence of this Court is defendant
24 is committed to the State Department of Corrections for a
25 term of 18 years Defendant shall be given credit for any

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19

1 time served, pursuant to South Carolina Code Section 24-13-
2 40, and that is to be calculated and applied by the State
3 Department of Corrections Thank you very much
4
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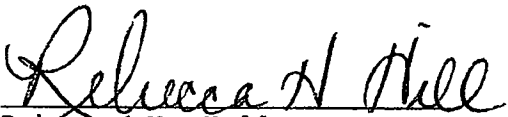
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STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON) CERTIFICATE

I, REBECCA H HILL, Official Court Reporter for the
Judicial Department of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had in the
guilty plea of the captioned case, in the Court of General
Sessions for Colleton County, South Carolina, on the 27th
day of January, 2009

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

November 1, 2009


Rebecca H Hill,
Official Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of Colleton)

DONOVAN HENDERSON * 199129)

Full name and prson number (if any) of Applicant)

v)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

09-CP-15-691

APPLICATION FOR

POST-CONVICTION RELIEF

2009 AUG -4 PM 4:24

PAT. 1
COLLE. 1
COM. PLEAS

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 clear to which question any such continued answer refers.

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

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

- 1 Place of detention PERRY CORRECTION INST
- 2 Name and location of Court which imposed sentence Colleton County
GENERAL SESSIONS
- 3 Name(s) of co-defendant(s) (if any) RONELL RICHARD BROWN
- 4 The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed
(a) 2008 - GS - 15 - 0295 1st Degree Burglary
(b) _____

- (c) _____
- 5 The date upon which sentence was imposed and the terms of the sentence
- (a) JANUARY 27, 2009 18 yrs 85% 70
- (b) _____
- (c) _____
- 6 Check whether a finding of guilty was made
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
- 7 Did you appeal from the judgment of conviction or the imposition of sentence?
NO
- 8 If you answered "yes" to (7), list
- (a) the name of each Court to which you appealed
- I /
- II _____
- III _____
- (b) the result in each such Court to which you appealed
- I _____
- II /
- III _____
- (c) the date of each such result
- I _____
- II /
- III _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results
- I _____
- II /
- III _____
- 9 If you answered no to (7) state your reasons for not so appealing
- (a) WASNT AWARE THAT I COULD APPEAL
- (b) _____

- (c) _____
- 10 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully
- (a) INEFFECTIVE Assistance of Counsel
- (b) INvoluntary PLEA
- (c) DUE PROCESS Violation
- 11 State concisely and in the same order the facts which support each of the grounds set out in (10)
- (a) SEE ATTACHED MEMORANDUMS and Exhibits
- (b) _____
- (c) _____
- 12 Prior to this application have you filed with respect to this conviction
- (a) any petition in a State Court under South Carolina Law? /
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? /
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? /
- (d) any other petitions, motions or applications in this or any other Court? /
- 13 If you answered "yes" to any part of (12), list with respect to each petition, motion or application
- (a) the specific nature thereof
- I _____
- II _____
- III _____
- IV _____
- (b) the name and location of the Court in which each was filed
- I _____
- II _____
- III _____
- IV _____

(c) the disposition thereof

I	_____
II	_____
III	_____
IV	_____

(d) the date of each such disposition

I	_____
II	_____
III	_____
IV	_____

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

I	_____
II	_____
III	_____
IV	_____

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

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

(a) which grounds have been presented

I	_____
II	_____
III	_____

(b) the proceedings in which each ground was raised

I	_____
II	_____
III	_____

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

(a) This is my First PCR and can
 (b) only be raised now
 (c) _____

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

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

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

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

i E.W. BENNETT, Jr.
P.O. Box 693
 ii Walterboro, S.C. 29488
 iii _____

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

i GUILTY PLEA HEARING
 ii _____
 iii _____

19 State clearly the relief you seek in filing this application

VACATED AND Remanded for New Trial

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

NO

STATE OF SOUTH CAROLINA)

County of Colleton)

VERIFICATION

I, DONOVAN HENDERSON, 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

+ Donovan Henderson

SWORN to and subscribed before me this 27th
day of July 2009

[Signature] (LS)
Notary Public

My Commission Expires May 12th, 2014

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

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

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

x Donovan Henderson
Applicant

SWORN or affirmed to and subscribed before me this

2nd day of July, 2005

[Signature]
Notary Public

My Commission Expires

May 12th, 2014

I.
INEFFECTIVE ASSISTANCE OF
TRIAL COUNSEL

[Standard of Review]

When ineffective assistance of counsel is alleged as a ground for relief in a PCR action, 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)

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 v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). 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 results of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

In interpreting the prejudice prong, our State Supreme Court in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000), held "consistent with existing federal precedent, that a

defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both " Id 527 S.E.2d at 109 The court determined that "deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice " Id 527 S.E.2d at 109.

Moreover, claims alleging that trial counsel was ineffective for failing to object to trial court errors are cognizable in a PCR proceeding This includes failure to object to inadmissible evidence, Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(failure to object to hearsay), improper arguments by the prosecution, Matthews v. State, 2001 WL 1887491 (S.C. Sup. Ct., decided June 17, 2002), erroneous jury instructions, Plyer v State, 309 S.C 408, 424 S.E 2d 477 (1992)(counsel deficient for failing to object to improper charge on malice, which improperly shifted burden of proof from the state to defendant), or any other matter that could otherwise be reviewed on direct appeal, if not for counsel's failure to properly preserve the issue.

Accordingly, a claim alleging that trial counsel was ineffective for failing to object to an indictment obtained through acts of perjury and gross prosecutorial misconduct, can be raised in a PCR proceeding pursuant to the Strickland standards of review.

[Perjury and Gross Prosecutorial Misconduct]

Here, Applicant argues that trial counsel provided

ineffective assistance by allowing the State, without objection, to charge, convict, and sentence him under an indictment obtained through willful acts of perjury and prosecutorial misconduct.

Therefore, Applicant would show this PCR Court the following

Applicant's bill of indictment prints that, "At a Court of General Sessions, convened on June 12, 2008 , the Grand Jurors of Colleton County present upon their oath." (see Exhibit 1, Indictment). Furthermore, the indictment is affixed with a true bill stamp, and signed by Solicitor Stone (see Exhibit 1, Indictment), who was the State Judicial Official assigned the responsibility of preparing and processing the document.

However, the evidence conclusively establishes that the information published in the document regarding a June 12, 2008

convened Court of General Sessions, is in fact false. The attached, certified true copy of the Judicial Department's calendar of Circuit Court terms shows that on June 12, 2008

"NO" General Sessions Court had been open in Colleton County for the Grand Jurors to present anything upon their oath, much less that a crime had taken place. (see Exhibit 1, Indictment in comparison with Exhibit 2, Calendar of Convened Courts). Thus false information is contained in the State indictment, prepared and processed by Solicitor Stone

South Carolina law is very specific concerning matters of false information in a State document. It is an Offense Against Public Justice to willfully give false information in a State document. S.C. Code Ann. §16-9-10, "Perjury and Subornation of Perjury" states in pertinent part

A(2). It is unlawful for a person to willfully give false, misleading, or incomplete information on a document, record or report or form required by the law of this State.

B(2). A person who violates the provisions of subsection A(2) is guilty of a misdemeanor, and upon conviction must be imprisoned not more than 6 months, or fined not less than one hundred dollars or both

C. A person may be convicted under this section ... if he commits perjury by his own act, consent or agreement

FIRST. it should be noted that a criminal indictment is a document required by the law of this State. In State v. Gentry, 363 S.C. 96, 610 S.E.2d 494 (2005), our Supreme Court held that an indictment is a "notice document" required by both our State Constitution, and statutory law. see S.C. Const. Art. I. §11, and Art. V. §22 see also S.C. Code Ann. §17-19-10 (2003) ("[n]o person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury. .," except in specified instances).

Therefore, for purposes of establishing an offense of perjury against public justice, a State indictment would satisfy the document requirements specified under subsection A(2), S.C. Code Ann. §16-9-10

SECOND, it should also be noted that a County Prosecutor,
 [~~Q~~ - Isaac Stone is required to know the
 laws of this State, and has special responsibilities to see that
 justice is done, and is held to the highest standards of
 professional ethics. see Appellate Court Rules, Rule 407, Rules
 of Professional Conduct, Rule 38 Comment Also see Quattlebaum
 In fact, the prosecutor hold a quasi-judicial position. see State
v. Durden, 264 S C, 86, 212 S E 2d 587 (1975), State v. King, 222
 S C 108, 71 S.E 2d 793, 798 (1952)(" .He [prosecutor] must see
 that no conviction takes place except in strict conformity with
 the law, and that the accused is not deprived of any
 constitutional right or privilege " [insert added]

However, instead of discharging his responsibilities in
 conformity with the laws of this State, Solicitor Stone

knowingly and willfully caused false information to be
 printed and published in Applicant's indictments, thereby
 violating the provisions of §16-9-10 Thus, Mr Stone ~~is~~
 guilty of committing an act of perjury against public justice,
 and which would by necessity also constitute gross professional
 misconduct see Rules of Professional Conduct, Rule 407, SCACR
 Rule 8 4(b)(it is professional misconduct for a lawyer to commit
 a criminal act that reflects adversely on the lawyer's honesty,
 trustworthiness or fitness as a lawyer in other respects), Rule
 8 4(d)(it is professional misconduct for a lawyer to engage in
 dishonesty, fraud, deceit, or misrepresentation), and Rule
 8.4(e)(it is professional misconduct for a lawyer to engage in

conduct that is prejudicial to the administration of justice)

Accordingly both perjury and gross prosecutorial misconduct are established in this case. Therefore, Applicant would show this Court the following ineffective assistance of trial counsel for not challenging the false indictment information*

[Counsels Deficient Performance]

In Strickland, the Court explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Id. 466 U.S. at 685, 104 S.Ct. at 2063 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 263 (1942)), "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. 466 at 689, 104 S.Ct. at 2065

A criminal attorney is constitutionally required to conduct pretrial investigation and discovery, and file any necessary

(*) For quite some time now it has been common knowledge in this State's judicial circle that the County Solicitors are utilizing an irregular and improper indictment process which allows true billed indictments to be returned at such an astronomical rate of return that it precludes any meaningful evidence review, or consideration by the grand jury. (see Exhibit 3, newspaper articles concerning States irregular process)

motions to suppress see e.g. Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). It was conclusively shown above that false information is contained in Applicant's true billed State indictment(s). That the false information is on the face of the indictment(s), and easily discoverable through an examination of the document. Under these circumstances, "any competent" trial attorney would have not hesitated to enter an objection, and/or move to suppress Applicant's defective indictment(s), especially given the certainty of prevailing on such a motion.

All attorney's licensed to practice criminal law in South Carolina are required to know and understand this State's statutory law and rules related to the lawful return of true bill indictment(s). Therefore it would be an untenable position for trial counsel to now claim ignorance of the law.

South Carolina criminal law sets forth clear provisions for challenging defects in the indictment. see S.C. Code Ann §17-19-90, ("Every objection to an indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to squash such indictment before the jury shall be sworn and not afterwards). Unquestionably, trial counsel should have utilized §17-19-90, to challenge Applicant's true bill indictment(s).

In summary, the false information is apparent on the face of the indictment, and easily discoverable through an examination of the document. Accordingly, trial counsel provided a deficient performance in not entering an Objection to Applicant's defective indictment(s), or moving to squash

[Prejudice]

In interpreting the prejudice prong under a defendants sixth amendment right to counsel, our State Supreme Court identified a narrow category of cases in which prejudice is presumed. In Quattlebaum, the Supreme Court concluded, consistent with existing federal precedent, " . . . that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice " Id 527 S.E 2d at 109. Our Supreme Court further determined that the focus must be on the misconduct because the Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused see e.g. Quattlebaum, 527 S E 2d at 109.

Above, prima facie evidence was presented showing that the Prosecutor violated the provisions of §15-9-10, and thereby, committed an act of perjury against public justice by willfully giving false General Sessions Court information in Applicant's true billed indictment(s). Moreover, it was further established that the Prosecutor's act of perjury, against public justice, would by its very nature also constitute a violation of the Rules of Professional Conduct specifically, Rules 8 4(b) 8 4(d) and 8 4(e)], and thereby establish gross prosecutorial

misconduct. Thus Quattlebaum is controlling in this case, and an "irrebuttable presumption of prejudice" has been established see Quattlebaum, 527 S E 2d at 109

Conclusion

Under the circumstances found in this case Applicant's conviction and sentence cannot be allowed to stand because to do so the State would have to now become a knowing party to the Prosecutor's acts of perjury, and gross misconduct, and maintain Applicant's indictment in it's records, thereby representing those acts to the public.

Above, Applicant established a claim of ineffective assistance of trial counsel by his showing that (1), counsel's performance was deficient in failing to Object to the defective indictment and (2), because prejudice is presumed due to the Prosecutor's acts of perjury and gross misconduct

Accordingly, and based on the foregoing Applicant's conviction and sentence should be overturned

II

CONFLICT OF INTEREST

A. Applicant, Donovan Henderson (hereinafter "Henderson") contends that his Sixth Amendment right to counsel was violated because the representation of his attorney was tainted by a conflict of interest. Specifically, Henderson alleges that trial counsel's conflict of interest helped persuade him to plead guilty, rather than proceed to trial.

At a minimum, the Sixth Amendment right to effective assistance of counsel encompasses the attorney's duty of loyalty to the client, and concomitantly, the duty to avoid conflicts of interest. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); U.S. v. Tatum, 943 F.2d 370 (4th Cir. 1991). A defendant asserting a conflict of interest claim must establish that an actual conflict of interest existed and that it adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). "The defendant need not demonstrate prejudice if the conflict of interest actually affected the adequacy of the legal representation." Id. at 349, 100 S.Ct. at 1719.

Henderson alleges a conflict of interest took place when his trial counsel made him aware that he had represented the victim, David M. Pinckney, on previous State charges. [fn 1]

Henderson's attorney told him that he was going to file a motion to be relieved because he felt there was a "major conflict of interest." A hearing was held on the conflict of interest motion. Henderson testified that he also felt it was a conflict and asked for new counsel to be appointed. The Honorable Perry M. Buckner heard and denied the motion.

Although conflicts of interests usually occur when an attorney represents multiple clients, see e.g., Hoffman v. Leebe, 302 F.2d 481 (4th Cir. 1990); Thomas v. Holtz, 818 F.2d 481 (6th Cir.), cert. denied, 484 U.S. 870, 103 S.Ct. 198, 98 L.Ed.2d 149 (1987). Henderson contends that in his case, it's clear that a conflict of interest took place because of his

[fn.1] David M. Pinckney, the alleged victim, the day of this incident, shot the petitioner, Donovan Henderson three (3) times with an AK-47 automatic assault rifle. And afterwards, while police were en route, hid the weapon at a friend's and discarded evidence of the spent shell casings. The alleged victim is also an ex-convicted felon.

attorney's prior representation of the alleged victim in his case. The rule is that once a defendant has proven the existence of an actual conflict, only an adverse impact on the attorney's performance must be shown. See, Ruffin v Kemp, 767 F 2d 52, 58 (11th Cir 1985) see also, U S v Corizzo, 736 F 2d 52, 58 (2nd Cir 1986). But even if a conflict occurs, a defendant may waive the right to conflict-free representation. Such waiver, to be effect [], must be 'voluntary, knowingly and intelligently done with sufficient awareness of the consequences'. Bridges v U S, 794 F 2d 1189, 1193 (7th Cir 1986). Simply put, waiver is effective if the defendant "knows what he is doing and made the choice with eyes wide open". Faretta v California, 422 U S 806 (1975) [quoting Adams v U S, 317 U S 269 (1942)], see also, U S ex rel Donald v Elrod, 716 F 2d 431 (7th Cir 1983).

Henderson contends that an adverse impact resulting from a conflict is shown here by counsel's efforts to pressure and coerce him to plea and protect the interest of the alleged victim. See, Thomas v Foltz, supra.

- B. Counsel's pressure on Henderson to plead guilty with the advise that he would receive a Life Without Parole (LWOP) sentence to protect alleged victim had adverse impact upon Henderson inducing him to plead guilty.

Absent counsel's advice to plead guilty to 18 years, it is likely that a full blown trial would've revealed for the jury the facts that the alleged victim, who shot the Henderson (3) times with an AK-47 Assault Rifle, was never charged with any crimes incident to the alleged burglary, i.e., attempted murder/assault with intent to kill/possession of firearm by convicted felon. A trial could've also revealed the fact that alleged victim, after the shooting, hid the weapon [AK-47] by sending it off the premises to a friend's house. See Incident Report (EXHIBIT 3) and he discarded the spent shell casings as a cover-up.

Furthermore, a trial would've clearly uncovered that Henderson's prior convictions could not have been used to enhance his sentence to LWOP. Because, standing alone, the prior conviction of trafficking cocaine is the only conviction, classified by statute, as a "serious offense" in Henderson's conviction record other than a Youthful Offender Act (YOA) conviction for armed robbery which cannot be utilized for enhancement.

purposes of subsequent adult convictions [fn.2] see, Notice to seek LWOP (EXHIBIT 4) therefore, without the use of the YOA conviction, the consequent threat of LWOP could not have been employed as a coercive plea inducement tactic by either the State or defense counsel

Finally, it becomes clear, by examining the evidence, that Mr Henderson would not have been convicted for First Degree Burglary because, by statutory definition, a First Degree Burglary could never have been proven by the State to have actually occurred

SUMMARY

Clearly, trial counsel's motion to be relieved should've been granted. It's obvious that, after the denial of that motion, that counsel pressured Henderson to plead guilty to 18 years thereby protecting his former client, the alleged victim in this case, and quite conceivably, protecting himself from the necessity of having to confront a previous criminal client about matters when he is now an alleged victim. By failing to investigate the legal relevance of Henderson's prior convictions before advising him to plea, counsel unfairly and erroneously leveraged and induced Henderson's plea because no other trial defense strategy was made available. What's clear also, is that counsel was protecting his former client, and possibly himself, by discouraging Henderson from seeking trial. A trial of which would've revealed his former client's, the alleged victim, criminality incident to the the alleged burglary thereby allowing him, his former client, to escape questioning and possible prosecution.

[fn.2] During the plea hearing, when the Solicitor informed the court of Henderson's prior's (convictions), it was made known that he had been convicted under the Youthful Offender Act (YOA) for armed robbery. The Judge indicated on record, something to the effect that he did not believe it permissible to consider the YOA conviction "for any enhancement purpose" but that he would, because he's done so in the past.

CONCLUSION

RESPECTFULLY, the applicant, Mr Henderson asserts that his conviction and sentence should be set-aside, that leave should be granted to revoke his plea because he has demonstrated the existence of a conflict of interest. And, due partly to that conflict, coupled with counsel's failure to adequately investigate, his representation fell below the reasonable objective standards of the legal profession. Henderson believes and asserts also that he has demonstrated prejudice because, had it not been for counsel's errors and omissions, he would not have pled guilty and instead, would've insisted on proceeding to trial.

III

DID COUNSEL PROVIDE INEFFECTIVE ASSISTANCE BY FAILING TO
FULLY ADVISE APPLICANT OF THE CONSEQUENCES OF HIS GUILTY PLEA?

[STANDARD OF REVIEW]

A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of the plea by showing, 1) that counsel's representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial " see Strickland V Washington, 466 U S 668, 104 S ct 2052, 80 L.ed 2d 674 (1984), Hill V. Lockhart, 474 U S 52, 106 S ct 366, 88 L ed 2d 203 (1985), Carter V State, 329 S.C 355,360,495 SE 2d 773 (1998). Richardson V. State, 310 S C 360, 426 SE 2d 795 (1993), Rosco V State, 345 S C. 16, 546 SE 2d 417 (2001).

Therefore, allegations that an applicant represented by counsel did not enter his guilty plea freely and voluntarily must show that his plea counsel committed errors amounting to deficient performance and causing prejudice to applicant. See Scott V State, 334 S.C 248,513 SE 2d 100 (1999)

I

Unknowning and Involuntary Plea

The due process clause of the United States Constitution requires that a guilty plea must be entered voluntarily and knowingly Boykin V Alabama, 395 U S. 238,89 S ct 1709 (1969) In order for a defendant to knowingly and voluntarily pled guilty, he must have full understanding of the consequences of his plea State V Hazel, 275 S C 392,271 SE 2d 602 (1980), Dover V State, 304 S C 433,405 SE 2d 391 (1991)

In this case, Applicant contends that his guilty plea was involuntarily and unknowingly entered, because counsel failed to advise him that after completion of sentence he was also required to serve a mandatory term of Community Supervision and that in all revocation proceedings for Community Supervision violation offenses, applicant would not be afforded the right to trial by jury, appointment of counsel, or indictment, even though he faced a potential violation sentence of up to one year. Additionally, that repeat Community Supervision violations could result in successive one year violation sentences being imposed and which could actually double the sentence originally imposed.

Under the provisions of S C Code Ann § 24-21-560 (D) (Supp 2003), State's Community Supervision Program (CSP) Participation is a mandatory condition of release after completion of sentence. Section 24-21-560 further provides in pertinent part:

- (C) If the department determines that a prisoner has violated a term or the community supervision program and the community supervision should be revoked, a probation agent must initiate a proceeding in General Sessions Court.

If the court determines that a prisoner has willfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program.

- (D) If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner must also complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.

Accordingly, a prisoner who is sentenced to successive revocations of community supervision program may be required to serve terms of incarceration for successive revocations as provided in section 24-21-560 (C) and may be required to serve additional periods of community supervision for successive revocations, as provided in section 24-21-560 (D) The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original, "No parole offense," see e g State V Mills, 360 S C 621, 602 SE 2d 750 (S C 2004) ("The court determined that CSP violations could result in successive violation sentences, which could operate to double the original sentences imposed for convictions ")

Furthermore, the determination of whether to impose a CSP violation sentence of up to one year, would be made by the court through revocation proceedings during which the defendant would not be afforded an indictment, trial by jury or counsel. see section 24-21-560, and Mills at 752. (Pleicones J dissenting)

In this case, Applicant contends that his guilty plea was entered into involuntarily and unknowingly because he was not advised that his sentence would include a mandatory term of CSP, which in operation acted to automatically Forfeit his Constitutional and Statutory right in all future revocation proceedings

[TRIAL BY JURY]

Under the Sixth Amendment, criminal defendant's have a right to trial by jury in state criminal prosecutions, Duncan V La, 391 U S 145,149 (1968) The right to trial by jury exists only in prosecutions for serious crimes Blanton V N Las Vegas, 489 U S 538,542 (1989) See also Duncan 391 U S 159-61 In whether the crime is "serious" for Sixth Amendment purposes the court will look at the severity of the maximum authorized penalty, See Lewis V U S , 518 U S. 322, 325-26 (1996) U S. V Linney, 134 F 3d 274, 280 (4th Cir 1998)

The United States Supreme Court has held that any crime punishable by a prison sentence greater than six months triggers the right to trial by jury regardless of the sentence ultimately imposed See Blanton, 489 U S 566, also see, Frank V. U S. U S. 147, 149-50 (1969), Baldwin V. New York, 399 U S 66,69 (1970) ("[N]o offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment of more than six months is authorized ") Duncan, 391 U S 161-62 (right to trial by jury where defendant sentenced to 60 days in jail)

Clearly, U S. Constitutional law provides that any time a defendant is exposed to the possibility of a prison sentence in the excess of six-months the right to trial by jury attaches South Carolina, cannot lawfully circumvent applicant's Sixth Amendment right to jury trial by process of labeling a CSP term of incarceration a violation offense The fact is that any CSP Violation sentence would be in addition to and outside the original sentence imposed for guilty plea A CSP violation term of incarceration is still a prison sentence no matter what its called

Therefore, either the court or defense counsel was required to to advise applicant before entry of guilty plea that any sentence imposed for conviction would include a mandatory term of CSP which included provisions forfeiting his right to trial by jury in all potential revocations proceedings where he faced the possibility of being sentenced to a new one year term of incarceration , or the remaining 15% of the No Probation

The waiver of a constitutional or statutory right [jury trial], cannot be implied or forced, and requires a showing on the record that the defendant made a knowing and intelligent waiver See State V Auther, 269 S C 495, 374 SE 2d 291 (1988) (citing Patton V U S , 281 U S 276, 50 S Ct 253, 74 L Ed 854 (1930), as the landmark case) Here the record is devoid of any advise offered to applicant concerning state's CSP, or its Mandatory provisions which in operation would act to deprive him of the right to trial by jury in any and all potential revocation proceedings

[RIGHT TO COUNSEL]

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense U S. Const Amend VI. In Gideon V Wainwright, 372 U S 335, 342 (1963), the court recognized the "Sixth Amendment's guarantee of counsel." As "Fundamental and essential to a fair trial " Id at 342, 83 S ct at 796 The United States system of justice suggest that any amount of actual jail or prison time has Sixth Amendment significance See e.g Argersinger V Hamlin, 407 U S 25, 92 S.ct. 2006, 32 L. Ed 2d 530 (1972) (holding that assistance of counsel must be provided when a defendant is tried for a crime that results in a sentence of imprisonment).

Both the plain wording of the amendment and the reading of Gideon would support the guarantee of counsel in "All" criminal prosecutions, petty or serious, whatever their consequences See Scott V. Illinois, 440 U S at 376, 379, 99 S ct at 1163, 1165 (Brennan J dissenting) Although the court has never read the guarantee of counsel that broadly, one principle has been clear NO imprisonment may be imposed on the basis for an uncounseled conviction Thus in Argersinger the court rejected a formalistic distinction between petty and non^lpetty offenses and applied Gideon to "Any criminal trial, where an accused is deprived of his liberty " Id at 32,92 S.Ct. at 2010 Id at 41,42,92 S Ct at 2014,2015 (Burger C.J. concurring in result) (because "Any deprivation of liberty is a serious matter," no individual "Can be imprisoned unless he is represented by counsel.")

In this case, State's CSP statute contains provisions that operate to deprive Applicant of both his right to trial by jury and the accompanying right to appointment of counsel. Specifically, CSP provides that the court may impose a new sentence of up to one year for violation offenses without Applicant being provided with trial by jury or counsel. The loss of the right to counsel in proceedings where the court may impose a new one year violation sentence is a serious matter, involving the loss of Constitutional Rights and which must be explained to applicant before entry of guilty plea.

The loss or waiver of the Constitutional right to counsel must be entered into knowingly and intelligently, see e.g. U S V Singleton, 107 F 3d 1091,1095 (4th Cir 1997) (citing Brady V United States, 397 U S. 742, 90 S Ct 1463, 25 L. Ed 2d 747 (1970), and Johnson V Zerbst, 304 U S 458, 58 S Ct. 1019 1024-25, 82 L Ed. 1461 (1938)). The waiver cannot be implied because representation by counsel is indispensable to fair administration of criminal justice system. See Brewer V Williams, 430 U S. 387, 404 (1977) (Powell J. concurring) (expressing disapproval of implied waiver of a Constitutional right)

Therefore, either the plea court or defense counsel was required to advise Applicant before entry of his guilty plea, that state's CSP required a mandatory waiver of his constitutional right to counsel in all future revocation proceedings. That did not happen in this case.

[RIGHT TO INDICTMENT]

In State V Gentry, 363 S C 93,610 SE 2d 494 (2005), our Supreme Court held that an indictment is a "Notice document" required by State Constitution and Statutes. See S C. Const Art. I § 11 and Art. V. § 22 [Footnote omitted] S C Code § 17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by grand jury..." (except in specified exceptions, not applicable here).

Furthermore, a criminal defendant has the right to make contemporaneous objection to a defective indictment. See S C. Code Ann § 17-19-90.

As shown above, States CSP operates to deprive applicant of his right to an indictment, See Mills on any potential violation offense which a sentence of up to one year may be imposed. Applicant's right to indictment, protected by both the S.C. Constitution and U.S. Constitution, See Gentry.

Thus, either the court or defense counsel was required to advise applicant that his guilty plea would operate as a waiver of his right to indictment.

Again, the waiver of a Constitutional or Statutory right must be entered into knowingly and intelligently see State V Auther and cannot be implied by a silent record.

Therefore, based on the fact that neither the trial court or counsel advised applicant that his guilty plea would result in a loss of the right to indictment, this court should find the plea unknowing and involuntary See e.g. Boykin V. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

PART IICOMMUNITY SUPERVISION PROGRAMDUE PROCESS VIOLATIONUNKNOWNING AND INVOLUNTARY PLEAINEFFECTIVE ASSISTANCE OF COUNSEL

The due process clause of the United States Constitution requires that a guilty plea must be entered voluntarily and knowing Boykin v Alabama, 395 U S 238, 89 S Ct 1709 (1964) In order for a defendant to knowingly and voluntarily plead guilty, he must have full understanding of the consequences of his plea, that includes direct consequences i e , Consequences that have a definite, immediate and largely automatic effect on defendant's punishment, see State v Hazel, 275 S C 392, 271 SE2d 602 (1980) In Hazel, our State Supreme Court held that her plea was not knowing because it was entered without an understanding of the mandatory punishment to which she was pleading It was a plea entered in ignorance of its direct consequences and therefore invalid

Here applicant argues that the State's Community supervision Program (hereinafter 'CSP') is a direct consequence of his criminal conviction Also that his plea was entered involuntarily and unknowingly and in violation of due process because it was without understanding of the mandatory punishment of his plea and the CSP

In eliminating parole for violent offenders in 1996, the legislature enacted a scheme of determinate sentencing to be followed by periods of mandatory community supervision see S C Code Ann §24-21-560 "imposition of the CSP is mandatory and thus has a definite, immediate and largely automatic effect on defendant's punishment" see People v Catu, 4 N Y 3d 242, 245, 792 N Y S 2d 887, 825 N E 2d 1081 (Ct App 2005)

The CSP is significant, upon immediate release from the underlying term of imprisonment, a defendant must be furnished with a written statement setting forth the conditions of the CSP. In addition to supervision by and reporting to a parole officer, the CSP requires compliance with any conditions to which a parolee may be subject to including, for example, monthly fee, electronic monitoring, a curfew, restrictions on travel, and substance abuse testing and treatment. Moreover, the CSP requires a defendant, upon release from determinate sentence, to serve the remaining 15% balance of the 85% "no parole sentence" on community supervision. See State v McGrier, Opinion No 26489 5/12/08. A defendant must be made aware of this mandatory punishment to meet the requirement of due process. See People v Hill, 9 N Y 3d 189, 879 N E 2d 152, 849 N Y S 2d 13 2007 N Y Slip Op 08782.

In the State of South Carolina the CSP as defined in S C Code Ann §24-13-100 Supp 2001) is a collateral consequence of sentencing see Jackson v State, 349 S C 62, 562 SE2d 475 (S C 2002). Although a defendant pleading is not entitled to explanation of possible collateral consequences i e , Consequences that are peculiar to individual and generally result from actions taken by agencies courts does not control.

The constitutional defect lies in the plea itself not in the resulting collateral consequence of sentencing.

Because defendant pleading guilty to a determinate sentence must be aware of the CSP component of that sentence in order to knowingly and intelligently choose among alternative courses of action. The failure of a court to advise of CSP requires reversal of conviction.

[CONCLUSION]

Applicant contends that his guilty plea was entered into involuntarily and unknowingly and in violation of due process because the trial court or defense counsel was required to advise him that his sentence would include a mandatory term of community supervision and the mandatory punishment it carries. A guilty plea entered in ignorance of its direct consequences and mandatory punishment is invalid. State v Hazel, S C , 271 SE2d 602 (1980) U S C A

Amend 14

IV

INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO INVESTIGATE BEFORE ADVISING TO PLEA

Applicant ("hereinafter Henderson") contends that his counsel was ineffective and showed a deficient performance when he failed to investigate before advising him to plead guilty

First, a court must strongly presume that counsel has exercise reasonable professional conduct See Strickland v Washington, 466 U S at 690, 104 S Ct at 2065, and Samples 897 F 2d at 196 No such presumption, however, is warranted when a lawyer advises his client to plea bargain to an offense, which the attorney has not investigated

Henderson contends that he was denied effective assistance of counsel in pleading guilty due to counsel's failure to investigate and give accurate advice concerning states Notice to Seek Life Without Parole

Trial Counsel was served Notice of Intention To Seek Life Imprisonment Sentence on January 2, 2009 under Section 17-25-45(A), S C Code of Laws 1976, as Amended on the basis that you have two prior convictions for Most Serious Crimes (See Exhibit 4)

The first conviction the State tried to use but counsel failed to investigate was

- 1) A serious offense [to wit Charleston County 2002 conviction for Trafficking in Cocaine, 1st offense (S C Code Section 44-53-370) as defined in Section 17-25-45(C)(2)]

Counsel failed to investigate that the weight of the drugs in the 2002 conviction was 10-28 grams, which only carries a maximum 10 year parolable sentence by law and cannot be used to enhance to LWOP because the prior conviction must carry a 30 year maximum term of imprisonment to be used See Section 17-25-45(C)(2)(a)

- 2) A Most Serious Offense [to wit Charleston County 1993 Armed Robbery, Robbery Armed with a deadly weapon (S C Code Section 16-11-330(A) as defined in Section 17-25-45(C)(1)]

Counsel failed to investigate that the Armed Robbery conviction was a YOA sentence and could only carry a maximum term of (6) six years and that a YOA sentence [cannot] be used to enhance under Section 17-25-45(A), also in Section 17-25-45, it states that any combination of these offenses can be used In Henderson's case neither of these convictions can be used

[CONCLUSION]

Counsel's failure to do a minimal research of the applicable statute governing Section 17-25-45(A) which was integral factor Applicant's plea negotiations, constituted ineffective assistance of counsel rendering Applicant's guilty plea involuntary See Hill v Lockhart, 474 U S at 59, 106 S Ct at 370

Applicant can clearly prove the prejudice requirement because had he known his prior convictions could not be used to enhance to LWOP he would have not pled guilty and insised on going to trial See Hill supra

Henderson's guilty plea should be vacated and his case remanded for a new trial based on Counsel's failure to investigate before advising to plead guilty and his faulty legal advice which is a clear showing of a miscarriage of justice See U S v Scott, 625 F 2d 623 (5th Cir 1981)

V.

INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO ERRONEOUS GUILTY PLEA ADVICE

Applicate contends that his guilty plea was involuntary because of his counsel's erroneous guilty plea advice

Counsel's erroneous advice was that applicate would receive a LWOP sentence if he did not take the State's offer of 18 years That very persuasive legal advice however is incorrect

Applicate contends that his counsel advised him that his prior 2002 Trafficking Cocaine conviction could be used to enhance to LWOP However, that advice is incorrect

In Applicate's case for the State to use his prior Drug conviction it must carry a mandatory term of 30 years See Section 17-25-45(c)(2)(a) Applicate's 2002 Drug Conviction only carried 10 years maximum because the quantity of drugs was less than 28 grams

Counsel also advised Applicate that his 1993 Armed Robbery YOA conviction could be used to enhance to LWOP, that also is incorrect advice because the YOA Armed Robbery only carries a maximum term of 6 years not the required 30 years to use for enhancement

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not be entered See Strickland v Whashington, 466 U S 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), Hill v Lockhart, 474 U S 52, 106 S Ct 366, 88 L Ed 2d 203 (1985), Wolf v State, 326 S C 158, 485 S E 2d 367 (1997), Satterwhite v State, 325 S C 254, 481 S E 2d 709 (1997)

In support of the first part of the Strickland and Hill test, Applicate has shown that his counsel's advice was deficient regarding enhancement to LWOP The record supports this contention Also the advice was detective and not within the range of competence demanded of attorney's in criminal cases See Hill supra The first part of the Strickland and Hill test has been met

In support of the second part of the Strickland and Hill test, the "prejudice" requirement, Applicate will offer testimony at PCR Hearing conclusively establishing that had his counsel not misinformed him regarding the enhancement to LWOP issue he would not have pled guilty and insisted on going to trial Thus the second part of the Strickland and Hill test has been met and a new trial is necessary in this case See Alexander v State, 303 S C 539, 402 S E 2d 484 (S C 1991), Hinson v State, 377 S E2d 388 (1989)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	
	)	2009-CP-15-691
Donovan Henderson, #199129	)	
	)	
Applicant,	)	
	)	
v	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent	)	
	)	

The Respondent, making its Return to the Application for post-conviction relief filed August 4, 2008 would respectfully show this Court

I

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Colleton County. The Applicant was indicted at the June 2008 term of the Colleton County Grand Jury for burglary – 1st degree (2008-GS-15-295). Everett W. Bennett, Jr. Esquire, represented the Applicant. On January 27, 2009, the Applicant pled guilty as indicted. The Honorable Perry M. Buckner sentenced the Applicant to confinement for eighteen (18) years. The Applicant did not appeal the guilty plea or the sentence.

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

II

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

- 1 Ineffective assistance of counsel in that counsel failed to object to indictment obtained through willful acts of perjury and prosecutorial misconduct
- 2 Conflict of interest in that counsel had represented the victim on previous charges
- 3 Involuntary guilty plea in that Applicant was not advised that his sentence would include a mandatory term of CSP (community supervision program)
- 4 Due process violation

III

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application Butler v State, 286 S C 441, 334 S E 2d 813 (1985) Where the application alleges ineffective assistance of counsel 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

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, 466 U S 668 The Applicant must overcome this presumption in order to receive relief Cherry v State, 300 S C 115, 386 S E 2d 624 (1989)

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel First, the Applicant must prove that counsel's performance was deficient Under this prong, the court measures an attorney's performance 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

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 the record does not conclusively refute. Accordingly, 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).

IV

Applicant alleges a conflict of interest in that counsel had represented the victim on previous charges. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id., Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

V

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474

U S 52, 56 106 S Ct 366, 369 (1985) A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements Crawford v U S, 519 F 2d 347 (4th Cir 1975), Edmonds v Lewis 546 F 2d 566 (4th Cir 1976)

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea However, allegations regarding ineffective assistance of counsel and the voluntary nature of the plea may raise a question of fact that is not conclusively refuted by the record Accordingly, Respondent requests an evidentiary hearing on this allegation Sharper, 305 S E 2d 247

VI

The Applicant further alleges that he was denied due process of law However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based The Uniform Post-Conviction Procedure Act requires that the Applicant must " specifically set forth the grounds upon which the application is based " S C Code § 17-27-50 (2003) In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held Welch v MacDougall, 246 S C 258, 143 S E 2d 455 (1965), Blandshaw v State, 245 S C 385, 140 S E 2d 784 (1965) Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act This allegation is so vague that it is impossible for the State to respond

VII

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

VIII

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing be held

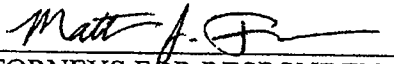
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

MATTHEW J FRIEDMAN
Assistant Attorney General

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P O Box 11549
Columbia, SC 29211
(803) 734-3737

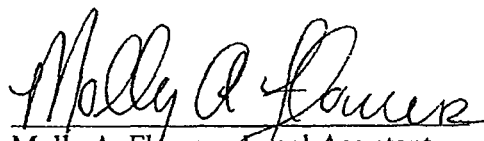
2/1, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	2009 CP-15-691
	)	
DONOVAN HENDERSON 199129	)	
	)	
Applicant	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
	)	

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

Robert J Bonds, Esquire
Hetrick Law Firm
P O Box 139
Walterboro, SC 29488

DATED this 1st day of February, 2010


Molly A. Flowers, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
Donovan Henderson,	)	
	)	
Applicant,	)	
	)	
vs	)	Case No 09-CP-15-0691
	)	
State of South Carolina,	)	
	)	
Defendant	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned action was held on April 21, 2011, before The Honorable D Craig Brown, in the Court of Common Pleas for Colleton County, South Carolina, attended by Counsel, as follows

APPEARANCES

Robert J Bonds, Esq
Appearing for Applicant

Matthew J Friedman, Assistant Attorney General
OFFICE OF ATTORNEY GENERAL
P O Box 11549
Columbia, SC 29211-1549
Appearing for State of South Carolina

VIVIAN CROSS, CIRCUIT COURT REPORTER

transcribed by
DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island South Carolina 29457
dGarrison@sccourts.org

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Testimony of E W Bennett

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3

1 APRIL 21, 2011 10 15 A M

2

3 (APPLICANT PRESENT)

4 THE COURT Mr Friedman?

5 MATTHEW FRIEDMAN Your Honor, this
6 is Donovan Henderson

7 THE COURT Mr Bonds, are you ready
8 to proceed?

9 ROBERT BONDS We are, Your Honor
10 We call Mr Henderson to the stand

11 By way of brief education to Your Honor
12 about this case, this case is a guilty plea that
13 resulted in -- it was a negotiated sentence of
14 eighteen years and, uh, -- the sentence was
15 accepted, I believe, in January of 2009 by Judge
16 Buckner We are here today seeking post-
17 conviction relief based on a couple of issues
18 one, a conflict of interest that Mr Bennett had
19 that arose, the failure to fill an appeal after
20 sentencing, and also there was a life without
21 parole issue involved in this case that Mr
22 Henderson wants to tell the Court about I
23 think that those are the three issues that we
24 will be moving forward on

25 THE COURT Mr Henderson, how are

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4

1 you, sir?

2 APPLICANT Fine

3 THE COURT Before we go forward, I
4 just want to advise you of a couple of things
5 You understand that that -- first of all that
6 only certain things can happen in a post-
7 conviction relief action Do you understand
8 that?

9 APPLICANT Yes, sir

10 THE COURT Do you understand the
11 process?

12 APPLICANT Yes, sir

13 THE COURT That if you are not
14 entitled to post-conviction relief that you will
15 simply have to serve the remainder of the time
16 that you have on this sentence?

17 APPLICANT Yes, sir

18 THE COURT And do you understand
19 that if I decide to grant you post-conviction
20 relief that the only thing that I could do would
21 be to vacate your plea and your sentence and you
22 would be -- I guess that they would bring you
23 back here to Colleton County until they could
24 try you again or until -- you could plea guilty
25 Do you understand that?

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1 APPLICANT Yes, sir

2 THE COURT What would happen is that
3 any charges that were dropped, any negotiations,
4 any charges that were dismissed or reduced, all
5 that would be thrown out and you would start
6 back over with your original charges and would
7 be facing the original potential penalties Do
8 you understand that?

9 APPLICANT Yes, sir

10 THE COURT Understanding all that,
11 do you want to proceed today with this matter?

12 APPLICANT Yes, sir

13 THE COURT Mr Friedman, anything
14 from you before we begin?

15 MATTHEW FRIEDMAN No, Your Honor

16 THE COURT All right Mr Bonds,
17 anything further from you before we begin?

18 MATTHEW FRIEDMAN No, sir, Your
19 Honor

20 THE COURT All right Mr
21 Henderson, come around here, raise your right
22 hand and they will put you under oath, sir

23 (WITNESS TAKES STAND)

24 DONOVAN HENDERSON, being duly sworn to
25 tell the truth, the whole truth and nothing but

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1 the truth, testified, as follows

2 DIRECT EXAMINATION

3 BY MR BONDS

4 Q You're Mr Donovan Henderson?

5 A Yes, sir

6 Q Mr Henderson, how old are you, sir?

7 A Thirty-five

8 Q How far did you go in school?

9 A Eleventh grade

10 Q Did you complete the eleventh grade or ---

11 A No, sir

12 Q --- you dropped out during your eleventh
13 grade year?

14 A I dropped out

15 Q Have you since gotten your GED, or have you
16 had any other education since that time?

17 A No, sir I am in school right now

18 Q Okay Good Let me just ask you, -- Mr
19 Bennett was appointed to represent you, is that
20 correct?

21 A Yes, sir

22 Q And you were charged here -- what charges
23 did you have pending against you that resulted
24 in his representation?

25 A A first degree burglary and an attempted

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1 armed robbery

2 Q Mr Henderson, let me ask you, to your
3 knowledge was he appointed sometime in October
4 or November of 2008?

5 A Yes, sir

6 Q Did you -- were you in jail when you first
7 met Mr Bennett?

8 A Yes, sir

9 Q Did he come to the jail?

10 A Yes, sir

11 Q At that time did you tell him about your
12 case?

13 A Yes, sir

14 Q And did you discuss the witnesses that may
15 have been involved in this matter?

16 A Yes, sir

17 Q Did you discuss the victim with him or who
18 the victim was?

19 A Yes, sir

20 Q What, if anything, did he say about a
21 relationship that he may have had in the past
22 with the victim in this case?

23 A That was like a week -- a week before we
24 went to court, he'd, uh, he said that the victim
25 was his client a few years back

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1 Q Okay, I want to back up for a second When
2 you initially met with him and discussed the
3 case, did he ever indicate to you that he knew
4 who the victim was or had some relationship in
5 the past with the victim?

6 A No, sir

7 Q Okay Did you become aware that he knew or
8 had some relationship with the victim in the
9 past?

10 A Like a week before I went to court

11 Q Would that have been about January 5th of
12 2009?

13 A Yes, sir

14 Q And had you already been informed at that
15 point that this case was going to be first for
16 trial either the week of January 12th or -- I
17 think -- January 26th?

18 A January 27th, I believe

19 Q But one of those two weeks it was going to
20 be first for trial?

21 A Yes, sir

22 Q And at that point I believe that an
23 affidavit -- well, first of all let me hand you
24 this and ask if you can identify it? Did you
25 receive -- I'm handing you that letter -- hold

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1 on one second

2 ROBERT BONDS Let me make sure
3 that I show this -- I apologize, Your Honor

4 DIRECT EXAMINATION CONTINUED

5 BY ROBERT BONDS

6 Q Mr Henderson, and I -- and I mean no
7 disrespect, can you read that letter or would
8 you like for me to read that letter for you?

9 A No, I can read it

10 Q Go ahead, if you would Take just a second
11 and then tell me if that looks familiar

12 A Yeah, (reading) "Mr Henderson as
13 stated, I will not be able to represent you as
14 the victim in this case, David M Pinckney, was
15 a former client of mine and that would result in
16 a conflict of interest, a conflict for me to
17 represent you With kind regards, I am very
18 truly yours, E W Bennett "

19 Q Is that a letter that -- when did you
20 receive that letter?

21 A I received that letter January the 5th,
22 2009

23 Q Is that the -- is that the date of the
24 letter, January 5th, 2009?

25 A There's -- that's the date on the letter

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1 Q Where were you when you received that
2 letter?

3 A I was in County

4 Q In lockup?

5 A Yes, sir

6 Q Okay Do you believe that you got it that
7 day or do you recall?

8 A I believe that I got it like that day or a
9 couple of days after that

10 Q Okay Let me also hand you this document,
11 (tendering) Is that a copy of the affidavit
12 that was attached to the letter?

13 A Yes, sir

14 Q And that is an affidavit that was filed out
15 by Mr Bennett?

16 A Yes, sir

17 Q And you saw that he wanted the court to
18 hear -- or to be -- to relieve him as counsel,
19 is that correct?

20 A Yes, sir

21 Q Did you want him to be relieved as counsel
22 at that point?

23 A Yes, sir

24 Q Did a hearing take place concerning that?

25 A Yes, sir

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1 Q When did that hearing take place?

2 A I can't actually recall it, but the date --
3 the date, but I know that it was in January
4 through like a week, or something like that,
5 before I got to court

6 Q Was that a hearing upstairs in the big
7 courtroom?

8 A Yes, sir

9 Q Do you know if Judge Buckner was the judge?

10 A Yes, sir

11 Q And at that point had -- were arguments
12 made?

13 A Yes, sir

14 Q And did your lawyer ask to be relived as
15 counsel?

16 A Yes, sir

17 Q And was he?

18 A No, sir

19 Q Did the judge make a ruling that day, from
20 the bench?

21 A No, sir, not that date He write a letter
22 and made the ruling

23 Q Did Mr Bennett inform you of that ruling?

24 A Yes, sir

25 Q Tell the court about that

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1 A He had tell me that the lawyer -- that the
2 judge tell him that there was nothing that he
3 could do because he was -- he had did it before
4 in the past, on a conflict of interest Being
5 that there was previous charges that he can't
6 relieve him as my counsel, that he would have to
7 proceed as being my counsel

8 Q Okay Were -- was there anything that Mr
9 Bennett told you that he could do at that point?

10 A No, sir

11 Q Did you still want a new lawyer?

12 A Yes, sir

13 Q Let me ask you this, a couple of weeks
14 later Mr Bennett continued to represent you?

15 A Yes, sir

16 Q A couple of weeks later you pled, is that
17 right?

18 A Yes, sir

19 Q Okay Did you bring to the court's
20 attention at that point that you didn't want Mr
21 Bennett as your lawyer?

22 A No, sir, because he had told me that there
23 was nothing that he could do, that the same
24 judge that denied the Motion was the same judge
25 that sentenced me

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1 Q Okay As a result of this conflict, do you
2 believe that there was a conflict in Mr Bennett
3 representing you?

4 A Yes, sir

5 Q Do you believe that Mr Bennett didn't do
6 something that he should have done as a result
7 of that conflict?

8 A Yes, sir

9 Q Tell the court about that?

10 A He could have relieved -- because when he
11 asked me if -- when the judge asked me if I had
12 ever had a conflict, asked me how I felt about
13 it, I tell him that I felt that there was a
14 conflict of interest because he'd represented my
15 victim before and I don't feel as though he was
16 going to represent me to his best ability

17 Q Thank you Now, in regard to the appeal,
18 did you request that your guilty plea be
19 appealed?

20 A Yes, sir

21 Q Okay And why did you want it to be
22 appealed?

23 A Because I know that Mr Bennett, he ain't
24 supposed to represent me because -- being that
25 the letter that he write me and telling that

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1 there was a conflict of interest and he couldn't
2 represent me, and I know that he ain't going to
3 represent me to his best ability, so I didn't
4 want him to be my lawyer

5 ROBERT BONDS All right I'd like
6 to go ahead and mark the letter as Plaintiff's
7 (sic) Exhibit 1, the affidavit as Plaintiff's
8 Exhibit 2, and then if I could get ---

9 THE COURT Any objection by the
10 State as to those items being marked?

11 MATTHEW FRIEDMAN There is no
12 objection, Your Honor

13 THE COURT All right

14 ROBERT BONDS Thank you, Your
15 Honor

16 (SO ENTERED AS APPLICANT'S EXHIBIT 1)

17 (SO ENTERED AS APPLICANT'S EXHIBIT 2)

18 DIRECT EXAMINATION CONTINUED

19 BY ROBERT BONDS

20 Q Mr Henderson, you've been handed a
21 document Can you tell the court what that
22 document is?

23 A It's a request to Captain Fraser I'd
24 wrote to, uh, Mr Bennett to file an appeal for
25 me so that I could come back to court on that

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1 appeal

2 Q Let me just ask you, this -- on February
3 1st, 2009, did you write this request, is that
4 your handwriting?

5 A Yes, sir

6 Q Okay And that's where you asked to please
7 give Mr Bennett notice that you would like him
8 to put in an appeal for you, is that right?

9 A Yes, sir

10 Q And did Captain Fraser receive this?

11 A Yes, sir

12 Q This request to staff ---

13 A Yes, sir

14 Q --- document?

15 A Yes, sir

16 Q To your knowledge, was this then hand
17 delivered to Mr Bennett's office?

18 A Yes, sir

19 Q All right And is it your understanding
20 that an appeal was never filed?

21 A Yes, sir, because I write -- the appeals,
22 -- where they do appeals at, I write them and
23 ask them if anybody filed an appeal for me and
24 they told me that they never did file, that
25 nobody ever filed an appeal for me

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1 Q All right Now, let me ask you this, the
2 reason for the appeal was the fact that you
3 wanted to appeal this issue about the -- about
4 him continuing to represent you as it related to
5 that appeal, that that was denied?

6 A Yes, sir

7 Q All right Now I want to move on to one
8 other area that I would like you to tell the
9 court about, and that is the -- the Solicitor's
10 Office, as I understand it, having reviewed the
11 file, had spoken with Mr Bennett The
12 Solicitor's Office felt that you were eligible
13 for a possible life without parole as a result
14 of this case Is that right?

15 A Yes, sir

16 Q And you received notice -- Mr Bennett
17 received notice of that?

18 A Yes, sir

19 Q All right Tell the court what your
20 understanding and your feeling is as to your
21 eligibility as it relates to life without
22 parole, and that being a -- you being a
23 candidate for that and how that weighed into
24 your plea?

25 A I was just -- I could get life without

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1 parole for a 1993 YOA case that I had, armed
2 robbery Then when I went to court -- when I
3 went to court, the judge -- the solicitor tell
4 the judge that I had a 1993 YOA charge and --
5 the judge and the solicitor -- well, the judge
6 tell the solicitor that he don't believe that
7 they could have charged me with an armed robbery
8 charge at that time, for a YOA

9 Q Let me just -- is it your understanding
10 that as a -- is it your contention that as a
11 result of the prior armed robbery, that that was
12 one of the things that the solicitor was basing
13 their -- making you eligible for an LWOP?

14 A Yes, sir

15 Q All right And you were sentenced to a
16 YOA, is that right?

17 A Yes, sir

18 Q And so its your contention that if you were
19 sentenced to -- that you couldn't have been
20 sentenced to a YOA if you got an armed robbery
21 Is that what this was about?

22 A Yes, sir

23 Q All right Do you have any other issues as
24 it relates to your armed robbery with the YOA?
25 Excuse me, with the life without parole? Is

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1 there anything else that you want to tell the
2 court about?

3 A No, sir

4 Q Was there something about the trafficking
5 charge that you wanted to tell the court about?

6 A Oh, yes

7 Q Okay

8 A I'm sorry about that, Your Honor

9 THE COURT That's okay

10 APPLICANT The trafficking charge
11 is, uh, ten to -- ten to three, three to ten,
12 charge and it carried -- it's a serious -- first
13 trafficking is zero to twenty-eight grams and --
14 if you get parole, if you have parole on that
15 charge you're only supposed to be -- supposed to
16 be, like, for LWOP And if you do have parole
17 -- if you don't have parole, you can be eligible
18 for LWOP

19 DIRECT EXAMINATION CONTINUED

20 BY ROBERT BONDS

21 Q Let me just ask you, is there anything else
22 that you want to tell the court today concerning
23 this -- the issues that we've discussed or any
24 other issues?

25 A No, sir

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1 ROBERT BONDS Judge, I don't have
2 any other questions of this witness I would
3 like to make, if I haven't already, that number
4 three, the letter request to staff

5 MATTHEW FRIEDMAN No objection

6 THE COURT All right

7 (SO ENTERED AS APPLICANT'S EXHIBIT 3)

8 ROBERT BONDS Thank you, Your
9 Honor

10 CROSS EXAMINATION

11 BY MATTHEW FRIEDMAN

12 Q Good morning, Mr Henderson

13 A Good morning, sir

14 Q You pled guilty, is that right?

15 A Yes, sir

16 Q Do you recall telling the plea judge that
17 you understood the nature of the charge and the
18 possible punishment?

19 A Yes, sir

20 Q And the possible punishment for burglary
21 first was fifteen to life, ---

22 A Yes, sir

23 Q --- is that right?

24 A (Affirmative nod)

25 Q Do you recall that you had a negotiated

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1 sentence in this case?

2 A Yes, sir

3 Q Was that eighteen years?

4 A Yes, sir

5 Q Do you remember telling the court that you
6 understood the terms of that negotiated
7 sentence?

8 A Yes, sir

9 Q You also told the court that no one has
10 threatened you or promised you anything to get
11 you to plead guilty?

12 A Yes, sir

13 Q You told the court that you were fully
14 satisfied with your attorney, do you remember
15 that?

16 A Yes, sir

17 Q You also told the court that you were
18 pleading guilty of your own free will and
19 accord?

20 A Yes, sir

21 Q The court advised you during the plea that
22 you had a right -- that you had ten days to
23 appeal? To appeal the plea? Do you remember
24 that?

25 A Yes, sir

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1 Q Do you remember if you specifically asked
2 Mr Bennett to file an appeal for you?

3 A Yes, sir, I asked him.

4 Q You asked him?

5 A Yes, sir

6 Q I believe that you also had an attempted
7 armed robbery charge dismissed in exchange for
8 the plea, is that right?

9 A Yes, sir

10 Q You understand that if you're successful at
11 this PCR hearing that that charge could be back
12 on the table?

13 A Yes, sir

14 Q You also understand that the State could
15 charge you -- give you notice for Life without
16 the possibility of parole

17 A Yes, sir

18 Q Do you recall telling the plea court that
19 you were in fact guilty of this offense?

20 A Yes, sir

21 MATTHEW FRIEDMAN I have nothing
22 further, Your Honor

23 THE COURT Mr Bonds, anything else?

24 ROBERT BONDS Nothing from the
25 witness but I do have one witness upstairs --

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1 Captain Franks (sic), as to who this document
2 was delivered to as it relates to the appeal I
3 told him I'd be up there He's working criminal
4 court right now It would take me just one
5 second to try to get him He'll be a very brief
6 witness, Your Honor

7 THE COURT All right Mr
8 Henderson, you may step down, sir

9 (WITNESS STEPS DOWN)

10 (BRIEF RECESS)

11 (APPLICANT PRESENT)

12 ROBERT BONDS Captain Fraser I
13 got my F's confused I apologize, Your Honor
14 He's upstairs

15 (BRIEF RECESS)

16 (APPLICANT PRESENT)

17 ROBERT BONDS Your Honor, this is
18 Captain Fraser He will be our next witness

19 (WITNESS TAKES STAND)

20 THE COURT Okay

21 CHARLES DANIEL FRASER, being duly sworn
22 to tell the truth, the whole truth and nothing
23 but the truth, testified, as follows

24 DIRECT EXAMINATION

25 BY ROBERT BONDS

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1 Q Captain Fraser, where are you employed,
2 sir?

3 A Colleton County Sheriff's Office I'm
4 Captain over the Detention Center

5 Q How long have you been working at the
6 detention center?

7 A A little over three years now

8 Q Are you familiar with the detention center
9 rules and regulations of how it operates?

10 A Yes, sir

11 Q Are you familiar with a document called
12 Request to Staff?

13 A Yes, I am

14 Q Let me also ask you this, do you know Mr
15 -- are you familiar with Mr Henderson?

16 A Yes, I am

17 Q Let me just ask you -- and I want to hand
18 you what has been marked as Plaintiff's (sic)
19 Exhibit 3 and ask you if you recognize that,
20 sir?

21 A (Upon review), yes, sir, I do

22 Q Can you tell the court in general what is
23 -- what is that document?

24 A It's a request to staff that was sent by
25 Mr Henderson asking his attorney, Mr Bennett,

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1 to -- in reference to an appeal

2 Q Okay And was that document signed by you?

3 A Yes, it was

4 Q To the best of your knowledge, was that
5 document delivered to -- was that request
6 delivered to Mr Bennett's office?

7 A To the best of my knowledge it was

8 Q And if -- if an inmate needed to get a
9 message such as that to his lawyer, is this how
10 that would be done?

11 A This is how it was done at this time,
12 because I've had complaints from several inmates
13 that they weren't -- that they felt that I
14 wasn't actually delivering them

15 I've now went to a standard where I faxed
16 everything over and keep a copy of the
17 confirmation attached to it

18 Q But at this -- in this case, if you signed
19 your name to that, to the best of your knowledge
20 that document would have been delivered?

21 A. Yes, sir

22 Q Okay What was the date of that request,
23 sir?

24 A He sent it up on 2/1/09 and I received it
25 and had it delivered on 2/2/09

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1 Q Okay Thank you

2 ROBERT BONDS I don't have any
3 other questions of this witness, Your Honor

4 MATTHEW FRIEDMAN Just one
5 question

6 THE COURT Okay

7 CROSS EXAMINATION

8 BY MATTHEW FRIEDMAN

9 Q Captain Fraser, do you recall if you
10 personally gave that document to Mr Bennett?

11 A No, I do not

12 MATTHEW FRIEDMAN No other
13 questions, Your Honor

14 THE COURT You may step down

15 (WITNESS STEPS DOWN)

16 ROBERT BONDS That would be our
17 case, Your Honor

18 THE COURT Mr Friedman?

19 MATTHEW FRIEDMAN Thank you, Your
20 Honor The State would call Eddie Bennett

21 (WITNESS TAKES STAND)

22 EVERETT W BENNETT, Jr , being duly
23 sworn to tell the truth, the whole truth and
24 nothing but the truth, testified, as follows

25 DIRECT EXAMINATION

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1 BY MATTHEW FRIEDMAN

2 Q Good morning, Mr Bennett

3 A Good morning

4 Q How long have you been practicing law?

5 A I was licensed in November of 1980 -- about
6 thirty years, I guess

7 Q Were you appointed or retained in this
8 case?

9 A I was appointed on this case I think at
10 the time we had a system here in Colleton
11 County, we called it the first tier defender
12 system, and -- uh, I was actually paid by the
13 County to handle any conflicts where the public
14 defender's office conflicted They
15 automatically came to me first If I had a
16 conflict, then it would go to an individual
17 appointed, an attorney in order

18 Q Do you recall about how many times that you
19 met with the Applicant in this case?

20 A I don't remember exactly how many I would
21 -- probably -- just looking through my notes,
22 I'd say probably half a dozen times between the
23 time I was appointed and we went to trial

24 I think the first court appearance that we
25 made -- one of the first things I did for him,

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1 uh, -- you know, he'd been denied bond, for
2 burglary first, and armed robbery of course is
3 violent at the magistrate court level, so we
4 actually filed a Motion on November the 19th to
5 set a bond for him I remember that we tried
6 to get it heard on November 20th, but for some
7 reason it didn't get heard So -- well,
8 actually it did Okay On November 20th,
9 (affirmative nod) Judge -- I think Judge
10 Buckner -- no, excuse me Judge Collins Cooper
11 heard the bond Motion and he set a bond for
12 \$100,000 on all these charges

13 Q Do you recall if you discussed the elements
14 of the charges and what the State was required
15 to prove?

16 A Yeah, I -- I discuss that with all my
17 clients and, uh, -- one of the things that we
18 discussed was that we got a notice, uh, from the
19 solicitor's office that, you know, what we call
20 an LWOP notice that if he was convicted that
21 they would seek to invoke, you know, a life
22 sentence without parole Of course we discussed
23 that in detail Uh, -- and of course all the
24 elements of attempted armed robbery and burglary
25 first Of course, for burglary first you can

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1 get up to life anyhow Uh, -- so we -- we did
2 discuss all that

3 Q Based on his prior record, did you think
4 that there was any history about whether or not
5 he was eligible for LWOP?

6 A Well, we had a discussion about that and,
7 uh, you know, he told me that he had a YOA
8 sentence back in '93 And I told him that --
9 actually this came up during the, you know, we
10 were discussing the plea, with Judge Buckner, is
11 when I think that it came up, on January the 26th
12 or January the 27th Of course this was back in
13 '93 But normally armed robbery, you would not
14 be eligible for getting a YOA sentence for a
15 charge of that type because it's violent and
16 it's a most serious offense But he was
17 actually -- he was convicted in Charleston
18 County, uh, and I actually -- and the
19 solicitor's office, you know, I think, I gave
20 them a copy -- actually a certified copy, you
21 know -- of the sentencing sheet, the disposition
22 sheet So he actually got sentenced and it says
23 description armed robbery, very clearly, Statute
24 16-11-330, which is the armed robbery statute
25 He got a YOA sentence, so I guess his lawyer did

1 a pretty good job, getting a YOA sentence So
2 -- you know, we discussed that And of course,
3 you know, if he's got an armed robbery
4 conviction, no matter what sentence that we got,
5 the details and the description behind that,
6 he's eligible for LWOP

7 Q Do you recall if the Applicant gave a
8 confession in this case?

9 A Yeah He didn't give a written confession
10 but he actually gave a videotape interview where
11 he confessed, you know, to being at the -- to
12 being involved in it Ronnell Brown (phonetic)
13 was his codefendant

14 I don't know if anybody has brought this up
15 but my client, Mr Henderson, actually got shot
16 twice at the scene When the officers came to
17 the scene, uh, supposedly -- I don't know -- you
18 know, I think that he denied, you know, he said
19 that Ronnell Brown had the gun and -- that --
20 somebody had a nine millimeter

21 And when they broke -- where it was a home
22 invasion, where they broke into, uh, David
23 Pinckney was one of the people there -- well,
24 they had a -- Sean Thornton was the deputy
25 solicitor and he made reference to it and during

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1 the plea, uh, before Judge Buckner, that they
2 had a nine millimeter and the victims had an
3 AK-47 So they were kinda out-gunned, so to
4 speak So they -- you know, the victims in the
5 house opened fire with an AK-47 and actually hit
6 Donovan, he got hit twice He actually crawled
7 out into the yard When the officers got there,
8 they heard him -- you know, he was hurt, so they
9 went over and assisted him

10 Ronnell Brown and whoever else were --
11 there were two other people involved in it but I
12 don't think that they ever got identified or
13 arrested They just left him there You know,
14 they took off and left him kinda lying in the
15 woods, bleeding, you know.

16 And, uh, -- but anyhow, uh, -- and that
17 -- you know, him having confessed -- and he was
18 in the hospital about eleven days, I think,
19 because that actually came up during the plea
20 We discussed -- you know, should he get credit
21 because he wasn't in jail -- he was taken to the
22 hospital and, so, we were talking about whether
23 he should get credit for the eleven days while
24 he was in the hospital

25 So, you know, that wasn't a

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1 particularly strong case on my end -- I mean,
2 that's part of the reason -- you know, also I
3 prepared to go to trial in this case I had
4 already filed all the pretrial Motions, the voir
5 dire questions, uh, you know, the typical --
6 well, I've got copies of them But I -- we were
7 ready to go to trial and he decided, you know,
8 to enter a guilty plea You know, he didn't
9 think that he had -- you know, it would be
10 pretty hard to argue that he wasn't present at
11 the scene of the crime when he got shot twice

12 So that's part of the reason I -- and on
13 top fo that he had a confession, and he had a
14 long record

15 And, uh, -- so, I think he felt like -- I
16 mean, he indicated to me -- of course they
17 always -- you know, every criminal defendant
18 wants probation, you know, a suspended probation
19 sentence But I think he felt like eighteen
20 years certainly was preferable to a potential
21 life sentence

22 Q Did you discuss the confession with him?

23 A Yeah, we talked about that

24 Q Okay

25 A And I actually filed a Motion to try and

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1 keep it out We were going to argue that he was
2 on pain medication at the time, because at the
3 time that they interviewed him -- you know, he
4 got -- he got hit pretty good You know, he
5 told me that he was taking pain medication and
6 he didn't feel like he was, you know, fully
7 alert or -- you know, didn't have his full
8 faculties We were prepared to argue that

9 Q Did you discuss any negotiations that you
10 had with the solicitor's office?

11 A Yeah, the, uh, -- my memory is not perfect
12 at my age but I pulled the -- I kept a good file
13 on it The solicitor actually -- right after I
14 got appointed, uh, gave us a -- I don't know
15 whether this was originally given to me or, uh,
16 the public defender's office, but I got it But
17 it was dated -- it was October 15th and it says
18 "the offer expires and case must be pled by
19 11/10/2008" and that's where they made the
20 eighteen year offer "dependent on truthful
21 testimony against codefendant, Ronnell Brown "

22 And Amanda Spillee (phonetic), who was an
23 assistant solicitor that worked supposedly the
24 trial court is the one that signed it So
25 that's kinda what -- that's what instigated, you

1 know, commenced the plea negotiations

2 Q Was the eighteen what he ultimately pled
3 to?

4 A Yeah I -- you know, I -- I tried to get
5 them down but that's the best that they would
6 offer, and it was a negotiated plea

7 Q Did you explain the consequence of the
8 plea?

9 A Yeah, the main thing I told him was that
10 this was a no-parole offense, uh, just means --
11 and I explained to him -- that he would have to
12 serve at least eighty-five percent of the
13 sentence before he could be considered for any
14 kind of community supervision, which is a little
15 bit different than parole, but before he could
16 be considered for any type of early release or
17 anything like that

18 Judge Buckner had -- Judge Buckner does a
19 good job on pleas He actually explained to him
20 before he pled -- he does this in every case of
21 this type, but he -- that he may have to serve
22 the whole eighteen years, day for day So he
23 was fully advised of that

24 We also explained to him that under the
25 LWOP statute that he was eligible for that

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1 Certainly once he pled to these charges, if he
2 ever got convicted again of, you know, any
3 serious or most serious offense that he would be
4 eligible for LWOP at that time

5 Q Whose decision was it to plead guilty?

6 A It was his, uh, -- and I -- I leave that up
7 to -- my clients make that decision I never
8 try to make that decision and, uh, -- and I will
9 tell you what I tell (sic) Donovan, because I
10 tell all my clients this same thing 'I will
11 try to give you all the information that I can,
12 I will tell you what the law is, I will tell my
13 view of the facts, I will tell you what the
14 State has got to prove, but ultimately the
15 decision of whether or not to plead is yours
16 because no matter what happens in this case, I
17 am going home when it is over with and you will
18 be the one to serve the time, not me So you
19 get to make that decision ' I am pretty sure I
20 told almost the exact same thing to Donovan

21 Q The Applicant testified about a conflict of
22 interest and that you'd previously represented
23 the victim Can you explain that to the court?

24 A Yeah David Pinckney, I'd represented back
25 in 2001 He didn't retain me I got appointed

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1 on his case, it was a conflict case It was a
2 grand larceny case Don't quote me on this, I
3 think it involved a break-in at the Druid Hills
4 Apartments near Walterboro Uh, -- I didn't
5 know David prior to that, never heard from him
6 after it was over I think ultimately that
7 those charges got dismissed

8 They had nothing to do with this case and,
9 uh, that case -- that case was disposed of in
10 2001 When I got appointed on this case it was
11 almost eight years later To be honest with
12 you, I mean when I got appointed on Donovan's
13 case, I don't even know that I remembered, you
14 know, it had been so long ago, that I even
15 represented David Pinckney And, uh, being an
16 appointed case, you know, I got appointed on a
17 lot of cases of that type But David Pinckney
18 has been represented probably by most of the
19 criminal defense lawyers in Walterboro

20 So -- but as soon as I realized that I had
21 David Pinckney, I disclosed it to Donovan and I
22 told him -- and here's the way that I put it I
23 told him that David Pinckney was no friend of
24 mine, he wasn't an ongoing client, I was
25 appointed I did my duty, you know, I

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1 represented him but it wasn't like I had ongoing
2 talks with David Pinckney or any kind of ongoing
3 attorney-client relationship I never saw or
4 talked to David Pinckney after I finished
5 representing him in 2001

6 I told him that as far as I was
7 concerned that, you know, I -- I didn't think
8 that that would keep me from doing a good job
9 for him, but I had to disclose it to him because
10 it was, you know, a potential conflict of
11 interest I told him that if he wanted me off
12 the case that I understood, that it didn't hurt
13 my feelings, to just let me know what he wanted
14 to do

15 But I told him that I was automatically
16 going to file an affidavit of conflict because I
17 felt like that was my ethical duty and
18 obligation to disclose that conflict to the
19 court and to him and, uh, -- I don't remember
20 what -- I really don't remember exactly what he
21 said about it, but I went ahead and filed the
22 affidavit of conflict And normally -- I don't
23 remember every detail about this case but
24 normally when you file -- when I was first
25 chairing, defending, normally when you file an

1 affidavit of conflict and interest, it normally
2 is just kind of granting You know, it's just a
3 formality They normally grant it But for
4 some reason, and I don't remember why, Judge
5 Buckner did not feel like this posed an actual
6 conflict

7 And I will tell you this, I think this
8 was about the time -- and I think his -- the
9 South Carolina Supreme Court, even Justice Toal,
10 they were kinda -- they were taking a little bit
11 more of a, I guess, a relaxed attitude towards
12 conflicts of interest of this type You know,
13 it was a budget crunch in the State and all I
14 mean, like now the -- it used to be when public
15 defenders represented somebody in the past that,
16 you know, they automatically had a conflict but
17 now -- if you had three public defenders, the
18 other ones could handle it, you know, but --
19 they're not supposed to share information

20 But, anyhow, we actually had a hearing on
21 that, on January 13th, and I asked to be
22 relieved, asked to -- for them to relieve me and
23 to appoint somebody else to represent Donovan
24 And of course, I think Donovan -- I don't think
25 Donovan had any problem with me, but -- you

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1 know, most people in his situation would
2 probably feel better, no matter how hard I am
3 working for him, uh, you know, that -- I mean,
4 a lot of criminal defendants are a little
5 suspicious about that kind of stuff anyhow

6 But Judge Buckner, once he asked me about
7 my representation of David Pinckney, about
8 having more ongoing contact with him, if I'd
9 gained any knowledge of David Pinckney about
10 this case, etc , etc , he went through the whole
11 litany of questions and he made the decision
12 from the bench that he didn't feel like this
13 actually -- you know, posed an actual conflict
14 So he -- he ordered that I remain on the case

15 Q Do you think that the your prior
16 representation of the victim adversely affected
17 your representation of the Applicant in this
18 case?

19 A Didn't really mean anything to me I mean,
20 David Pinckney could walk in here right now and
21 I don't think I could recognize him So, I
22 mean, it really had nothing to do -- other than
23 I represented him in 2001 But, no, I had no
24 particular -- like I said, I had no ongoing
25 relationship or not ongoing -- I wasn't -- I was

1 trying to look out for Donovan I could care
2 less about David Pinckney

3 Q Do you recall the Applicant asking you to
4 file an appeal in this case?

5 A I do not -- I did not -- in fact, I looked
6 at my file again when they said that, and I
7 actually -- I actually let Bobby make a copy of
8 that I do not have a copy of that in my file,
9 and I don't remember seeing it

10 If I had gotten that, I would have normally
11 filed an appeal, even if I thought that he
12 didn't have any grounds, you know, I would have
13 normally done that

14 Uh, and I -- I mean, I know that it is a --
15 like -- Officer Fraser said that a lot of people
16 had been complaining that things hadn't been
17 delivered I don't know if he brought it to my
18 office or not, I'll be honest with you I'm
19 saying that maybe it is possible that he did but
20 -- I can tell you that I don't ever, personally,
21 recollect seeing that But, now I will tell you
22 that I don't have a perfect memory That's why
23 I do keep a -- as you can see, I keep a very
24 thick file and I did not see it in there

25 But regardless of that -- like I say,

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1 normally if I would have gotten it I would have
2 filed it but I -- I will tell you this, this was
3 a negotiated plea I think that it said that
4 his main ground for wanting to file an appeal to
5 the plea was because of the issue that he
6 contends about the affidavit of -- you know, the
7 conflict of interest with David Pinckney That
8 wasn't even discussed during the plea, you know
9 So I don't -- I mean, you can appeal anything
10 but I don't think that it would have gotten
11 anywhere is what I am saying I mean,
12 negotiating the plea, and the way that I read
13 the transcript of it, about -- I -- like I said,
14 I wouldn't have minded filing it if I had gotten
15 it, but I can tell you from prior experience
16 that it would have been a waste of time

17 MATTHEW FRIEDMAN I have nothing
18 further, Your Honor

19 THE COURT Mr Bonds?

20 ROBERT BONDS Thank you, Your
21 Honor

22 CROSS EXAMINATION

23 BY ROBERT BONDS

24 Q Mr Bennett, do you know when you were
25 appointed to represent him?

/

?

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1 A Let's see -- from what I am looking at, I
2 think it was sometime in October, but I don't
3 have an exact date I can try to find one

4 Q In reviewing your files, would you agree
5 with me that it was certain -- that prior to
6 November the 18th that you were -- of 2008,
7 perhaps October of 2008, you were appointed to
8 represent him?

9 A Yeah, October of 2008

10 Q And I think as early as December 11th, '08,
11 that you had a pretty good idea that the
12 solicitor's office was looking at eighteen years
13 or life without parole, is that fair?

14 A Yeah, but we got the plea offer, I think it
15 was sometime in October when they gave that --
16 and I think that I had just gotten appointed at
17 that time

18 Q And you wrote my client, your former
19 client, that he was going to be first up for
20 trial, I think, January 12th of January 16th, does
21 that sound right?

22 A Yeah, my ---

23 Q 2009?

24 A --- recollection of it was that it was the
25 week of January 26th

1 Q Okay

2 A Because we had to hear the Motion to be
3 relieved, was heard on January 13th I think
4 that's why the -- that it was scheduled like it
5 was, so that we could hear that Motion

6 Q Now, the -- you actually -- you filed --
7 you were appointed in October, but you didn't
8 file the affidavit of conflict until January 5th,
9 is that right?

10 A That's when the actual affidavit was filed?

11 Q Yes, sir

12 A And I don't know -- it may have taken me a
13 while to realize -- I always try to, you know,
14 do conflict changes Usually I remember if I
15 represented somebody, but apparently -- I think
16 what happened, Bobby, is that I didn't remember
17 David Pinckney's name but, you know, at some
18 point -- you know, I'm not always Johnny-on-the-
19 spot, but at some point we did realize, we
20 checked our records and we realized that we had
21 a conflict As soon as I realized -- you know,
22 when I say "conflict", that I had previously
23 represented the victim, David Pinckney As soon
24 as I realized it, I disclosed that to Donovan I
25 think I -- I actually discussed it with him in a

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1 meeting on January 2nd, even prior to doing that
2 letter

3 Q And -- may I have those exhibits

4 A When I say January 2nd, I mean January 2nd of
5 2009

6 Q Let me just ask you, is this a copy of --
7 Plaintiff's Exhibit 1 -- of your January letter
8 to Mr Henderson?

9 A Yes, sir

10 Q And is this a copy of your affidavit?

11 A Yes, this is the standard affidavit --
12 actually I think the public defender's office
13 sort of created that, and they graciously let me
14 borrow it and that's what we generally used

15 Q Okay The affidavit was filed and I guess
16 what I want to know is, do you believe that
17 there was a conflict, and, if so, is that why
18 you filed the affidavit?

19 A Well, there was a -- let me put it this
20 way, Bobby There was, uh, certainly a conflict
21 in the context that I had represented Pinckney
22 before, back in 2001

23 Q Yes, sir

24 A So there was a potential conflict of
25 interest, let's call it that

1 Q Okay

2 A And anything that I represented a victim
3 where I was appointed to represent a defendant,
4 I automatically do that I feel like that, you
5 know, under our ethical canons that's probably
6 the proper way to proceed Then I let the court
7 decide whether there is an actual, you know,
8 conflict

9 Q All right Mr Bennet, do you recognize
10 this document?

11 A Yeah, that's one of my -- that was written
12 the day after the hearing when Judge Buckner
13 actually, uh, refused to relieve me of counsel
14 in this case,

15 He -- basically what he -- and this isn't
16 quoting Judge Buckner, I am just kinda
17 paraphrasing or summarizing what he -- what his
18 ruling was, was that Judge Buckner had stated
19 that when I represented David Pinckney back in
20 2001, uh, that I did not gain any knowledge --
21 because it was unrelated charges That I didn't
22 have such knowledge from our relationship that
23 would pose an actual conflict of interest in
24 representing Donovan

25 But I told him that 'if you are still

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1 uncomfortable with that decision, -- I told him
2 previously that there was nothing that I could
3 do

4 Q I'm sorry?

5 A Previously I think he testified that -- he
6 said that I told him that there was nothing else
7 that he could do That's not true I did tell
8 him, uh, since the judge would not relieve me
9 that he could, his family or whatever, -- I told
10 him that and then in the letter I told him that
11 'you can hire another attorney to represent
12 you '

13 Anytime that you have appointed counsel, if
14 you or your family have enough money, you can go
15 out and hire somebody else to represent you, is
16 what I ---

17 ROBERT BONDS Mark this
18 Plaintiff's 4

19 MATTHEW FRIEDMAN Without
20 objection

21 (SO ENTERED AS APPLICANT'S EXHIBIT 4)

22 THE WITNESS But I did not ---

23 THE COURT Hold on a minute, let her
24 mark it

25 CROSS EXAMINATION CONTINUED

1 BY MR BONDS

2 Q Mr Bennett, you were commenting and I
3 didn't mean to cut you off

4 A That's okay, I was waiting for her (court
5 reporter) to mark it and all

6 What I was going to say, Mr Bonds, is that
7 I did not know what else that he could do as far
8 as the court system was concerned, because I had
9 already filed an affidavit of conflict and then
10 my Motion to be relieved based on the conflict
11 So to my knowledge, the only thing that I knew
12 that you could do was possibly try to hire
13 another lawyer

14 Q All right Did you think that was a matter
15 that needed to be appealed, at that point, or at
16 some later point?

17 A Uh, -- sure, I mean that's something that
18 possibly could be appealed at a later time It
19 couldn't have been appealed right then because
20 it was not dispositive of the case

21 Now, when we did -- when we did the plea
22 negotiations -- and, Bobby, I haven't really
23 researched this I haven't looked up a case on
24 this, but I would assume that once we did the
25 negotiated plea, based on his answers to Judge

1 Buckner's very detailed questions, he never
2 brought, you know, the conflict of interest up
3 at that time I think that possibly -- I don't
4 know Like I said, I would have to research it
5 but I think that possibly would waive the appeal
6 ability of any issue concerning the conflict of
7 interest

8 Q Did you explain to him, Mr Bennett, as to
9 whether or not he had a right to appeal at some
10 time -- Judge Buckner's decision denying the --
11 you being able to be relieved as counsel?

12 A I don't know that we had a specific
13 discussion about that but I did tell him that if
14 he went to trial certainly he would have thirty
15 days to appeal, you know, to appeal the trial if
16 he was not satisfied with the decision or the
17 verdict He was advised by Judge Buckner and I
18 think that I discussed it with him too that you
19 have ten days to file an appeal of a guilty
20 plea; you know, after the plea was taken I do
21 believe that I explained to him, Bobby, that
22 when you appeal a guilty plea that you are
23 fairly limited, you know, in what you can appeal
24 there Even more limited on a negotiated plea
25 Q. And Judge Buckner was the -- was Mister

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1 Henderson there and able to participate in the
2 hearing where the matter concerning you being
3 removed was addressed by Judge Buckner?

4 A I am pretty sure that he was there I
5 don't have the transcript of it

6 Q Was that on the record?

7 A Yeah, it was done in open court

8 Q Let me just ask you, Judge Buckner was also
9 the sentencing judge, correct?

10 A (Affirmative nod), he was the trial judge

11 Q And he was sentenced on, I believe, the 27th
12 of January, 2009?

13 A Let me check and I will tell you, -- (upon
14 review of file), yeah January the 27th, that's
15 correct

16 Q And as far as notice, did you receive any
17 oral or written notice from Mr Henderson
18 concerning his desire to have this matter --
19 have the case, the guilty plea appealed?

20 A Like I said, I do not recollect ever seeing
21 that document that you have

22 Q Okay

23 A Dated February 2nd, or something, 2009

24 I don't personally recollect it I looked
25 through my file and I didn't see it I don't

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1 ever remember, you know, seeing Corporal Fraser
2 give me anything in my office If he brought
3 something to my office -- I am not saying -- you
4 know, that's for the court to decide He said
5 that he wasn't really sure whether -- he said he
6 thought maybe he did or something, but, uh, he
7 didn't seem too sure of that himself But I
8 don't remember ever seeing it, Bobby

9 Q Just for the record, we're referring to
10 this document, you're referring to Plaintiff's
11 Exhibit 3, Request to Staff?

12 A Yeah

13 Q Have you had an opportunity this morning to
14 review that document?

15 A Yeah, I looked at it

16 Q And the date of the request was 2/1/09?

17 A Yeah And I think that he said that he
18 delivered it on February 2nd to -- now, he did
19 say that he didn't deliver it to me, I think he
20 pretty much said that, but I don't remember ever
21 seeing that

22 Q Had you received that notice, you would
23 have filed an appeal?

24 A Yeah, if I had gotten that document, yeah,
25 as a matter of -- I always do that Whether or

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1 not I think they've got an appeal or not, that's
2 my policy

3 Q Certainly the conflict issue could have
4 been one of those issues?

5 A Yeah, I mean, you could have raised it I
6 don't think that you could have successfully
7 raised it, but you could have raised it

8 Q Thank you, Mr Bennett

9 ROBERT BONDS Court's indulgence

10 CROSS EXAMINATION RESUMED

11 BY ROBERT BONDS

12 Q Mr Bennett, did you go over the file with
13 Mr Henderson?

14 A Yeah, we gave him a complete copy of
15 everything

16 Q You gave him a copy of his statement?

17 A Yeah Every case that I, uh, -- every case
18 that I handle, Bobby, we, uh, we make a complete
19 copy of the -- when we do our discovery, we get
20 the Rule 5 discovery back and I make a complete
21 copy of that and, uh, we take it to the client
22 at the jailhouse so that they -- so that they
23 can see everything I am a strong believer in
24 the client being able to see everything that is
25 in his file

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1 I am pretty sure that he and I looked at
2 the tape -- or either I took it over there where
3 he could view it You know, they have a -- a
4 room where you can look at things over there

5 Q Do you specifically recall going over the
6 pictures of the crime scene with him?

7 A I actually have them in the file so, yeah,
8 I am positive that we did

9 ROBERT BONDS I don't have any
10 other questions

11 THE COURT Mr Friedman?

12 MATTHEW FRIEDMAN No other
13 questions, Your Honor

14 THE COURT All right, you may step
15 down

16 (WITNESS STEPS DOWN)

17 THE COURT Anything further, Mr
18 Friedman?

19 MATTHEW FRIEDMAN No, sir

20 THE COURT Anything? Mr Bonds?

21 ROBERT BONDS No, sir

22 THE COURT Oral argument?

23 ROBERT BONDS No, sir

24 MATTHEW FRIEDMAN Nothing further
25 from the State, Your Honor

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1 THE COURT I will take a look at this
2 and I will let you know

3 (HEARING CONCLUDED)

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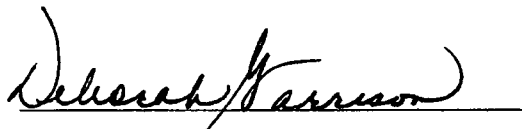
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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison, official court reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held before The Honorable D Craig Brown on April 21, 2011, as transcribed from the audio recording prepared by Vivian Cross, Circuit Court Reporter,

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

February 26, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF COLLETON)

2009-CP-15-691

Donovan Henderson, #199129,)

Applicant,)

v)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent)

 PATRICIA C. GRANT
 COLLETON COUNTY
 COMMON PLEAS
 2011 MAY 13 AM 11:03

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 4, 2009. The Respondent made its Return on February 1, 2010. An evidentiary hearing into the matter was convened on April 21, 2011 at the Colleton County Courthouse. The Applicant was present at the hearing and was represented by Robert J. Bonds, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Everett W. Bennett, Jr., Esquire, testified at the hearing. Captain Charles Frazier also testified at the hearing. This Court had before it the records of the Colleton County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, the PCR application, Respondent's Return thereto, a letter dated January 5, 2009 from counsel to Applicant, an affidavit from counsel, a request to staff dated February 1, 2009 from Applicant to the Colleton County Detention Center, and a letter dated January 14, 2009 from counsel to Applicant.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Colleton County. The Applicant was indicted at the June 2008 term of the Colleton County Grand Jury for burglary – 1st degree (2008-GS-15-295). Everett W. Bennett, Jr., Esquire, represented the Applicant. On January 27, 2009, the Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable Perry M. Buckner sentenced the Applicant to confinement for eighteen (18) years. The Applicant did not appeal the guilty plea or the sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel in that counsel failed to object to indictment obtained through wilful acts of perjury and prosecutorial misconduct.
2. Conflict of interest in that counsel had represented the victim on previous charges.
3. Involuntary guilty plea in that Applicant was not advised that his sentence would include a mandatory term of CSP (community supervision program).
4. Due process violation.

At the hearing, Applicant only proceeded on the allegations of conflict of interest, ineffective assistance of counsel for failure to challenge whether Applicant was eligible for life without parole (LWOP), and failure to file a direct appeal.

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 his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the

07-18-2011 12:28pm From-COLL CTY CLERK OF COURT COMMON PLEAS

relevant findings of fact and conclusions of law as required by S C Code Ann § 17-27-80 (2003)

Applicant testified that counsel told him a week before court that he had previously represented the victim. He asserted there was a hearing to relieve counsel about a week before court, but Judge Buckner denied the motion to relieve counsel. Applicant testified that he wanted to appeal the conflict of interest issue. He testified that he completed a request to staff indicating that he wanted his attorney to file an appeal. Applicant asserted that he was not eligible for LWOP because he received a Youthful Offender Act (YOA) sentence on his 1993 armed robbery.

Captain Charles Frazier testified that he worked at the Colliton County Detention Center and he recognized his signature on the request to staff dated February 1, 2009 from Applicant. He testified that to the best of his knowledge he delivered the request to counsel's office on February 2, 2009. Captain Frazier testified that he did not personally hand the request to Mr. Bennett. He testified that he now faxes the request forms to attorneys, but that was not his practice in February 2009.

Plea counsel testified that he met with Applicant about six times prior to the plea hearing. He testified that Applicant gave a videotaped confession. Counsel testified that Applicant was shot twice at the scene and was in the hospital for eleven days. He asserted that he moved to suppress the confession because Applicant was on pain medication at the time of the confession. Counsel testified that Applicant did not have a strong case for trial, but he was prepared to go to trial until Applicant decided to plead guilty. He testified that a negotiated sentence of eighteen (18) years was the best deal the solicitor would offer in this case. He contended that he explained the significance of a negotiated plea to Applicant, and he informed him that burglary -

1st degree was a no-parole offense and he would have to serve 80% of the sentence. He testified that it was Applicant's decision to plead guilty. Counsel testified that he believed Applicant was eligible for LWOP based on his prior armed robbery conviction. He testified that he discussed the LWOP issue in detail with Applicant.

Counsel testified that he does not recall Applicant asking him to file an appeal and he does not recall seeing the request to staff from Applicant. He asserted that he would have filed an appeal if Applicant had asked, even though it was a negotiated plea. Counsel testified that Applicant potentially waived the conflict of interest issue by pleading guilty.

Counsel testified that he represented the victim in a grand larceny case in 2001, which was about eight years before this case. He asserted that he did not know the victim before the 2001 case and he never spoke with him after the case concluded. He testified that he informed Applicant as soon as he realized the potential conflict and told Applicant that he had no ongoing attorney-client relationship with victim. Counsel told Applicant that he did not think the prior representation would keep him from effectively representing Applicant. He asserted that he filed an affidavit of conflict and a motion to be relieved as counsel, but Judge Buckner did not believe there was an actual conflict and denied the motion. Counsel testified that his prior representation of the victim did not adversely affect his representation of the Applicant. He testified that he did not think the Applicant had any problem with his representation, and he asserted that the conflict was not even discussed during the plea hearing.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP, 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 (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, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate 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." Id. at 625 (citing Strickland, 466 U.S. 668). 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." Id. 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).

This Court finds that counsel's testimony was credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof.

The record reflects that Applicant understood the nature of the charges and the possible punishments. At the plea hearing, he indicated that he was fully satisfied with counsel and that no one threatened him or promised him anything to get him to plead guilty. He told the court that he understood the terms of the negotiated sentence. He also admitted guilt at the plea hearing. This Court finds that Applicant's plea was entered voluntarily and intelligently with a full understanding of the consequences. This Court finds that Applicant understood the terms of the negotiated sentence and that it was Applicant's decision to plead guilty.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977), Strickland, 466 U.S. at 668, Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel obtained a favorable negotiated sentence for Applicant considering that Applicant was facing exposure of confinement for life for burglary - 1st degree plus an attempted armed robbery charge. In addition, the State had noticed Applicant for LWOP based on a prior conviction for armed robbery. This Court finds that counsel properly advised Applicant regarding his eligibility for LWOP. Applicant was eligible for LWOP based on his prior conviction for armed robbery, a most serious offense. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that counsel was not ineffective for failing to file a direct appeal. Further, this Court finds that Applicant is not entitled to a belated direct appeal. The United

States Supreme Court has rejected a bright line rule that counsel must always file an appeal in a criminal case. Roe v Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1079 (2000). The Court went on to hold that a professionally reasonable attorney should, in most cases, consult with the defendant regarding an appeal. Id.

In determining whether an attorney should consult with the criminal defendant concerning an appeal, the totality of the circumstances must be considered. Id. In examining the totality of the circumstances, courts should consider (1) whether a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal), or (2) whether this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See Rule 227(g)(1), SCACR, Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

Trial counsel is not required to file a notice of appeal without specifically being asked to do so. Roe, 528 U.S. 470. In the present case, there is no indication that Applicant specifically asked counsel to file a notice of appeal. Since Applicant pled guilty to a negotiated plea agreement, there was also no reason for counsel to believe that Applicant wanted to file an appeal.

Moreover, this Court finds that Applicant waived his right to challenge the conflict of interest ruling when he pled guilty. A guilty plea must be unconditional. State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001). Conditional pleas are not recognized in South Carolina. State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982). "The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes waiver of all prior claims of constitutional rights or

deprivations thereof" Id. Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations State v. Snowden, 371 S C 331, 638 S.E 2d 91 (Ct. App. 2006), Whetsell v. State, 276 S C 295, 277 S.E 2d 891 (1981), see also State v. Munsch, 287 S C 313, 314, 338 S.E 2d 329, 330 (1985) (holding that a guilty plea "leaves open for review only the sufficiency of the indictment and waives all other defenses"), State v. Griffin, 914 S W 2d 564 (Tenn. Crim. App. 1995) (finding that defendant waived appellate review of juvenile court transfer by pleading guilty without reserving question)

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S C 385, 389, 570 S E 2d 172, 174 (2002)

Conflict of Interest

Applicant contends that counsel's prior representation of the victim resulted in a conflict of interest. This Court finds that no conflict of interest actually materialized. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S C 357, 426 S E 2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict

of interest adversely affected his lawyer's performance " Duncan v. State, 281 S C 435, 315 S E 2d 809 (1984) The applicant bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance Jackson v. State, 329 S C 345, 495 S.E.2d 768 (1998)

Here, Applicant has failed to establish that counsel's prior representation of the victim adversely affected his representation. Counsel testified that the prior representation was eight years earlier and he had no contact with the victim after the 2001 case was concluded. The charge on which he represented the victim was completely unrelated to the Applicant's charges. Counsel even testified that he would not recognize the victim. Moreover, out of an abundance of caution, counsel filed a motion to be relieved and Judge Buckner found no actual conflict and denied the motion. This Court finds that no conflict of interest actually materialized.

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, including involuntary guilty plea and due process violation, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

07-18-2011 12:31pm From-COLL CTY CLERK OF COURT COMMON PLEAS

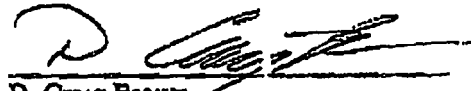
T-102 P 018/041 F-898

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order 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 served and 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 9th day of May, 2011


D. Craig Brown
Presiding Judge
14th Judicial Circuit

Felton, South Carolina.

The State of South Carolina

County of Colleton

2008 JUL 13 11 0 18

COURT OF GENERAL SESSIONS

June, Term 2008

THE STATE

vs

Donovan P Henderson

Indictment for

Burglary / Burglary (After June 20, 1985) First degree

SC Code 16-11 0311
CDR Code 0079

WITNESSES

A Stallings CCSO

ARREST WARRANT NUMBER

71380

March 19 2008

ACTION OF GRAND JURY

TRUE BILL

Anne Line Callender

Foreperson of Grand Jury
Date 06/12/08

INDICT

Foreperson of Petit Jury
Date

INDICT

C. J. Henderson

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

INDICTMENT

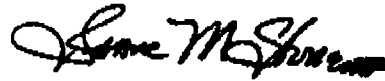
2008 GS 15 0295

At a Court of General Sessions, convened on June 12, 2008, the Grand Jurors of Colleton County present upon their oath

Burglary / Burglary (After June 20, 1985) - First degree

That in Colleton County, South Carolina, on or about March 8, 2008, the Defendant, Donovan P Henderson, did enter the dwelling of David Pinckney, located at 8546 Charleston Highway in Walterboro, without consent and with the intent to commit a crime therein during the nighttime hours and armed with a handgun, in violation of Section 16 11-311 of the South Carolina Code of Laws (1976, as amended)

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



Isaac M Stone
Solicitor