

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Charleston County

Stephanie P. McDonald, Circuit Court Judge

---

**RECEIVED**

SEP 11 2013

**S.C. Supreme Court**

KEVIS LAVOR LEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000048

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APPENDIX

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS  
 COUNTY OF CHARLESTON 2010-GS-10-1319

STATE OF SOUTH CAROLINA )  
 -vs- ) TRANSCRIPT OF RECORD  
 KEVIS LAVOR LEE, ) December 10, 2010  
 Defendant. ) Charleston, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

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

Michael Nelson, Assistant Solicitor  
Attorney for the State

Andrew Grimes, Esquire  
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR  
Circuit Court Reporter

1 (December 10, 2010.)

2 THE COURT: Are you Kevis Lavor Lee?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Mr. Lee, you're here today  
5 indicted for assault and battery with intent to kill.  
6 You could get up to 20 years for that. I'm told you want  
7 to plead guilty; is that right?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. I want you to  
10 understand that you have a right to a jury trial which  
11 you waive.

12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. This is a strike  
15 offense. It's also a no parole offense. Did your lawyer  
16 go over that with you?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: So you understand after today you  
19 are going to have one of the most serious strike offense  
20 types against you, and if you ever get convicted of  
21 another strike offense, you will go to jail for the rest  
22 of your life without the possibility of parole.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. Now, you have the

1 right to a jury trial, and you waive your right to a jury  
2 trial when you plead guilty. If you change your mind  
3 about this, you let me know. We'll arrange that for you.  
4 The state then has to present enough evidence to convince  
5 12 jurors that you're guilty beyond a reasonable doubt.  
6 All 12 jurors have to agree you're guilty in order to  
7 convict you, and, if convicted, you have the right to  
8 appeal. You can challenge the state's evidence, put up  
9 evidence of your own, testify if you want, and if you  
10 don't want to testify, I will tell the jury they're not  
11 to hold that against you while deliberating.

12 Do you understand those rights?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And you want to waive them and  
15 plead guilty?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And you're pleading guilty  
18 because you're guilty?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Are you under the influence of  
21 any drugs or alcohol today?

22 THE DEFENDANT: No, sir.

23 THE COURT: Do you need to spend any more  
24 time with your lawyer?

25 THE DEFENDANT: No, sir.

1 THE COURT: Are you satisfied with his  
2 representation?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And you and he sat down and  
5 talked about the evidence the state has against you?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And he told you what the law is  
8 on assault and battery with intent to kill?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Based on those discussions, you  
11 decided you didn't want to go to trial; is that correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You don't want to put up a  
14 defense?

15 THE DEFENDANT: No, sir.

16 THE COURT: You don't want to tell the jury  
17 your side of the story?

18 THE DEFENDANT: No, sir.

19 THE COURT: You don't want to try to suppress  
20 any of the evidence?

21 THE DEFENDANT: No, sir.

22 THE COURT: Has your lawyer done everything  
23 you've asked him to do?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You're satisfied with his

1 representation?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Anybody promise you anything or  
4 threaten you to get you to plead guilty other than you  
5 negotiated a plea for 70 months to run concurrent with a  
6 federal sentence you're serving? Other than that, has  
7 anybody promised you anything or threatened you to get  
8 you to plead guilty?

9 THE DEFENDANT: No, sir.

10 THE COURT: All right. How old are you?

11 THE DEFENDANT: Twenty-four.

12 THE COURT: How far did you get in school?

13 THE DEFENDANT: I dropped out in ninth grade,  
14 but I got my GED.

15 THE COURT: Married?

16 THE DEFENDANT: No. I got a fiancée.

17 THE COURT: All right. Does he understand  
18 what he's doing waiving his right to a jury trial and  
19 pleading guilty, Mr. Grimes?

20 MR. GRIMES: Yes, sir.

21 THE COURT: All right. I find his plea is  
22 freely, voluntarily, and intelligently made.

23 What would the state like to tell me?

24 MR. NELSON: Thank you, Judge. This happened  
25 on August 6 of '09 at [REDACTED] in North

1 Charleston. This defendant and the victim were in a  
2 verbal argument. The defendant proceeded to pull out a  
3 pistol, shoot the victim in the abdomen area. Victim was  
4 transported to the hospital and had surgery to recover.  
5 Judge he has a prior record, in '04, public disorderly  
6 conduct; '06, PWID cocaine and PWID prox; an '08 simple  
7 possession.

8 We have negotiated, as you said. We would  
9 ask you to accept that negotiated sentence.

10 THE COURT: Mr. Grimes, anything you want to  
11 say?

12 MR. GRIMES: Yes, sir, I ask you to accept  
13 the negotiated sentence. He is 24, he has one child who  
14 is four years old. His family is in the electronic  
15 business, and after he finishes his sentence he would  
16 like to go work with them, maybe eventually take that  
17 business over in North Charleston. They do a lot of  
18 commercial and wiring work and residential work, lights  
19 up, wire houses.

20 ~~I ask the sentence be served at the federal~~  
21 ~~bureau of prisons.~~ I think they already have -- they  
22 have better programs there. They get more training, and,  
23 practically speaking, it would save the state some money  
24 not to house somebody, and we would ask that you go along  
25 with the negotiation of the current sentence, credit for

1 time served, and be allowed to do his sentence at the  
2 federal bureau of prisons.

3 Thank you.

4 THE COURT: Would you like to say anything,  
5 Mr. Lee?

6 THE DEFENDANT: No, sir.

7 THE COURT: All right. The sentence is 70  
8 months. ~~It will run concurrent with the federal sentence~~  
9 ~~you're serving.~~ You'll get credit for 376 days. Good  
10 luck.

11 - - -

12 (Whereupon, the proceedings were concluded.)

13 - - -

14  
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24  
25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 10th of December.

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

February 4, 2012



Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA )  
County of Charleston )

2011-CP-10-9169  
IN THE COURT OF COMMON PLEAS

Kevin LAVOR Lee #329783  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

APPLICATION FOR  
POST-CONVICTION RELIEF

**FILED**  
2011 DEC 12 PM 4:34  
JULIE J. AUGUSTINE  
CLERK OF COURT

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 Ridgeland Correctional Institution
2. Name and location of Court which imposed sentence Charleston County  
General Sessions Court
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) 2010-GS-1001319 (Abw:K)

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CLERK OF COURT

(b) Assault and battery with intent to kill.

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

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

(a) 12-14-10

(b) 70 months ran concurrent with fed statute 2:10-CR-00037 SB

(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. N/A

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

(b) the result in each such Court to which you appealed:

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

ii. N/A

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

(c) the date of each such result:

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

ii. N/A

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

(d) if known, citations of any written opinion or orders entered pursuant to such results:

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

ii. N/A

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

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) I agreed to an negotiated sentence

(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 trial counsel

(b) Violation of due process

(c) Breach of trust

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

(a) I did not receive certain stipulations of

(b) negotiated plea agreement.

(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? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

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

(a) the specific nature thereof:

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

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

iii. N/A

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

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

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

ii. N/A

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

iv. N/A

(c) the disposition thereof:

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

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

iii. N/A

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

(d) the date of each such disposition:

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

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

iii. N/A

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

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

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

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

iii. N/A

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?

N.O

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

(a) which grounds have been presented:

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

ii. N/A

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

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

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

ii. N/A

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

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) I agreed with negotiate plea
- (b) Was led to believe I was receiving
- (c) what I plead to

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? N/A
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

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. Andrew David Erimes  
101 Meeting Street, 5th Floor Charleston, SC 29401
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. sentencing
  - ii. preliminary hearing
  - iii. \_\_\_\_\_

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

A correction of my negotiated  
sentence that was imposed.

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

yes, District of South Carolina  
united states District court

Revised 3/2003

STATE OF SOUTH CAROLINA )

County of Charleston )

VERIFICATION

I, Kevis Lee, 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.

Kevis Lee  
do Rec

SWORN to and subscribed before me this 8  
day of December, 2011.

Virginia Bolson (L.S.)  
Notary Public

My Commission Expires: May 20, 2021

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

I, Kevin Lee, 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.

Kevin Lee  
Kevin Applicant

SWORN or affirmed to and subscribed before me this  
8 day of December, 2011.

Virginia Robinson  
Notary Public

My Commission Expires: May 20, 2021



## II.

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

1. Ineffective assistance of counsel in that Applicant did not receive certain stipulations of the negotiated plea agreement.
2. Violation of due process.
3. Breach of trust.

## 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 (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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that 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, 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.

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

V.

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

VI.

WHEREFORE, having made its Return, the State requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior 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

Feb 10, 2012.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 )  
 )  
 KEVIS LAVOR LEE )  
 )  
 Applicant, )  
 )  
 vs )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

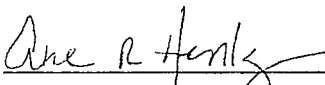
2011-CP-10-9169

AFFIDAVIT OF SERVICE BY MAIL

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

**James Bradley, Esquire**  
 Richardson, Patrick, Westbrook & Brickman LLC  
 Mt. Pleasant, SC 29465

DATED this 10<sup>th</sup> day of February 2012

  
 \_\_\_\_\_  
 Anne R. Henley, Legal Assistant  
 For Respondent



1 THE COURT: Is this Mr. Lee? Kevis Lee?

2 MR. NIXON: Yes, Your Honor, it is.

3 THE COURT: Okay, happy to hear from you.

4 MR. NIXON: Thank you, Your Honor, may it please  
5 the Court.

6 If I may beg the Court's indulgence to give you  
7 a little bit of a background. I can tell you that I  
8 have been speaking with my client and had met with him  
9 previously at the SCDC.

10 And just a few minutes ago he is indicating to  
11 me that he wants to withdraw. And I will tell the  
12 Court that he is going back and forth on it. And if I  
13 can give you just a little bit of a background as to  
14 what is going on, might help explain why we are where we  
15 are.

16 THE COURT: Please.

17 MR. NIXON: Mr. Lee was sentenced to some  
18 federal charges prior to him pleading guilty to the  
19 state charges. Mr. Andrew Grimes in the public  
20 defender's office represented him on a state ABWIK  
21 charge.

22 On the federal sentence he had received a  
23 70-month sentence. And so our position is when he came  
24 into court on the state charges he was pleading only  
25 because he understood that not only was he going to get

1 the same 70-month negotiated sentence on the state  
2 charges, but that it was also going to be served in the  
3 federal penitentiary as opposed to the state facility.

4 That didn't happen. After the plea, we would  
5 present evidence that we believe would show that the  
6 public defender realized that it had been done  
7 basically backwards. In order to get him in the  
8 federal system, that it would have had to have been --  
9 the state charges would have had to have been taken  
10 care of first and then the federal charges. And it  
11 wasn't done that way.

12 And to his great credit this lawyer did a great  
13 job. He went and contacted the assistant federal  
14 public defenders and got them to bring the case back in  
15 front of a federal judge who actually did an amended  
16 federal sentence.

17 So just to give you a little bit of background.  
18 He pled in March of 2010. He was in state court in  
19 early December of 2010. And then within a matter of a  
20 couple weeks after that, end of December of that same  
21 year, went back in front of the federal judge and the  
22 sentence was amended.

23 And I'm no expert in the federal practice, but  
24 when I look at the order it seems clear that Judge  
25 Blatt remanded him to the custody of the federal

1 marshals and said that he was going to do the 70-months  
2 sentence concurrently. And I read it to say that it  
3 was going to be done in a federal institution.

4 So that should be all good and there should not  
5 be a problem. Well, apparently, and again with my  
6 limited experience with the BOP, the bureau of prisons,  
7 I think the public defender, as well as the federal  
8 public defenders, talked to different people, did all  
9 these different things with the bureau of prisons.

10 And the bureau of prisons just kind of with  
11 their blinders on said, we don't care. I'm not going  
12 to say they disregarded the order of a federal judge,  
13 but --

14 THE COURT: But they did.

15 MR. NIXON: -- he is still there. He is still  
16 in state custody.

17 THE COURT: Okay.

18 MR. NIXON: So fast-forward here to today.

19 what Mr. Lee has wanted is to be able to serve  
20 his time in the federal system. And he would testify  
21 today that he pled guilty under the belief that he was  
22 going to do that, and I believe his public defender  
23 would say that's what he had told him he would get.

24 The reason why he is wavering on it a little bit  
25 right now, and little bit more history. So what I did

1 is I contacted the assistant solicitor and the deputy  
2 solicitor, Mr. Durant, who had said in an e-mail to me  
3 after I explained to him the situation that they would  
4 not oppose me trying to get him in the federal system.

5 But in order for that to happen we have to win  
6 this PCR today. And then we have this ABWIK charge  
7 still pending. But they had agreed to a PR bond. That  
8 if I was to win this PCR, and again they're not saying  
9 that I should, they're just saying hypothetically if  
10 that were to happen, that they would not object to a PR  
11 bond.

12 Then I have talked to assistant federal public  
13 defenders. And I think it's as simple as a phone call  
14 to the federal marshals to say, you got this guy here,  
15 he's no longer got a conviction on the state charge,  
16 here is the federal sentence, you got to come get him.

17 And what has been represented to me by some  
18 federal public defenders is the marshals will come get  
19 him, take him, and that would be the end of the story.  
20 We bring him back sometime later to basically re-plead  
21 on this state charge to a concurrent sentence, but he  
22 would be in the federal system.

23 So then fast-forward to where we are with the  
24 assistant attorney general and their policy is they're  
25 not going to agree not to appeal this case, again

1 hypothetically if we were to prevail on it. And that's  
2 where we are today.

3           And that is why he is wavering a little bit  
4 because we were at the point we thought we could get it  
5 done. But now if the information that he has is they  
6 can't say whether or not they're going to appeal it, in  
7 fact their policy is they are going to appeal anything  
8 that is granted, it complicates things a whole lot more  
9 for him.

10           So he is struggling with that issue. But like I  
11 said, I met with him I think June 27th, went up to  
12 MacDougall, talked with him. Talked with him several  
13 times this morning. Explained this to him back in the  
14 hold, the lockup back there. And the last thing he  
15 said to me, and again he keeps going back and forth, I  
16 want to withdraw.

17           I said, well, let's bring you into the court and  
18 see where we are.

19           So if I could ask him one more time and see  
20 where we are?

21           THE COURT: You may.

22           (Off the record discussion.)

23           MR. NIXON: All right, thank you, Your Honor.

24           He has indicated that he wants to go forward on  
25 it.

1 THE COURT: Okay.

2 MR. NIXON: So we are ready to go forward and  
3 ready to call our first witness.

4 THE COURT: Happy to hear from you. I'm ready.

5 MR. NIXON: We call Andrew Grimes to the stand,  
6 Your Honor.

7 MR. ANDREW GRIMES,  
8 after having first been sworn to tell the truth, the  
9 whole truth and nothing but the truth testified on her  
10 oath as follows:

11 MR. NIXON: May it please the Court, Your Honor.

12 THE COURT: Yes, sir.

13 DIRECT EXAMINATION

14 BY MR. NIXON:

15 Q Mr. Grimes, you are an assistant public defender  
16 here in Charleston County?

17 A Yes, sir.

18 Q How long have you been doing that?

19 A Since 2006 in Charleston County.

20 Q And in that time you've represented a number of  
21 defendants on guilty pleas and at trials?

22 A Yes, sir.

23 Q Is criminal defense practice your sole area of  
24 practice at this time?

25 A Yes, sir.

1 Q And it has been for how long?

2 A I would say 2004 I was a full-time public  
3 defender in walterboro.

4 Q You are familiar with Mr. Lee's case?

5 A Yes, sir.

6 Q And you represented him on an ABWIK charge back  
7 in December 2010 when he came into court and pled  
8 guilty?

9 A Yes, sir.

10 Q At the time that he pled guilty to that charge,  
11 you were aware of a federal sentence that he had pled  
12 to and received a 70-month sentence; is that correct?

13 A Yes, sir.

14 Q Was it your intention to have him -- well, let  
15 me ask you this. Did you negotiate or work with the  
16 solicitor's office to work out a plea deal for him?

17 A Yes, sir.

18 Q And was that to have a 70-month sentence run  
19 concurrent to his federal sentence?

20 A No, it was a 10-year sentence to run concurrent  
21 with his federal sentence which was 70 months.

22 Q Okay. I'm going to show you, if I could.

23 (Whereupon, Petitioner's Exhibit No. 1 is marked  
24 for identification.)

25 Q Go ahead, Mr. Grimes.

1 A I think I may have mis-spoke. I think the  
2 original offer may have been a 10-year offer.

3 Q I'm going to show you Petitioner's Exhibit No. 1  
4 which is the sentencing sheet from that day.

5 Will you take a second to look at that?

6 A Yes, sir.

7 Q Does that indicate that it was a negotiated  
8 sentence?

9 A Yes, sir.

10 Q And the sentence on there is 70 months to be  
11 concurrent with his federal sentence; is that right?

12 A Yes, sir.

13 Q Does that help refresh your recollection at all  
14 about what that plea deal was?

15 A Yes, sir.

16 Q Tell us what that is or what that was, please.

17 A 70 months on the ABWIK charge to run concurrent  
18 with the federal sentence on a felony possession  
19 charge.

20 Q Okay. Was it your understanding that that  
21 sentence was going to be served in the federal system?

22 A Yes, sir.

23 Q Did you communicate that with Mr. Lee?

24 A Yes, sir.

25 Q Do you think that's what he understood was going

1 to happen to him once he plead guilty on the state  
2 charges?

3 A Yes, sir.

4 Q That he was going to be sent to the bureau of  
5 prisons and do his sentence there concurrent to his  
6 federal sentence but in a federal facility?

7 A Yes, sir.

8 Q Did you all have much discussion about that or  
9 talk about that? Was that something that was important  
10 to him?

11 A I don't recall how much discussion we had. But  
12 I do -- I know, step back, I know he had to file a  
13 letter with an agency in Columbia after all this.

14 And going through the file I knew it was  
15 important to him. And when I did federal criminal  
16 defense work I know their facilities are a little bit  
17 better, we talked about that.

18 And I think it was -- I don't want to say it was  
19 the only reason he pled, but I would say it was an  
20 important reason why he pled.

21 Q And in fact there are different type of work  
22 facilities, different types of training and other  
23 things that you can get in a federal facility that you  
24 are not going to be -- that's not going to be made  
25 available to an inmate in the state facility?

1           A     Yes, sir. I know I had a client before where he  
2 got his termite inspection, got some other job skills.  
3 This is nothing near what the state system would have.

4                     (Whereupon, Petitioner's Exhibit No. 2 is marked  
5 for identification.)

6           Q     Let me show you what is marked Petitioner's  
7 Exhibit No. 2 which is a district court amended  
8 sentence.

9                     Take a second to look at that, please.

10          A     Yes, sir.

11          Q     That date on that sentence -- well, let me ask  
12 you this way. After he pled guilty on the state  
13 charge, did you realize that what you had told him was  
14 going to happen probably was not going to happen?

15          A     Yes, sir. Ms. Proctor, in our office, had  
16 watched the plea. And when I walking out she kind of  
17 grabbed me and she spoke outside and she said that she  
18 has had some problems with that happening, and I may  
19 have sort of done it backwards.

20                     I guess I assumed since he had already been  
21 sentenced federally that that would sort of be the  
22 controlling sentence, controlling charge.

23                     And based upon that I sent an e-mail to the  
24 South Carolina Association of Criminal Defense Lawyers  
25 to see if I had messed up. And if I had, what I could

1 do to fix it. And I got a couple responses back  
2 saying, yeah, you did mess up. And here is how you go  
3 about fixing it.

4 And I think Nick Bianci, who I work with here  
5 when he was a state prosecutor, he sent me an e-mail to  
6 the effect like he would be the white knight coming in  
7 to save me. I thanked him for that.

8 Bob Haley, who is his federal public defender,  
9 they were all able to get together and come up with the  
10 amended order. And we thought that would solve the  
11 problem.

12 Q And that is Petitioner's Exhibit No. 2 that you  
13 just referenced?

14 A Yes, sir.

15 Q And so they took him back into federal court and  
16 that was an amended federal order dated in December of  
17 2010, a couple of weeks after he pled in state court?

18 A Yes. Looks like dated December 23rd, 2010. I'm  
19 not sure if he went to court or if it was just motions  
20 where everyone agreed.

21 Q And on page 2 of that under imprisonment up at  
22 the very top, what does it indicate from the order from  
23 the federal judge where he is going to be serving his  
24 time?

25 A In the United States bureau of prisons for 70

1 months.

2 Q Then down below it indicates he has been  
3 remanded to the custody of the federal marshals?

4 A Yes, sir.

5 Q You had indicated that you had to deal with an  
6 agency in Columbia in response to Mr. Lee's issue.

7 Did you indicate to them that based upon your  
8 advice that he would do his sentence in federal prison  
9 that Mr. Lee accepted the offer?

10 A Yes, sir.

11 Q Is that still your position today?

12 A Yes, sir.

13 MR. NIXON: I don't have any other questions,  
14 Your Honor. Thank you.

15 THE COURT: Thank you. Cross-examination.

16 MS. WILLIAMS: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MS. WILLIAMS:

19 Q Mr. Grimes, you were retained to represent the  
20 applicant, weren't you?

21 A No, ma'am.

22 Q You were hired as private counsel?

23 A No, ma'am.

24 Q I meant to say were you appointed to represent  
25 the applicant?

1 A Yes, ma'am.

2 Q Yes. Sorry.

3 How frequently did you meet with the applicant  
4 before his plea?

5 A I don't recall. I was looking through my office  
6 and our storage for the file. And had my parallel,  
7 officer manager, the file couldn't be located.

8 But, I don't think I met with him as much as I  
9 maybe normally meet with clients because he had been  
10 sentenced federally, there were no bond issues or  
11 issues like that.

12 And the shooting charge, we weren't sure if the  
13 victims would come forward to prosecute. There was  
14 concerns over a deal gone bad type of case.

15 Q Did you discuss the elements of the charges  
16 against the applicant, and what the State was required  
17 to prove with Mr. Lee?

18 A I'm sure I had. I don't know what date that  
19 would be, though.

20 Q When you discussed this plea offer with the  
21 solicitor's office before Mr. Lee pled guilty, did they  
22 mention anything in writing about Mr. Lee serving his  
23 sentence in the federal prison, or was just the  
24 substance of the plea offer the 70-months time  
25 consecutive to the federal time? I mean concurrent to

1 the federal time?

2 A I don't know if they discussed it or we  
3 discussed it where he would serve it at. I think Mr.  
4 Young probably -- I guess speculation -- probably would  
5 have said he had no control over where he served it at.

6 Like I said before, I assumed he would go to  
7 federal custody so I wasn't going to make a big deal  
8 about it. And we wanted to make sure it was concurrent  
9 with the other stuff.

10 And in negotiating with the state, that was the  
11 important part from my point of view.

12 Q Do you recall what the state's evidence was  
13 against Mr. Lee?

14 A Again, not offhand. But I think they had  
15 statements from the victim. And I don't think the gun  
16 that he was charged with in federal court I think was a  
17 separate incident, I don't think that was connected.

18 And I think, you know, we may have been -- may  
19 not have disputed the shooting itself, maybe whether it  
20 was he had malice aforethought or some other defense  
21 like that.

22 Q Okay. You also had testified that the serving  
23 of his sentence in federal prison was not the only  
24 reason that he pled guilt; that's correct?

25 A Yes, ma'am.

1 Q Could you discuss the other reasons why he pled  
2 guilty and was influenced to plead guilt that day?

3 A Probably I would imagine you are basically in a  
4 free shooting. He's already doing 70 months  
5 regardless. So this charge is concurrent, that would  
6 be one reason. He would not be looking at 20 years on  
7 that charge.

8 And just the risk of going to trial and losing  
9 is inherent with any type of serious case, and we would  
10 avoid that risk.

11 Q You also discussed that once you felt like you  
12 missed up in regard to your advice to Mr. Lee, you kind  
13 of solicited what you should do or advice from, you  
14 named an organization?

15 A Yes, ma'am.

16 Q What organization did you name?

17 A South Carolina Association of Criminal Defense  
18 Lawyers.

19 Q And once you received that information, did you  
20 do your best to do everything you could to fix the  
21 situation, the errors that you felt that you made?

22 A Yes, ma'am.

23 MS. WILLIAMS: No further questions, Your Honor.

24 THE COURT: Thank you. Any redirect?

25 MR. NIXON: Just briefly.

## 1 REDIRECT EXAMINATION

2 BY MR. NIXON:

3 Q But it's fair to say the error that you felt you  
4 make, you were not able to correct despite what you  
5 tried to do to fix that?6 A Yeah, he is obviously in state custody despite  
7 Judge Blatt's order.8 Q And again, you had indicated that part of the  
9 reason, or a big part of the reason why he agreed to  
10 plead guilty is because of the representation you made  
11 that he would be doing that in the federal system?

12 A Yes, sir.

13 MR. NIXON: Thank you. No further questions,  
14 Your Honor.

15 MS. WILLIAMS: Nothing further.

16 THE COURT: Okay.

17 MR. NIXON: Call Mr. Lee to the stand, Your  
18 Honor.19 MR. KEVIS LEE,  
20 after having first been sworn to tell the truth, the  
21 whole truth and nothing but the truth testified on her  
22 oath as follows:

23 MR. NIXON: May it please the Court, Your Honor.

24 THE COURT: Yes, sir.

25 DIRECT EXAMINATION

1 BY MR. NIXON:

2 Q Mr. Lee, you are currently doing a 70-month  
3 sentence on assault and battery with intent to kill?

4 A Yes, sir.

5 Q Have you also been sentenced in federal court to  
6 70 months for other charges?

7 A Yes, sir.

8 Q And your understanding is those charges are  
9 being served concurrently, or at the same time?

10 A Yes, sir.

11 Q Mr. Grimes, was he your public defender on the  
12 state charges?

13 A Yes, sir.

14 Q And you've discussed those charges with him  
15 prior to coming into court and pleading guilty back in  
16 December of 2010?

17 A Yes, sir.

18 Q At the time that you came in in December of  
19 2010, you had already pled guilt to the federal charges  
20 and received the federal 70-month sentence; is that  
21 right?

22 A Yes, sir.

23 Q Speak up a little bit, okay. She is taking down  
24 everything you are saying, if she can't hear you.

25 Did Mr. Grimes talk to you about serving your

1 sentence in the federal system?

2 A Yes, sir.

3 Q And when you went in and pled guilty, did you  
4 expect that after you pled guilty you were going to be  
5 put into the custody of the federal system?

6 A Yes, sir.

7 Q And that was -- was that part of the reason why  
8 you pled guilty is because you wanted to do your time  
9 in the federal system?

10 A Yes, sir.

11 Q Why did you want to do your time in the federal  
12 system?

13 A Because I already had to because of my sentence.

14 Q Have you heard about programs or opportunities  
15 or education, job type stuff that are available to  
16 inmates in the federal system?

17 A Yes, sir.

18 Q Is it your understanding that those are more  
19 opportunities and better opportunities for yourself in  
20 the federal system than there would be in the state  
21 system?

22 A Yes, sir.

23 Q In fact in the state system, you're at  
24 MacDougall right now, right?

25 A Yes, sir.

1 Q Are they doing anything or providing you any  
2 kind of opportunities for education or learning a skill  
3 or a trade?

4 A No, sir.

5 Q When you get out of prison, you want to be able  
6 to become a productive member of society and work or  
7 somehow provide for yourself; is that right?

8 A Yes, sir.

9 Q Do you think the federal system would better  
10 enable you to do that in the future?

11 A I know that.

12 Q And knowing that, is that part of the reason why  
13 you wanted to plead so you knew that you would get into  
14 the federal system?

15 A Yes, sir.

16 Q Did Mr. Grimes represent to you or tell you that  
17 if you pled guilty on these State charges that they  
18 would be concurrent, and that you would do them in the  
19 federal system?

20 A Yes, sir.

21 Q If you had known that you weren't going to be  
22 able to do it in the federal system, would you have  
23 pled guilty?

24 A No, sir.

25 MR. NIXON: No further questions, Your Honor.

1 Thank You.

2 THE COURT: Thank you.

3 CROSS-EXAMINATION

4 BY MS. WILLIAMS:

5 Q Mr. Lee, you said that a part of the reason that  
6 you pled guilty is because Mr. Grimes told you -- or  
7 you were expecting to serve your time in federal  
8 prison. That's correct, right?

9 A Yes.

10 Q You said that was part of the reason. So what  
11 were the other reasons that you pled guilty?

12 A Other reason? Because I didn't want to go to  
13 trial. And I didn't -- wanted to get everything over  
14 with because I have children out there and everything.

15 MS. WILLIAMS: Just a second, Your Honor.

16 THE COURT: Sure.

17 Q (By Ms. Williams) Mr. Lee, so today you are  
18 saying your plea was involuntarily entered because you  
19 didn't -- you thought you would be serving your  
20 sentence in federal prison, right?

21 A Yes, ma'am.

22 Q And do you also realize that had you gone to  
23 trial and you were convicted by the jury, that this may  
24 have been the same result?

25 A No, ma'am.

1 Q Had you gone to trial and been convicted, you  
2 may still have been serving your time in federal prison  
3 now?

4 MR. NIXON: Objection, speculation.

5 THE COURT: Well, sustained. But I think you  
6 misstated your question anyway.

7 MS. WILLIAMS: No further questions, Your Honor.

8 THE COURT: Any redirect?

9 MR. NIXON: None, Your Honor.

10 THE COURT: Okay. Sir, you may step down.

11 MR. NIXON: I don't have any other witnesses,  
12 Your Honor. If you would entertain closing comments, I  
13 would be glad to make those as well.

14 THE COURT: Anything you want to tell me, I'm  
15 happy to listen.

16 MR. NIXON: Thank you, Your Honor.

17 Again, thank you for allowing me to be able to  
18 say what I did on the front end. I think it's clear  
19 from the case that Mr. Grimes did everything he could  
20 do, but still acknowledged that he did make a mistake.  
21 But for that mistake, he would not have pled guilty.

22 He came in and represented to this person, my  
23 client, that if you plead guilty you are going to do it  
24 in the federal system. And he has testified that the  
25 reason why he pled guilty was knowing that he would do

1 it in the federal system.

2 And the reality of it is, I think Mr. Grimes did  
3 everything he could and did as far as the charges go.  
4 But you are sitting here faced with a client, who has  
5 already gotten 70 months in the federal system, you  
6 have negotiated a sentence with the State for the exact  
7 same sentence to be run concurrent.

8 And obviously both have testified to the  
9 benefits, and I think that goes to the prejudice prong.  
10 Obviously we have got to show there was  
11 ineffectiveness, that it fell below the reasonableness  
12 of another person in that position which I think has  
13 been shown by the admission of Mr. Grimes, that he did  
14 not do what he should have done as far as being able to  
15 establish where he was going to be.

16 He told his client that he was going to do it in  
17 the federal system and he was wrong. And thankfully he  
18 acknowledged that. And also he has testified that he  
19 relied on that.

20 But as far as the prejudice goes, it's not a  
21 situation of it would have been same if he would have  
22 gone to trial or if he would have done something else.  
23 The fact of the matter is the federal government has  
24 more money. They have more opportunities to provide to  
25 these inmates.

1           If he is guilty of a crime in the federal  
2 system, which he has pled guilty to, he is not  
3 challenging that. He did this with the understanding  
4 that that's where he would be. And he would be offered  
5 those opportunities.

6           And, you know, a lot of people get upset when  
7 you start talking about opportunities in a federal  
8 prison and why somebody would rather do their time in  
9 one place or another. But what I tried to establish  
10 with him is the reason why he wants to do that is to  
11 better himself so that when he does get out there is  
12 going to be less of a likelihood that he is going to be  
13 back in prison at some point. And he is not getting  
14 those things in the state system.

15           He knew that at the time that he pled. So  
16 that's part of the reason why he did what he did.

17           I'm going to go in. I'm guilty. I'm going to  
18 get the same sentence. It's all great for him because  
19 he is going to be doing it on the federal system.

20           So I think under the case law, Your Honor, that  
21 it's supported. I have got cases that I can hand up,  
22 Thompson v State, the Dade case. The most recent  
23 Supreme Court case that came down about Missouri v Frye  
24 talking about plea counsel making sure that they  
25 communicate plea offers and everything to a client to

1 make sure that they understand and know what is going  
2 on.

3 I would argue that those cases are akin to this  
4 one. Because whatever that defense lawyer tells that  
5 client, and I think it's similar in the appeal cases,  
6 if you don't tell them something, or if you don't make  
7 representations to that person, then you can't be  
8 necessarily held accountable.

9 But if you go in and affirmatively say, this is  
10 what is going to happen, you know either you're going  
11 to get an appeal, or you are going to do your time  
12 wherever, or this is the plea deal that you are going  
13 to get, whatever, or if you don't plead guilty you're  
14 going to lose X, Y and Z.

15 If you tell them something that's not accurate,  
16 then you are responsible for those representations.  
17 And I think that's what happened in this case. And I  
18 think there is a long line of cases that show that  
19 there was a deficiency on that when you are advising  
20 your client of something that is simply not true and  
21 incorrect and they rely on that when they plead guilty.

22 So I would submit to the Court, and respectfully  
23 ask that you entertain this PCR. And consider granting  
24 this PCR to him for ineffective assistance of counsel  
25 for those reasons the for the testimony that you heard

1 today.

2 And obviously I started off prior to the  
3 testimony talking to you a little bit about the  
4 procedure, which might not necessarily concern this  
5 Court and I understand that. But it concerned him and  
6 we will see where that goes if that happens.

7 But I still think he deserves a fair shot at  
8 that. He is here because he was told something that  
9 was simply not truly. And he relied on it. And he  
10 relied on that to plead guilty.

11 And I think the law is clear if that happens  
12 that he is entitled to have his post-conviction relief  
13 granted. Thank you, Your Honor.

14 THE COURT: Thank you, sir.

15 Anything further?

16 MS. WILLIAMS: Yes, Your Honor.

17 It's the State's position that the applicant  
18 failed in that the sole reason that he pled guilty was  
19 not based on trial counsel's representations.

20 Also, Your Honor, the State upheld the portion  
21 of their negotiated plea agreement. The provision is  
22 not only reflected on the record after being brought  
23 out to the Court's attention by trial counsel, it's  
24 also reflected on the sentencing sheet.

25 Trial counsel should not be held to be

1 ineffective because the federal bureau of prisons  
2 didn't come pick up the applicant. Once he realized  
3 what he thought was a mistake, he went and got a  
4 federal judge to amend the order saying he is in the  
5 custody of the federal bureau of prison.

6 And also, Your Honor, to the prejudice point.  
7 If he had proceeded to trial, it may have resulted in a  
8 similar outcome. He pled guilty for reasons other than  
9 serving his time in the federal prison. So it's the  
10 State's position that we request for the Court to deny  
11 the applicant's post-conviction relief application.

12 THE COURT: At the time of this plea, what  
13 sentence was he facing on the ABWIK charge? Or assault  
14 with intent to kill, I think, charge?

15 MR. NIXON: The sentencing sheet on the charge  
16 at the time was 0 to 20, Your Honor, is what the  
17 sentence was.

18 THE COURT: Okay. Anything further?

19 MR. NIXON: No, Your Honor. Thank you.

20 THE COURT: I appreciate the zealous advocacy  
21 that Mr. Lee has been so fortunate to have. He has got  
22 an excellent PCR lawyer. He had an excellent attorney  
23 in Mr. Grimes. And, quite frankly, I don't see  
24 anything here that indicates that he was ineffective or  
25 that the petitioner was in any way prejudiced by -- I

1 don't see the evidence as showing that Mr. Grimes  
2 represented that he would be in a federal prison.

3 I think he indicated he would do the best he  
4 could to work it out that way, and the transcript  
5 reflects that.

6 On page 5 of Judge Young's guilty plea the Court  
7 asked Mr. Lee: Anybody promise you anything or  
8 threaten you to get you to plead guilty other than you  
9 negotiated a plea for 70 months to run concurrent with  
10 the federal sentence you are serving? Other than that,  
11 has anybody promised you anything or threatened you to  
12 get you to plead guilty?

13 The defendant: No, sir.

14 Then when we are looking at the mitigation  
15 argument, and Mr. Grimes' portion in explaining to  
16 Judge Young why he should accept this negotiated plea  
17 of essentially no additional time. And as Mr. Grimes  
18 noted, a free shooting.

19 Yes, sir, I ask you to accept the negotiated  
20 sentence. And then the next paragraph, I ask the  
21 sentence to be served at the federal bureau of prisons,  
22 and he explains the reasons why, they have more  
23 training and more money. And asks that he be allowed  
24 to do it.

25 There is never any representations that that was

1 a done deal or that was going to happen. He was asking  
2 the Court for that.

3 Mr. Grimes doesn't have the power to make the  
4 federal bureau of prisons take him. Judge Young  
5 doesn't. And apparently Judge Blatt doesn't, which I  
6 still don't understand. And if I really wanted to play  
7 hardball I might file a rule to show cause in federal  
8 court, but, you know, that's just me.

9 He doesn't have a constitutional right to choose  
10 which facility he gets housed in, federal or state.  
11 And based on the evidence that was presented, the  
12 possibility that he might be in a federal prison as  
13 opposed to the state system was not the only reason  
14 that he pled guilty.

15 Mr. Grimes worked a miracle for him getting him  
16 a negotiated plea of 70 months concurrent. There is no  
17 reasonable probability that there would have been any  
18 difference had he gone to trial.

19 If he had gone to trial -- or other than he  
20 would have likely gotten a much stiffer sentence -- had  
21 he gone to trial and been convicted, by the way you all  
22 explained the chronology of federal versus state  
23 incarceration works, he still would be in the state  
24 prison. So, the application is denied. Thank you.

25 MR. NIXON: Thank you, Your Honor.

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(Whereupon, the proceedings in this matter  
before the Court were adjourned.)

\* \* \* \* \*

C E R T I F I C A T E

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I, the undersigned, ANNE BOULEY MEYER,  
Official Court Reporter for the Ninth Judicial  
Circuit of the State of South Carolina, do hereby  
certify that the foregoing is a true, accurate, and  
complete transcript of record, and of all the  
proceedings had and evidence introduced in the above  
captioned case, relative to appeal, in the Circuit  
Court for South Carolina, on the indicated date.

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

*Anne Bouley Meyer*

Anne Bouley Meyer, RPR  
Circuit Court Reporter

CC  
AG  
SCL  
CS

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 )  
 Kevis Lavor Lee, #329783 )  
 )  
 ) Applicant, )  
 )  
 ) v. )  
 )  
 State of South Carolina, )  
 )  
 ) Respondent. )

IN THE COURT OF COMMON PLEAS  
 2011-CP-10-9169

**ORDER OF DISMISSAL**

FILED  
 2012 DEC 17 PM 12:26  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY \_\_\_\_\_

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed December 12, 2011. The Respondent made its Return on February 10, 2012. An evidentiary hearing into the matter was convened on July 25, 2012, at the Charleston County Courthouse. The Applicant was present at the hearing and represented by William Nixon, Jr., Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Andrew Grimes, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and Respondent's Return thereto, the Applicant's General Sessions sentencing sheet (App. Ex. 1), and the Applicant's Amended Federal sentencing sheet (App. Ex. 2).

**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 Charleston County. The Applicant was indicted at the March 2010 term of the Charleston County Grand Jury for assault and battery with intent to kill (2010-

AM  
-1-

GS-10-1319). Andrew Grimes, Esquire, represented the Applicant. The Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable Roger M. Young sentenced the Applicant to confinement for seventy (70) months. The sentences were to run concurrently with the Applicant's federal sentence. Applicant did not appeal the plea or sentence.

### ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that Applicant did not receive certain stipulations of the negotiated plea agreement.
2. Violation of due process.
3. Breach of trust.

At the hearing, Applicant waived all grounds for relief except ineffective assistance of counsel.

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

At the evidentiary hearing, plea counsel testified that he was appointed to represent the Applicant and that he met with the Applicant frequently to discuss the case. Counsel testified that he was aware of the Applicant's federal sentence of seventy (70) months and that he was able to negotiate a plea deal for the Applicant. He testified that the plea agreement involved the Applicant pleading to seventy (70) months for assault and battery with intent to kill to be served concurrently with his federal sentence. Plea counsel testified that he does not recall if the plea offer from the solicitor mentioned anything about where the Applicant would serve his sentence, but that it is unlikely that the solicitor had control over

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where the time was served. Counsel also testified that it was his understanding that the Applicant would serve the sentence in Federal prison and that he communicated this to the Applicant.

Plea counsel testified that the serving of his sentence in Federal prison was an important reason why the Applicant pled guilty, but that it was not the only reason the Applicant pled guilty. He testified that it is likely that the Applicant also pled guilty to avoid the risk of going to trial and because the plea offer was a sentence concurrent to time that he was already facing.

Plea counsel testified that after the Applicant's guilty plea proceeding, he learned that he may have misadvised the Applicant about being able to serve his time in Federal prison. Counsel testified that he spoke with several other lawyers including the Applicant's Federal public defender to figure out how to remedy the situation. Lastly, counsel testified that he was able to get a Federal judge to amend the Federal sentencing order to indicate that the Applicant be remanded to the custody of the Federal Marshals and that he serve his time in the Federal Bureau of Prisons.

At the evidentiary hearing, the Applicant testified that he discussed with his attorney the serving of his state time which was concurrent with his Federal time in the Federal prison. He testified that he expected to be put in Federal prison and that he wanted to serve his time there because the Federal prison has better opportunities than the South Carolina Department of Corrections. The Applicant testified further that where he served his time was only part of the reason why he pled guilty. He testified that he also pled guilty because he did not want to go to trial and because he just wanted to get everything resolved because he had children at home. Lastly, the Applicant testified that had he known he was not going to serve his time in the Federal prison system he would not have pled guilty.

#### 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),



SCRCF; 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). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712

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(1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

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's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he was guilty of these offenses. Applicant told the plea court that he was satisfied with his attorney and that no one had threatened him or promised him anything to plead guilty. This Court finds that Applicant understood the terms of the negotiated sentence.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds 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 the Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel's representation did not fall

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below an objective standard of reasonableness.

This Court finds that trial counsel was not ineffective for advising the Applicant that he would be able to serve his state sentence in the federal prison system. This Court finds that that the Applicant has failed to carry his burden of proving that counsel's performance was deficient. This Court finds that trial counsel's performance was reasonable under professional norms. Plea counsel provided credible testimony regarding his representation of the Applicant. The record reflects that counsel never promised or represented to the Applicant that as a part of the Applicant's plea offer he would be able to serve his sentence in the federal prison system. Counsel had no power or authority to secure the Applicant housing in the federal prison system.

The record also reflects that the State never promised the Applicant that he would serve his time in the federal prison in exchange for his guilty plea. Counsel testified that he did not recall the State making that part of the plea agreement. During the plea proceeding, the Applicant stated that he was not promised anything to plead guilty other than a negotiated plea for seventy months to run concurrent with his federal sentence. (T. 5).

This Court finds further that trial counsel took reasonable steps necessary to make the Court and the Bureau of Prison aware of the Applicant's desire to serve his time in the federal prison system. At the Applicant's plea proceeding, counsel requested that the Applicant be allowed to serve his time in federal prison. Plea counsel said "I ask the sentence be served at the federal bureau of prisons. I think they already have--they have better programs there. They get more training, and practically speaking, it would save the state some money not to house somebody, and we would ask that you go along with the negotiation of the current sentence, credit for time served, and be allowed to do his sentence at the federal bureau of prisons." (T. 6-7).

In addition, plea counsel successfully had the Applicant's federal sentencing sheet amended by a

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federal judge to state that "The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of seventy (70) months to run concurrently with the seventy (70) month sentence imposed by the Honorable Roger Young on December 14, 2010 in the case of State of South Carolina v. Kevis Lee". (App. Ex. 2)

This Court also finds that the Applicant put forth no evidence to show that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty. This Court finds that the possibility of serving his time in federal prison was not the only reason the Applicant pled guilty. Both the Applicant and plea counsel testified that the Applicant had other incentives to plead guilty including avoiding a jury trial and the receipt of a sentence that was concurrent to the time he was already serving for the federal charge.

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 her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

#### All Other Allegations

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

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CONCLUSION


Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violation or deprivation 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.

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 12th day of December, 2012.

  
The Honorable Stephanie McDonald  
Presiding Judge  
9th Judicial Circuit

Charleston, South Carolina.

CERTIFICATE OF SERVICE

I, William H. Nixon, Jr., attorney for the Appellant, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the Notice of Appeal to:

Ashleigh Wilson, Esquire  
S.C. Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211

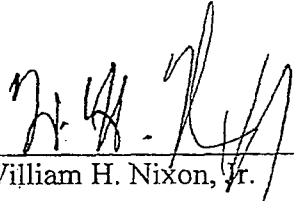
Office of Appellate Defense  
PO Box 11433  
Columbia, SC 29211-1433

Kevis Lavor Lee #329783 c/o  
Ridgeland Correctional Institution  
P.O. Box 2039  
Ridgeland, SC 29936

**RECEIVED**

JAN 10 2013

S.C. Supreme Court

  
\_\_\_\_\_  
William H. Nixon, Jr.

January 7, 2013  
Charleston, South Carolina

HEV20091207026

WITNESSES

JAMES STURKIE

North Charleston Police Department

AGENCY CASE NUMBER

2009034903

ARREST WARRANT NUMBER

1103745

DATE OF ARREST

December 4, 2009

ACTION OF GRAND JURY

TRUE BILL

*Dr. Lewis*  
Foreperson of Grand Jury

Date: MAR 02 2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010GS1001319

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

March Term 2010

THE STATE

09 7283 (01)

vs.

KEVIS LAVOR LEE

DOB:

B/M

Indictment for

Assault And Battery With Intent To Kill

FILED

3/12/2010 11:57:28 AM  
JULIE J. ARMSTRONG  
CLERK OF COURT

