

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 20 2013

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2009-CP-40-2523

Jaime E. Marrero,.....Petitioner,

v.

State of South Carolina,.....Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Amber B. Carter, S.C. Bar No. 78706
Ethan R. Ware, S.C. Bar No. 7990
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211-1390
(803) 799-9800
Attorneys for Petitioner

Other Counsel of Record:

Megan E. Harrigan
Assistant Attorney General
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3970
Attorney for Respondent

INDEX

CIRCUIT COURT'S ORDER OF DISMISSAL OF PETITIONER'S POST-CONVICTION RELIEF APPLICATION	001
CIRCUIT COURT'S ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT	026
PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF	027
PETITIONER'S AMENDED APPLICATION FOR POST-CONVICTION RELIEF	034
TRANSCRIPT OF SEPTEMBER 25, 2008 GUILTY PLEA	043
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING	064
PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT	180

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jaime Eduardo Marrero, #330923,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2009-CP-40-02523

ORDER OF DISMISSAL

JEANETTE W. MENDE
C.C.P. & G.S.

2013 MAR - 8 PM 3:18

RICHLAND COUNTY
FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed April 7, 2009. An evidentiary hearing into the matter was convened before this Court on Monday, January 14, 2013, at the Richland County Courthouse. Applicant was present at the hearing with counsel, Ethan Ware, Esquire, and Amber Martella, Esquire. Respondent was represented by Robert D. Comey of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former defense attorney, James H. May, Esquire. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the June 2006 term of the Richland County Grand Jury for Murder and Attempted Armed Robbery (2006-GS-40-03620, -03621). He was represented by then Assistant Public Defender James H. May on the charges. On September 25, 2008, Applicant proceeded to jury trial before the Honorable Lee S. Alford. After three (3) days

of trial, Applicant accepted a state plea offer for a recommended forty (40) year cap sentence under which he pled guilty to the charges as indicted. Judge Alford accepted the guilty plea and sentenced Applicant to thirty-eight (38) years imprisonment for Murder and twenty (20) years imprisonment for Attempted Armed Robbery, with the sentences running concurrently.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:¹

1. Failure by counsel for Mr. Marrero to disclose or challenge judicial bias and error, which resulted in Mr. Marrero's plea bargain;
2. Lack of evidence to support the plea bargain demanded by trial counsel;
3. Counsel at trial failed to properly cross-examine key witnesses in the case which would have provided exculpatory testimony, including but not limited to Ms. Hannah Fuller, Mr. Chris Ellis, Mr. Thomas Rice, and Mrs. Lamont Ellis;

4. Despite Mr. Marrero proclaiming his innocence, failure by trial counsel to adequately challenge the prosecution's case such that Mr. Marrero had no choice but to enter a plea bargain at insistence of counsel to avoid the death penalty;
5. Counsel for Mr. Marrero did not request or seek a psychological evaluation of Mr. Marrero despite testimony of psychological problems in the record; and
6. There is evidence investigators for Richland County failed to disclose another suspect to the crime alleged was known to be present in the vicinity of the crime scene at the time of the crime.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

¹ These are the allegations set forth initially by Applicant through his amended post-conviction relief application. However, any allegations not specifically addressed below in this Order were not raised at the evidentiary hearing and, therefore, are deemed to be voluntarily waived.

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

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant

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

Failure to Investigate Mental Health History

Applicant first alleges counsel was ineffective for failing to properly investigate Applicant's mental health history and to have him mentally evaluated prior to trial. At the PCR hearing, Applicant testified he had a "pretty rough" childhood growing up as he and his siblings were often left by his parents to take of themselves. He stated his father was in the military and his mother "would go out partying a lot" and that they eventually divorced. Applicant testified he couldn't recall whether he ever went through counseling as a youth for his parents' divorce, but said his brother has told him they did attend counseling as a result of an episode where a neighbor attempted to molest Applicant. Applicant noted he did not remember attending such counseling.

Applicant went on, saying he served in the U.S. Navy as a jet engine mechanic on the U.S.S. Enterprise during Operation Enduring Freedom, which "initiated attacks against Afghanistan". During his service, Applicant said he saw his shipmate's head "split...wide open" by a helicopter propeller, but did not recall going to counseling as a result. Applicant stated counsel never asked him about this incident, nor did he ever refer Applicant to anyone to have a mental evaluation done. He went on to say he did not recall what happened on the day of the incident except for "when the shot was fired". Applicant testified he lost roughly eighty (80) pounds during his time in jail, which he believed was a result of being depressed. Applicant said he told his prior attorney from the public defender's office, Danielle Payne, about having blacked

out during the incident and then recounted an incident when a friend of his was shot and killed in his presence.

On cross-examination, Applicant agreed he had been using a fair amount of illicit drugs at the time of the incident, and readily conceded he had been using ecstasy and cocaine that night. He reiterated that he blacked out and didn't remember anything about the robbery or shooting until he "came to" when the gunshot was fired. Applicant stated that in reviewing case law and the facts of his case, he saw "mitigating circumstances that would have...pointed to a possible mental illness issue...[that] was never explored on [his] behalf." Applicant said he was not able to say whether he was mentally incompetent to stand trial at the time, but acknowledged he told Judge Alford under oath at the plea hearing he wasn't under the influence of mind-altering drugs, alcohol or any other substance that would interfere with his ability to understand what he was doing, nor was he suffering from any mental, emotional or nervous conditions that would interfere with his judgment or ability to understand the entry of his plea. He finished by plainly agreeing the decision to enter the guilty-plea was "his decision alone".

Counsel testified he represented Applicant on the challenged charges in 2008 in his capacity as an Assistant Public Defender for Richland County. He noted he and the Chief Public Defender for the Fifth Judicial Circuit, Doug Strickler, took over representation as the third set of attorneys in the matter after both of Applicant's former attorneys, Betsy Franklin and Danielle Payne, left the public defender's office. Counsel noted prior to Applicant's trial he had tried "at least three" other cases. When asked about Applicant's mental capacity, counsel testified that based on his "interactions with [Applicant]", he believed Applicant "is a highly intelligent, mentally stable person" and "there was never any indication" he saw during their interactions that Applicant was not competent, "nor was there any indication" of such a mental deficiency to

[Handwritten signature]

either of Applicant's prior two defense attorneys based upon the contents of their defense files. Counsel went on, saying there "was never any indication that [Applicant] showed any signs beside he was a bright, very capable, very affable, very likeable person" and based upon "the standard in South Carolina to...not be criminally responsible or [to be] mentally [in]competent", there was "absolutely no question in [counsel's] mind that at the time [he] represented [Applicant]", Applicant was both competent and criminally responsible. Counsel stated he and Applicant talked about whether Applicant could use insanity at trial "a lot", but explicitly stated Applicant was not insane at the time of the shooting.

When asked whether he ever referred Applicant to a mental health professional for an evaluation, counsel said "[t]here was never any evidence to support...a claim" that Applicant needed to be evaluated, so he did not. Counsel reiterated that point, saying "there was never any indication whatsoever that [Applicant] had any kind of mental defect to warrant" having him evaluated and "there was never any, never any question about [Applicant's] mental competency or criminal responsibility." Counsel then noted "[t]here is no diminished capacity defense in South Carolina" that could have been developed as a defense for trial, and there "was no indication [Applicant] had any kind of mental defect" to mitigate him criminal responsibility. He also noted he did not have any doubt Applicant was not insane at the time of the crime based upon his sixty-plus (60+) pretrial meetings with Applicant.

Counsel stated he discussed Applicant's competency with prior counsel, Danielle Payne, when he took over Applicant's representation and said she had "looked at all avenues regarding what [Applicant] told...her" and she too did not believe Applicant needed to be evaluated. Counsel noted it is the public defender's office's "practice [that] once a person is quote/unquote tagged as a potential death penalty case, a complete workup is done in preparation[,].....at which

time all kinds of mental health records" on the client are obtained, and in this case counsel was sure they "obtained [Applicant's] military service records" as part of their preparation.

On cross-examination, counsel testified he met with Applicant "approximately between 50 and 60 times" to discuss the charges and to prepare the case for trial, during which he "never" had any concerns about Applicant's ability to understand and/or participate in their discussions. He explicitly noted he saw "zero" reason for having Applicant evaluated based on their extensive interactions. Counsel stated he "can't imagine there would ever be...testimony" available from a psychiatrist or psychologist finding Applicant incompetent to stand trial or insane at the time of the shooting. Counsel agreed there was a lot of testimony at trial presented showing Applicant's on-going drug use including the fact that he had been high on cocaine and ecstasy at the time of the shooting. In that regard, counsel noted, voluntary intoxication is not a viable defense in South Carolina, so arguing Applicant "blacked out" at the time of the shooting wouldn't have helped build a defense if the jury believed Applicant's drug use was the cause of that black out. When asked directly whether there was any indication of whether an insanity defense could be developed for use at trial, counsel testified there was "none". Counsel finished by saying even in hindsight, he is confident with his decision not to have Applicant evaluated.

Based on a thorough review of the record and testimony presented, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective in this regard. First, this Court finds counsel's performance was not deficient or objectively unreasonable in any way relating to this claim. This Court finds counsel's testimony to be entirely credible as to his interactions and meetings with Applicant, as well as his perceptions of Applicant's mental capacity and capabilities. Counsel's credible testimony makes abundantly clear that based on his sixty-plus (60+) meetings with Applicant, he had no concerns whatsoever with Applicant's

competency to stand trial or to enter a guilty plea. Further, counsel made clear there was entirely no factual or evidentiary basis to support an insanity defense at trial and Applicant's alleged "black out" was almost certainly due to his voluntary illicit drug use on the night in question, which provides no basis for a defense at trial. Aside from the inconsequential information contained in the medical records provided at the PCR hearing, this Court finds Applicant's testimony as to his alleged mental health problems and his inability to recall the incident to be wholly not credible. In sum, this Court finds counsel reasonably relied on his own perceptions of Applicant as uncovered during their countless interactions and made an objectively reasonable decision to not have Applicant mentally evaluated prior to trial. Accordingly, counsel was not deficient in this regard.

Further, this Court finds Applicant has failed to prove resulting prejudice from counsel's failure to have him evaluated. Applicant failed to present any credible evidence, medical diagnosis or expert testimony to this Court to substantiate a claim that he was mentally incompetent at the time of his trial or otherwise insane at the time of the shooting. "Under the second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the time of the shooting or incompetent at the time of the [trial]." Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992). Applicant has failed to produce any such probability aside from his own incredible testimony and medical records showing he has a history of depression. The record of Applicant's trial and guilty plea, coupled with counsel's credible PCR testimony, affirmatively refute any claim that Applicant was either incompetent at the time of trial or insane at the time of the crime. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496



S.E.2d 415, 417 (1998). Applicant has failed to produce anything other than his own incredible testimony and pure speculation as to what the result of such an evaluation would be. Therefore, Applicant has failed to prove resulting prejudice. Accordingly, this allegation must be denied as Applicant has failed to meet either of the two necessary prongs for ineffectiveness under Strickland v. Washington.

Involuntary Guilty Plea

Applicant next contends his guilty plea was entered involuntarily as a result of counsel's ineffective representation prior to and during the course of his jury trial.

Applicant testified on the third day of his trial, his two attorneys told him they had not realized how strong the testimony against him was going to be and they believed Applicant had "a 99.9 percent chance of walking out of [the courtroom] with a life sentence and...a .1 percent chance of getting a hung jury". He went on to say prior to trial counsel had been "real gung-ho" about going to trial, but "at the end he totally changed". Applicant stated counsel told him "if you want to see your son again", pleading guilty "is going to be your only chance to get back to [him]".

When it came time to discuss entering the plea, Applicant said, he wasn't given much time to consider his options and was only able to speak with his family very briefly about the decision before the judge asked to proceed with the trial. He added he "felt pressured" to plead guilty "when the comment came up about [his] son" and he was "hearing [his] only chance of getting back out there and spending time with [his] son" was to plead guilty.

Applicant said on "the fourth day when [he] came in before [he] took the plea agreement [he] was told, look, the judge made the solicitor come back with a plea" because the judge "said it's clear of this young man's guilt". Applicant noted that had he not been told he had no chance



of winning at trial, he would not have pled guilty. Regarding the state's intention to seek the death penalty, Applicant stated counsel told him throughout the process "it [was] still in the air" whether they intended to seek the death penalty because "[t]hey [hadn't] served the paperwork" yet. In sum, Applicant said he "didn't feel that [he] had any other choice" but to enter the plea.

On cross-examination, Applicant testified he told Judge Alford under oath at the plea hearing he was, in fact, guilty of killing the victim in this case. He agreed the trial judge said at the conclusion of the plea he believed the evidence proving Applicant's guilt was "pretty substantial" and, had Applicant continued with trial and been found guilty, he most likely would have imposed a life without parole sentence. Applicant conceded there were three different witnesses who had known him for many years who testified at trial, identifying Applicant as the shooter on the surveillance videotape based upon his voice, language, demeanor, and appearance. Applicant also noted he told Judge Alford during the plea he was satisfied with counsel's representation. Finally, Applicant testified it was his decision alone to enter the guilty plea.

Counsel testified Applicant's case was "originally tagged as a death penalty case" because "it was an execution on videotape", but noted the state "never actually served death penalty notice". He went on to say based on discussions with the solicitor's office, it was "a case that they [thought] [met] the standard, there's the aggravating factors, and this [was] a case they [were] intending to look at to go capital", but "there was never any kind of notice given that they actually were seeking the death penalty." Counsel stated by the time the trial was called, he was well aware it was not a death penalty case as the "procedure [for a capital trial] was never instituted because death notice was never given."

Counsel went on, saying he met with the prosecuting solicitor and Judge Alford in chambers on the Thursday during trial, at which time the judge told the state to "make this boy [a

602210

plea] offer" because of the way the trial was going at that point. Counsel said after discussing it with the victim's family, the state extended a plea offer for a forty (40) year cap sentence which he discussed with Applicant at counsel table. Counsel testified he told Applicant "if [he] did this [crime], [he] need[s] to plea", but if he didn't do it then he should reject the offer and "try to walk...out the front door" with a not guilty verdict from the jury. He expounded on that conversation, saying he told Applicant that while they were "going to try to win" the trial, he recommended "if [Applicant] did [the crimes]", he should plead guilty so he can see his child one day as a free man. After discussing the matter with his sister-in-law, counsel said, Applicant told counsel "[he] did it" and "[he] need[ed] to plead".

Regarding Applicant's rendition of their in-court plea discussions, counsel disagreed with Applicant's testimony saying "nobody would ever give a percentage chance" of winning a trial to their client "because you don't know what a jury is going to do". He then explicitly stated he has "never given a percentage chance" to a client "saying [they] [are] going to win" or lose their trial.

On cross-examination, counsel testified he met with Applicant between fifty (50) and sixty (60) times in preparing the case for trial and watched the surveillance videotape depicting the murder "probably four or five hundred times". Counsel stated there isn't "any other way to describe" the videotape of the murder but to say it was an execution of the victim, and he described the tape as "awful" and "hard to overcome". He went on to say he had "no doubt in [his] mind" that he provided all the advice and information necessary to Applicant for Applicant to make a voluntary, intelligent decision whether to plead guilty or to continue on with his trial. Counsel also noted he believed Applicant had a sufficient understanding of his rights and the waiver of those rights by pleading to make an informed decision whether to plead guilty.

Counsel further noted Applicant "always knew that life without parole was a realistic possibility" as an outcome at his trial as they "discussed it ad nauseum in preparing" for trial. He finished by saying, "I remember it like it was yesterday sitting down with [Applicant] saying if you did this you need to plead so that way you can see your son[, but] [i]f you didn't [do it], we need to go tell them...pardon my language...to fuck themselves and we walk out the front door", at which time Applicant "started crying" and "said he did it".

This Court finds Applicant has failed to establish his guilty plea was entered involuntarily or that counsel was ineffective in any way which would render his plea involuntary. As a preliminary matter, this Court finds Applicant's testimony as to his plea discussions with counsel to be entirely **not credible**, while conversely finding counsel's testimony in that regard to be **credible**.

"A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The credible testimony and record firmly convince this Court that Applicant's plea was entered freely, intelligently and voluntarily with full knowledge and understanding of all relevant issues, concerns, potential defenses and realistic potential penalties related thereto, in accordance with the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969).

Applicant readily admitted at the plea hearing he was aware of the potential sentences he was facing, the waiver of rights associated with pleading guilty, and the plea negotiations extended by the state. He further noted his satisfaction with counsel's representation and agreed

he was entering the pleas of his own free will without threats, coercion, promises or use of force to induce the plea. Further, Applicant readily acknowledged he would be waiving his ability to challenge the state's evidence/witnesses and to present a defense on his behalf by pleading, and admitted his guilt under oath to the charges.

Based upon the record and PCR testimony, this Court finds counsel adequately advised Applicant of all relevant issues and matters pertinent to the case to allow Applicant to make an intelligent, informed and voluntary decision on whether to enter a guilty plea or proceed to trial. Applicant, with full knowledge of the nuances and particulars of his case, made the voluntary and informed decision to forfeit his right to jury trial to accept an advantageous plea offer from the state. Applicant has failed to carry his burden in proving counsel was deficient in any way in his representation on the charges; in fact, the credible testimony before this Court indicates counsel's representation was extremely thorough and entirely in line with the high legal standards demanded of criminal defense attorneys in such serious cases. Accordingly, this Court finds counsel was not objectively unreasonable and Applicant's plea was entered freely, intelligently and voluntarily.

Further, this Court finds Applicant has failed to prove resulting prejudice from counsel's alleged deficient representation. Applicant has failed to convince this Court there is *any* "reasonable likelihood" that but-for counsel's alleged deficient performance, Applicant would not have pled guilty but rather continued with his trial. The evidence presented during the three days of trial set a very high hurdle for Applicant to overcome, and it is clear Judge Alford intended to impose a life without parole sentence upon Applicant had the jury returned a verdict of guilty. With these things in mind, along with the entirety of the record, it is clear Applicant

 13

has failed to prove that "but for counsel's alleged deficiency", he would not have pled but rather insisted upon proceeding to trial.

Failure to Object to Leading Questions

Applicant also alleges counsel was ineffective in failing to pose an objection to the solicitor's questions to Hannah Fuller on the basis that he was improperly leading her. In particular, Applicant points to Fuller's testimony during direct examination where she stated Applicant mentioned to her that he had killed somebody. (Trial Tr. p. 225, ll. 11 - 22).

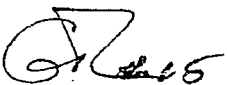
Counsel testified he "objected a lot in the beginning" of the trial to the solicitor's leading questions, but eventually came to realize the trial judge "was going to let [the solicitor] lead" the witnesses with his questions. Counsel went on to say "[t]here's time when you object and there's times when you don't", and that's part of "being a criminal defense attorney." Counsel noted his objections wouldn't have stopped the testimony from being admitted in the end anyway as "an objection (sic) of leading doesn't preclude the testimony, it just precludes the form of the question" posed by the attorney. Counsel thereafter noted that objecting to the testimony would have only highlighted Fuller's damning testimony to the jury and ultimately would not have stopped the testimony from being admitted after the solicitor simply rephrased the question.

On cross-examination, counsel testified the solicitor prosecuting Applicant's case was "notorious" for not being able to "ask a question that was not leading", but said "oftentimes circuit court judges will just allow it because that's what [that particular solicitor] does" when questioning witnesses. He also agreed there was nothing stopping the solicitor from simply rephrasing his questions to avoid leading and still eliciting the same answers as the substance of the testimony itself was not objectionable. Counsel stated he did not feel any of the instances of

alleged leading questions by the solicitor resulted in testimony that was the lynchpin of the case or otherwise changed the ultimate result.

This Court finds counsel was not objectively unreasonable for deciding not to decide to the solicitor's leading question(s) to Hannah Fuller about Applicant's admission of having killed someone. As accurately set forth by counsel at the PCR hearing, the substance of Fuller's testimony was not objectionable and, therefore, any objection based upon leading would only have caused the solicitor to rephrase the question, thereafter eliciting the same testimony a second time. Counsel stated he recognized the testimony could not be suppressed and, therefore, did not want to highlight that portion of the testimony by having the question asked multiple times. This Court finds counsel's testimony to be a reasonable articulation of valid trial strategy. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective"). Accordingly, this Court finds counsel was not deficient in his performance in this regard.

Further, this Court finds Applicant has failed to carry his burden in proving this alleged deficiency resulted in prejudice. As set forth above, the testimony elicited by the solicitor was admissible as non-hearsay under Rule 801(d)(2), SCRE, as the statements provided by Fuller were Applicant's own. Therefore, any objection to the leading question would have only precluded the form of the question and not the eventual substance of the testimony provided. Accordingly, the testimony was going to be admitted regardless and this Court can find no reasonable probability that the outcome of Applicant's case would have been any different had counsel posed an objection to the solicitor's leading question(s) to Fuller.

 15

Judicial Bias

Applicant alleges counsel was ineffective in failing to object to and/or move for recusal of the trial judge due to the alleged bias of the trial judge. Applicant contends the trial judge improperly ordered the state extend a plea offer to Applicant for less than LWOP as the judge believed the facts clearly indicated Applicant was guilty of the charges.

Applicant testified he was unaware of any pre-trial discussions between counsel, the state and the trial judge, but he did become aware of an in-chambers discussion with the judge during the course of the trial regarding a plea offer. Specifically, Applicant stated on the fourth day of trial, counsel told him the judge "made the solicitor come back with a plea" offer for Applicant because the judge "said it's clear of this young man's guilt and [he] want[ed] a plea." Applicant said counsel told him that was what the judge had said to them in-chambers. Applicant noted he felt pressured by the trial court to make a decision whether to accept the plea offer extended.

On cross-examination, Applicant stated he told the trial judge during the plea hearing under oath that he was guilty of the murder as charged and agreed there were at least three witnesses very familiar with Applicant who identified his voice, mannerisms and language off the surveillance videotape showing victim being shot in the face. Applicant noted he "was answering [the trial judge's] question as he asked" Applicant during the plea hearing because he was "trying not to hinder...being able to get [the] minimum] sentence" under the plea. Applicant finished by saying it was ultimately his decision alone to enter the plea as he did.

Counsel testified he met with the solicitor and trial judge on the Monday before trial at which time the trial judge asked the solicitor what the case was about. After the state set forth that it was a murder on video, the trial judge asked "why are we trying this case if [Applicant's] on video". Counsel said he replied to the judge that it was not Applicant on the videotape and

 16

then he explained that the men on the videotape are wearing masks the entire time. Counsel said the trial judge never suggested nor said anything about a plea being appropriate at that time, so he did not request the trial judge be recused.

The Thursday of trial, counsel said, he and the solicitor again met in chambers with the trial judge, at which time the judge "said with the way the trial [was] going and with Ms. Fuller's testimony about [Applicant's] remorse, please make, this boy needs to get an offer." Counsel said he told the judge he did not believe Applicant would accept any plea offers because Applicant didn't commit the crime, but co-counsel said to let the state find out what plea offer they could extend. After discussing the matter with the victim's family, the state returned with a plea offer for a forty year cap sentence. Counsel testified the state did have a choice about whether they wanted to extend any plea offer to Applicant and noted the state could have said no to the judge's request to extend an offer. Counsel also said it was the solicitor who "came up with the number 40 years" for the offer, and the trial judge at no point indicated what kind of offer the state should extend. Further, counsel said, the trial judge noted he couldn't tell the state what plea offer to extend to Applicant, but thought the forty year plea offer "sound[ed] like a fair offer".

Based upon a review of the transcript, this Court finds Applicant has failed to prove counsel was ineffective for failing to move for recusal of the trial judge simply based upon the trial judge's in-chambers remarks about the state extending a plea offer to Applicant. "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party." Koon v. Fares, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008). "It is not sufficient for a party seeking disqualification to simply allege bias; rather, the party must show some evidence of bias or

prejudice." *Id.* The only instance Applicant can point to an off-record discussion which he was not a party to where the trial judge, after sitting through three-plus days' worth of incriminating evidence, suggested the state extend a plea offer to Applicant. Applicant has failed to prove the specific circumstances under which the comment was made and had failed to convince this Court such a suggestion reveals a judicial bias sufficient to warrant counsel requesting recusal. Therefore, Applicant has failed to carry his burden in proving counsel was objectively unreasonable in failing to move for such.

Further, Applicant has failed to prove resulting prejudice as he has failed to show such an alleged judicial bias reasonably affected the outcome of the case. Both sides were allowed to present their arguments during the four day trial and all of the trial court's determinations set forth in the record were rationally and reasonably based upon the evidence and arguments presented at trial in accordance with the relevant law. See e.g. Danley Williams v. Moore, 400 S.C. 90, 733 S.E.2d 224 (Ct. App. 2012). Applicant has failed to establish any point in the record where the judge exhibited bias. Additionally, Applicant's testimony is clear that he understood it was solely his decision to accept the state's plea offer and that he ultimately did so in an effort to avoid a LWOP sentence at trial. Applicant has failed entirely to prove such an alleged bias reasonably affected his decision to forego his right to jury trial in favor of accepting an advantageous plea offer from the state. Accordingly, this allegation is denied.

Concurrent Time on Federal and State Sentences

Applicant contends counsel was ineffective for failing to ensure his federal and state sentences were set to run concurrently with each other as he believed they would upon entry of his Richland County guilty plea.

Applicant testified he does understand the difference between "concurrent" and "consecutive" sentences and he was adamant that his plea be conditioned upon his federal and state sentences running concurrently. Applicant stated counsel explained to him that "it was [a] formality to have to say that if this could happen or whatever", but counsel then told Applicant "do not worry" because he would "get [Applicant] into federal custody and...[run] that time concurrent...with the feds". Applicant stated had he known his five (5) year federal sentence was going to run consecutive with his state sentence, thereby turning the thirty-eight (38) year sentence into forty-three (43) years, he would not have pled guilty.

Counsel testified that, in addition to the thirty-eight (38) year sentence for Murder, Applicant was sentenced under the plea to twenty (20) years imprisonment to run concurrently for Attempted Armed Robbery and a Lynching — Second was dismissed by the state. He also noted there may have been a second petty crime the state dismissed with the Lynching. Counsel went on to say Applicant "was under sentence from the federal court for a cocaine trafficking" conviction at the time as well, on which "he got five [5] years" from Judge Currie. Counsel said he and Applicant discussed the federal sentence in trial preparation "not briefly", but rather "extensively", and because Applicant had never first been in federal custody he would "do state custody beforehand".

Counsel continued, saying he "knew [they] worked actively to try to get [Applicant] into federal custody both immediately after his trial and then actually at one point...with the attorney general...because the [trial] judge definitely wanted [Applicant] to...not get the five [5] additional years at the end of the [thirty-eight] 38 year" sentence. Counsel said he communicated to Applicant that "when you're in state custody, you do your state custody and then you go do federal custody" as the "Bureau of Prisons does not calculate state time in their calculations".

Counsel noted that at the plea hearing, the trial judge said he didn't "know if [he] can order this but if at all possible try to get concurrent time". Counsel said the state and federal sentence "was an issue that [he and Applicant] discussed at length" and Applicant "understood that he was going to be transferred from Bureau of Prisons one way or the other at the conclusion of his state term of incarceration". Counsel testified he did not believe it was ever Applicant's understanding that he was going to be transferred immediately to the federal prison upon entry of the plea based on their pre-plea discussions.

On cross-examination, counsel testified he never guaranteed Applicant at any point during plea negotiations that his federal and state sentences would run concurrently, which counsel believed Applicant understood. Finally, counsel stated the order in which the two sentences were set to run was "out of [their] hands" since the federal plea had already been entered without Applicant having ever been in federal custody.

After a thorough review of the testimony presented and the record, this Court finds Applicant has failed to meet his burden in proving counsel was ineffective in this regard. First, this Court finds Applicant's testimony as to counsel advising him the sentences would run concurrently to be not credible. Rather, this Court finds counsel's testimony about the discussions to be credible, specifically in that Applicant was fully advised and aware that he would be pleading guilty with no guarantee that his federal and state charges would run concurrently. The commentary in the record before this Court only further supports this finding as Applicant readily acknowledged his understanding of counsel's statement to the court that "neither [counsel nor the solicitor] can guarantee" the federal sentence would be run concurrent to the sentence to be imposed on the plea. (Trial Tr. pp. 289, l. 16 - p. 290, l. 25). Accordingly,

the credible evidence and record reflect Applicant entered his plea with full knowledge that his federal and state sentences were not guaranteed to run concurrently.

Further, the record before this Court indicates Applicant entered his guilty plea in an effort to avoid a life without parole sentence that would stop him from seeing his son ever again as a free man. With that in mind, and the statements on the record by the trial judge regarding his intention to sentence Applicant to LWOP if convicted by the jury, this Court finds no reasonable probability that had Applicant known he would be serving a forty-three (43) year sentence instead of a forty (40) year sentence, he would not have pled guilty but rather continued with the trial to face a near certain LWOP sentence. Applicant's testimony to the contrary is **not** credible. Accordingly, Applicant has failed to prove resulting prejudice.

Failure to Advise of Right to Appeal

Applicant finally contends counsel was ineffective for failing to adequately advise him of the right to appeal the entry of his guilty plea. Applicant said he "was confused" when the trial judge advised him during the plea hearing that he had ten days to file for appeal as counsel had previously said Applicant would not be entitled to appeal if he pled and that he did not see any trial court error which could be appealed. Other than that, Applicant said, he and counsel never discussed the right to direct appeal.

Counsel testified Applicant waived his right to direct appeal of the issues preserved during the course of the trial itself by entering the guilty plea as he did, but that he did have a right to appeal the plea. Counsel said he didn't know whether he and Applicant ever discussed the right to appeal the plea, but noted there was nothing objected to during the plea colloquy. Counsel stated he "spent the better part of the following day" after the plea "at the jail with [Applicant]...for...between one-and-a-half to two hours", but could not say whether they ever

discussed the right to appeal the plea. Counsel said he believed Applicant had sufficient understanding of the rights he was waiving by pleading guilty at the time he entered the plea. Counsel finished by saying it's generally his "practice that whenever [he] met with somebody" he would advise of the right to appeal, but also tell them that if an objection isn't raised during the plea "there's really nothing to appeal".

This Court finds counsel's testimony regarding his general practice to advise of the right to appeal to be credible and likely the course followed in this matter. Further, the record reflects the trial judge specifically advised Applicant of the right during the course of the plea. There is no evidence in the record to indicate Applicant ever requested an appeal be filed, nor to show counsel should have "reasonably believed" Applicant wanted to appeal. Applicant was fully aware of his right to appeal prior to final entry of the plea and at no time thereafter gave any indication that he wished to pursue such an avenue. Therefore, this allegation is without merit.

Further, even assuming *arguendo* counsel did fail to review the right to appeal with Applicant as Applicant now alleges, he has failed to set forth any credible evidence that would entitle him to a belated appeal. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to direct appeal from a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470 (2000). The South Carolina Supreme Court has applied this standard to guilty pleas as well, saying:

...absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to appeal from a guilty plea... The bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief. Instead, there must be proof that extraordinary circumstances exist such that the defendant should have been advised of the right to appeal.

Weathers v. State, 319 S.C. 59, 459 S.E.2 838 (S.C. 1995). Therefore, even if taken as true, an allegation that counsel did not inform Applicant of the right to direct appeal is not *per se* reason to warrant a belated direct appeal.

Regardless, the credible evidence before this Court indicates Applicant was fully informed of the right to appeal, but did not request one be filed. No extraordinary circumstances existed such that counsel reasonably *should have* known Applicant wanted an appeal. In fact, Applicant entered his plea freely and voluntarily under the terms of a negotiated cap sentence. Therefore, counsel had no reason to believe Applicant would want to appeal. Applicant also failed to establish any non-frivolous grounds existed for appeal. Accordingly, this Court finds Applicant is not entitled to relief and the current application must be denied and dismissed with prejudice.

Having found the allegations raised by Applicant at the PCR hearing to be wholly without merit, this Court finds the current application for post-conviction relief must be denied and dismissed **with prejudice**. Further, the current order is a complete and all-inclusive set of findings based upon the allegations raised by Applicant at the PCR hearing and Applicant has not presented any additional allegations for this Court to consider outside those specifically addressed above.

CONCLUSION

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

 23

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

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 8 day of March, 2013.



G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

FILED
MAR 11 2013

MAR 11 2013

MCNAUL LAW FIRM

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Jaime Eduardo Marrero, #330923)

Plaintiff,)

v.)

State of South Carolina,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO. 2009-CP-40-02523

**ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER**

This matter comes before the Court by way of Plaintiff's Motion to Reconsider pursuant to Rule 59 SCRPC. Specifically, Plaintiff asks this Court to reconsider its Order of March 8, 2013, denying Plaintiff's application for post-conviction relief.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRPC to reconsider this Court's Order filed March 8, 2013. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

July 18, 2013
Columbia, South Carolina

G. Thomas Cooper, Jr.
G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

RECEIVED

JUL 26 2013

McNair Law Firm, PA

STATE OF SOUTH CAROLINA

County of RICHLAND

In the Court of Common Pleas

JATME EDUARDO MARRERO #330923
Full name and prison number (if any) of Applicant.

vs.

The State of South Carolina
Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2009 APR - 7 AM 8:40
LENETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

INSTRUCTIONS — READ CAREFULLY

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

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

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

1. Place of detention LEE CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence Richland County General Session
Circuit Court at 1701 Main St., Columbia, SC. 292
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) MURDER - 06-3620
 - (b) ATTEMPTED ARMED ROBBERY 06-3621
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MURDER ; SEPTEMBER 25, 2008 ; 38 YEARS
 - (b) ATTEMPTED ARMED ROBBERY ; SEPTEMBER 25, 2008 ; 22 YEARS
 - (c) _____

5. 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

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

NO

7. If you answered "yes" to (6), 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.

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) MURDER ; I WAS SCARED OF GETTING A LIFE SENTENCE

(b) ATTEMPTED ARMED ROBBERY ; "SAME AS (a)" ; Ineffective counsel ;

(c) Involuntary guilty plea ; Judge Error

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

(a) MURDER ; Judge Alford put a condition on my guilty plea

(b) ATTEMPTED ARMED ROBBERY ; "Same as (a)" ; Also my attorney

(c) Jim May was ineffective on advising me of this fact, and on others. (see attached sheet)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) MURDER & ATTEMPTED ARMED ROBBERY ; On Sept. 25, 2008 I pled

(b) guilty of said charges in front of Judge Alford, wherein Judge

(c) Alford told me that I could appeal the court within 10 days.

State vs O'Leary, states that when a defendant pleads guilty He can not appeal the court's decision because he is admitting His guilt. By the judge putting that condition on the plea the trial was remanded.² The Judge Erred in my trial, and my attorney was ineffective for not advising me.

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO

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

I filed a motion for discovery & a motion to compel, but I had an attorney therefore my motions were not honored

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

(a) the specific nature thereof:

i. motion for discovery

ii. motion to compel discovery

iii. _____

iv. _____

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

i. Richland County, 5th Judicial, Columbia, SC

ii. 1701 Main St. General Sessions Court

iii. _____

iv. _____

(c) the disposition thereof:

i. my motion's were ~~not~~ forwarded to my

ii. attorney

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. _____

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

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) I just got convicted 7 months ago. It took me
- (b) 3 months to leave Kirkland R-N-E. AT Kirkland C.I., R+E
- (c) inmates are not allowed access to the Law Library

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (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? yes

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

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

- i. Jim May; Richland County Public Defender's Office
1701 Main St. Columbia, SC 29202
- ii. Danielle Payne; Richland County Public Defender's Office
- iii. Elizabeth Franklin; Richland County Public Defender's Office

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

- i. Plea hearing / Trial
- ii. _____
- iii. _____

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

I would like the court's decision to be remanded
and a new trial granted; Reduction in sentence

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

yes. I also have a Federal conviction.

STATE OF SOUTH CAROLINA

VERIFICATION

County of _____

I, Jaime Eduardo Marrero, 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.

SWORN to and subscribed before me this 2

day of April, 2009.

Debra Sines (L.S.)
Notary Public

My Commission Expires: 11-4-2015

RICHLAND COUNTY
FILED
2009 APR - 7 AM 8:40
JEANETTE W. McBRIDE
C.C.P. & G.S.

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

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

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

[Signature]
Applicant

SWORN or affirmed to and subscribed before me this

2 day of April, 2009.

Debra Sines
Notary Public

My Commission Expires 11-4-2015

MURDER : 38 yrs.

ATTEMPTED ARMED ROBBERY ; 22 yrs.

" Attachment A "

- 9A) I feel that my attorney, Jim May, was ineffective for two reasons. One; He did not object during my trial when the solicitor continuously led his witnesses during trial testimony. My attorney also failed to get proper expert witnesses relating to Hannah Fuller's testimony. Hannah Fuller has an extensive medical history of mental illness, in which a doctor's opinion would have rendered a different outcome, in my trial.
- Two; After I sat in County Jail for two and a half years, I tried to advise my attorney on circumstances, that in the least, he may have used in plea bargaining. My attorney stopped me from giving him this information. As a result, during the trial, Mr. May came to me with an on the spot deal after explaining to me that I was going to lose the trial and get Life Imprisonment. After telling me this I stopped the trial and took the plea, so that I could return to my family one day. For these reasons, I believe Mr. May was ineffective.
- 9B) During my plea hearing, Judge Alford, told me that I had 10 days to appeal the courts decision. In State v O'Leary, 393 SE 2d 186, 302 SC 17, and State v Truesdale, the judge was found in Error by saying these same words as Judge Alford. Guilty Pleas can not have conditions on them. When the Judge said this he put false hope in the air that mistakes were made and that a better deal may be

MURKIN, 20 yrs

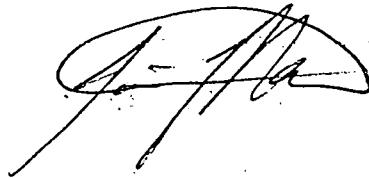
ATTEMPTED ARMED ROBBERY; 22 yrs.

"Attachment B"

available. In the above stated cases the Trial was remanded. I feel that my trial should be remanded as well.

Also, Judge Alford denied my attorney's motion for a continuance after the solicitor surprised us with witness testimony by Hannah Fuller. We did not know that Mrs. Fuller was coming to testify. If my attorney had known this he would have had a doctor to testify on her mental illness, discrediting Mrs. Fuller's testimony.

The solicitor sprung this on us a day before the trial. I feel Judge Alford was also at error in my trial.

A handwritten signature, possibly reading "A. Alford", written in dark ink. The signature is stylized with a large loop at the end.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL COURT

JAIME EDUARDO MARRERO,
#330923 APPLICANT

CIVIL ACTION #:

2009-CP-40-23

- VS -

MOTION TO AMEND

STATE OF SOUTH CAROLINA

RESPONDENT

APPLICANT JAIME EDUARDO MARRERO,

SCDC NO: 330923, NOW COMES TO AND BEFORE THIS
HONORABLE COURT PURSUANT TO RULE 35 OF THE
SCR CIV. P., AND PRESENTS A MOTION TO AMEND
HIS PENDING APPLICATION FOR POST-CONVICTION RELIEF,
TO INCORPORATE THE FOLLOWING CLAIMS TO HIS
APPLICATION.

AMENDMENTS

INDICTMENT NO: 2006-GS-40-3620
MURDER, S.C. CODE ANN. § 16-3-10

ARGUMENTS:

1) JUDE AIFORD VIOLATED RULE 501 OF THE
SOUTH CAROLINA CODE OF LAWS, (CANON#3) A
JUDGE SHALL PERFORM DUTIES OF JUDICIAL
OFFICE IMPARTIALLY AND DILIGENTLY, Did Judge
AIFORD VIOLATE MY CONSTITUTIONAL RIGHTS WHEN
HE ADMITS HIS IMPARTIALITY, TO MY ATTORNEY

RICHLAND COUNTY
FILED

2012 NOV 16 AM 11:10
JANETTE W. MCBRIDE
C.C.P. & G.S.

AND TO THE SOLICITOR AND WAS MR. JAMES MAY OR MR. STRICKLER INEFFECTIVE FOR FAILING TO MAKE AN OBJECTION OR ASK FOR THE JUDGE TO RECUSE HIMSELF?

2) WAS JAMES MAY'S STEWARDSHIP INEFFECTIVE FOR FAILING TO HAVE A MENTAL EVALUATION DONE ON CLIENT TO DETERMINE WHETHER OR NOT HE WAS COMPETENT TO STAND TRIAL OR AT THE SAID COMMISSION OF THE CRIME?

3) WAS MR. JAMES MAY INEFFECTIVE FOR CONVINCING HIS CLIENT THAT HIS ONLY CHANCE TO SEE HIS SON AGAIN, WAS TO TAKE THE PLEA OFFERED AND FOR PREDICTING WHAT THE JURY WOULD DECIDE ON?

4) WAS A CONDITION PLACED ON THIS PLEA WHEN CLIENT WAS CONVINCED THAT HE WOULD BE SERVING HIS FEDERAL SENTENCE FIRST WHILE HIS STATE SENTENCE WOULD BE RUN CONCURRENT?

5) WAS MR. JAMES MAY INEFFECTIVE FOR CONVINCING HIS CLIENT THAT NO ERRORS WERE MADE AND THAT

ARGUMENT NO: 1

WAS MY COUNSEL INEFFECTIVE FOR NOT MAKING AN OBJECTION TO OR FOR NOT ASKING JUDGE ALFORD TO RECUSE HIMSELF AFTER STATING HIS IMPARTIALITY IN THIS CASE?

FACTS:

CODE OF LAWS SC 2011 EDITION: RULE 501

CANON 3: A JUDGE SHALL PERFORM DUTIES OF JUDICIAL OFFICE IMPARTIALLY & DILIGENTLY.

JUDGE ALFORD CONDUCTED A SIDE BAR WHERE HE ASKED MY COUNSEL AND THE SOLICITOR, "WHY HAS THIS CASE MADE IT THIS FAR; IT IS CLEAR OF THIS YOUNG MAN'S GUILT." IN TURN JUDGE ALFORD TOLD THE SOLICITOR TO COME BACK WITH A DEAL TO OFFER THE DEFENDANT. DEFENDANTS COUNSEL NEVER ASKED FOR A RECUSAL OF THE JUDGE OR EVEN OBJECTED TO THE SITUATION.

ARGUMENT NO. 2

WAS COUNSEL INEFFECTIVE FOR FAILING TO HAVE A MENTAL EVALUATION DONE ON HIS CLIENT TO DETERMINE WHETHER OR NOT HE WAS COMPETENT TO STAND TRIAL OR IF HE WAS MENTALLY ILL AT THE SAID COMMISSION OF THE CRIME?

FACTS

DEFENDANT WAS THREATENED WITH THE DEATH PENALTY AND FOR A PERIOD EXTENDING UP TO TWO AND A HALF YEARS NEITHER PARTY ORDERED A MENTAL EVALUATION TO DETERMINE THE MENTAL STATE OF DEFENDANT. DEFENDANT WAS PLACED ON SUICIDE WATCH AFTER BEING BOOKED INTO THE RICHLAND COUNTY JAIL. THE STATES' KEY WITNESS EVEN TESTIFIED AS TO THE DEFENDANT'S SUICIDAL ACTIONS. THE DEFENDANT TESTIFIED DURING HIS PLEA THAT HE WAS NOT IN HIS RIGHT STATE OF MIND. ~~THIS IS PROVEN DEFENDANT'S~~ THIS IS A CLEAR VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS (BECKTON V. BARNETT, 920 F.2d 1190 (4th CIRCUIT 1990)) (HOOPER V. GARRAGHTY, 845 F.2d 471) (WOOD V. ZAHRADNICK, 578 F.2d 980) & (PAULING V. STATE 331 SC 606, 503 SE2d 468)

ARGUMENT NO: 3

WAS COUNCEL INEFFECTIVE FOR CONVINCING HIS CLIENT THAT HIS ONLY CHANCE TO SEE HIS SON AGAIN, WAS TO TAKE THE PLEA OFFERED AND FOR PREDICTING WHAT THE JURY WOULD DECIDE ON ?

FACTS

COUNCEL INFORMED THE DEFENDANT THAT THERE WAS A NINETY-NINE POINT NINE PERCENT CHANCE OF RECIEVING A LIFE SENTENCE, AND A TENTH OF A CHANCE OF GETTING A HUNG JURY. COUNCEL SAID THAT THERE WAS NO CHANCE OF RECIEVE A NOT GUILTY VERDICT. COUNCEL USED THE DEFENDANT'S LOVE OF HIS SON AS A PERSUASION TECHNIQUE TO FORCE A PLEA OF GUILTY. COUNCEL MADE PREDICTIONS OF HOW THE JURORS WOULD VOTE, CLEARLY EXPRESSING CLAIRVOYANCE. THIS IS A VIOLATION OF THE DEFENDANT'S RIGHTS. COUNCE MADE IT APPEAR THAT THERE WAS NO OTHER CHOICE BUT TO ACCEPT THE PLEA. (RAYFORD V. STATE 443 S.E.2d 805 "1994")
(ALEXANDER V. STATE 402 2E2nd 474)

ARGUMENT NO: 4

WAS COUNCEL INEFFECTIVE FOR NOT ENSURING THAT THE CONDITIONS SET FORTH ON THIS GUILTY PLEA WERE ADHERED TO AND ARE CONDITIONS SUPPOSED TO BE PUT ON A GUILTY PLEA?

FACTS

COUNCEL INFORMED HIS CLIENT THAT BY TAKING THIS PLEA; COUNCEL WOULD GET THE DEFENDANT TRANSFERRED INTO FEDERAL CUSTODY IN ORDER TO SERVE THE DEFENDANTS FEDERAL SENTENCE FIRST. DEFENDANT SIGNED THE PLEA AND ONLY THEN WAS WHEN THE JUDGE EXPRESSED THAT HE WASN'T CERTAIN IF THEY COULD GET THE FEDS TO COME GET THE DEFENDANT.

(CLARK V. STATE, 468 S.E. 2d 653 (SC 1996))

ARGUMENT NO. 5

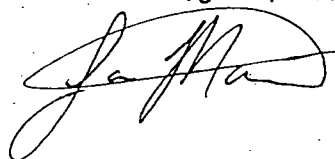
WAS COUNSEL INEFFECTIVE FOR CONVINCING HIS CLIENT THAT NO ERRORS WERE MADE AND THAT THERE WAS NO NEED TO EXERCISE HIS RIGHTS TO APPEAL?

FACTS

COUNSEL INFORMED THE DEFENDANT THAT THE COURT PERFORMED PERFECTLY AND THAT A DIRECT APPEAL COULD BE FILED BUT WOULD BE IN VAIN, AFTER THE DEFENDANT EXPRESSED INTEREST IN AN APPEAL. THIS WAS A VIOLATION OF THE DEFENDANTS RIGHTS. (THOMPSON V. U.S., 481 F.3d 1297, 1309 (2002 11th CIRCUIT))

JUDGE AIFORD DENIED COUNSEL'S REQUEST FOR A CONTINUANCE AFTER THE SOLICITOR PUT UP A SURPRISE WITNESS. THIS SHOULD HAVE DEFINITELY BEEN A DIRECT APPEAL ISSUE, THEREFORE IT MAY HAVE BEEN POSSIBLE THAT THE COURT ERRED.

SUBMITTED BY
JAIME MARRERO



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Jaime E. Marrero, # 00330923,

Petitioner,

CASE NO. 2009-CP-40-2523

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2012 NOV 16 AM 11:10
JEANETTE W. McBRIDE
Clerk of Court & G.S.

I, Deborah Harris, an employee of the McNair Law Firm, P.A., do hereby certify that I have this date served one (1) copy of *Motion to Amend* on behalf of Jaime Eduardo Marrero, #330923, upon the following party or counsel of record or party by causing said copy to be deposited with the United States Postal Service, first class postage prepaid, properly affixed thereto and addressed as follows:

Robert D. Corney, Esquire
Assistant Attorney General
State of South Carolina
PO Box 11549
Columbia, SC 29211-1549


Deborah Harris, Legal Assistant

November 16, 2012

Columbia, South Carolina

1 THE COURT: Have a pleasant night. See you all in
2 the morning.

3 MR. MAY: Thank you, Your Honor.

4 (There was an overnight recess).

5 MS. McDUFFIE: Your Honor, before we get started, our
6 next witness is a pathologist. We just wanted to put
7 in -- Your Honor, I have significantly reduced the number
8 of those, I want to represent to the Court.

9 MR. MAY: I believe we're going to have some
10 objections to these.

11 THE COURT: Pardon me?

12 MR. MAY: I believe we're going to have objections to
13 three of them.

14 I beg the Court's indulgence for a brief moment.

15 THE COURT: Yes, sir.

16 (Pause).

17 MR. MAY: Your Honor, may we approach?

18 THE COURT: Yes.

19 (Whereupon, there was a bench conference.)

20 THE COURT: Mr. Bailiff, knock on the door and tell
21 them we haven't forgotten about them, and we'll be with
22 them shortly. Don't tell them anything that's going on.

23 THE BAILIFF: All right.

24 THE COURT: Hopefully, I don't have to tell you that.

25 (Pause).

1 I'm ready. Let's -- let's go.

2 JAIME MARRERO, after being duly sworn,
3 testified as follows:

4 THE COURT: All right, sir. For the record, you are
5 Jaime Marrero; is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Marrero, you know, of course, we have
8 drawn a jury and started a trial. We're still in the
9 middle of a trial.

10 The State has not finished its case, and the defense
11 has not yet had an opportunity to present its case, and my
12 understanding is that you now wish to plead guilty to the
13 two charges of murder and attempted armed robbery; is that
14 correct, sir?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you understand that by entering --
17 well, let me advise you fully as to the possible sentences
18 on these charges.

19 On a murder charge, the possible sentences are the
20 minimum sentence of 30 years up to life without the
21 possibility of parole. That sentence is a no-parole
22 offense, which means you would expect to serve the
23 sentence you would actually be getting on the charge. Do
24 you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand also that for the
2 offense of murder, it is a most serious offense, and you
3 understand if you would get two most serious offenses on
4 your record or a combination of three serious or most
5 serious offenses on your record, you could get a sentence
6 of life without parole. This would constitute one strike
7 under either of those two or three-strike scenarios. Do
8 you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: You're also charged today with attempted
11 armed robbery, which carries a maximum punishment of 20
12 years. Each of these offenses is classified as a felony.
13 Do you understand that charge and the maximum punishment
14 you could receive on that charge?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Understanding the charges, the maximum
17 punishment you could receive on each charge, how do you
18 plead to these two charges today, guilty or not guilty?

19 THE DEFENDANT: Guilty, sir.

20 THE COURT: Do you understand that by pleading
21 guilty, you give up your right to remain silent? Do you
22 understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand that by pleading
25 guilty, you give up your right to a trial, that is to

1 finish your trial. We're in the middle of it. Do you
2 understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Now, I'm going to go over your rights
5 with you in a jury trial. You understand some of those
6 already because we're pretty far along in the trial. Let
7 me go over that with you.

8 At trial, you have the right to confront and
9 cross-examine all witnesses against you. You have the
10 right to present any witnesses and/or evidence in your
11 behalf.

12 You have the right to testify in your own defense, if
13 you wish to do so, but no one can make you testify in your
14 own trial.

15 If you decide to go to trial and not testify, the
16 judge will tell the jury they could not hold your failure
17 to testify against you. In fact, the jury couldn't even
18 consider your failure to testify in their deliberations on
19 your guilt or innocence.

20 You would be presumed innocent throughout your trial.
21 The State would have to prove you guilty beyond a
22 reasonable doubt to a jury of 12 people. All 12 people
23 would have to unanimously agree that you were guilty in
24 order for you to be convicted.

25 Even if you were convicted, you still would have the

1 right to appeal that conviction. Do you understand your
2 rights with regard to a trial by jury?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Understanding that, do you still want to
5 plead guilty, or do you want to continue with your trial?

6 THE DEFENDANT: Still want to plead guilty.

7 THE COURT: The State is recommending to the Court a
8 cap, a maximum of 40 years, on these charges. Is that
9 your understanding of the agreement you have with the
10 Solicitor's Office in order to plead guilty to these two
11 charges?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Has anybody --

14 MR. STRICKLER: If I could, Your Honor.

15 THE COURT: Yes.

16 MR. STRICKLER: Just couple of other matters,
17 collateral matters that I discussed with him and also
18 discussed with the prosecutor. One, is there are some
19 unrelated charges the State is aware of.

20 They're going to be contacting the other individuals
21 involved in those and are confident that those charges
22 will be disposed of also, without going back to court.

23 Mr. Marrero is concerned about the federal sentence
24 that we discussed with the solicitor, and Your Honor, I
25 indicated to him that the solicitor had guaranteed to me

1 that he would do everything he could to go ahead and get
2 him transferred to federal custody immediately so he could
3 go ahead and take care of that sentence with the
4 understanding that neither one of us can guarantee that
5 that gets accomplished.

6 THE COURT: All right. Yes, sir.

7 Is that correct, Solicitor?

8 MR. MEADORS: Yes, sir. The first part, those other
9 charges; Your Honor. There's a -- I'm not aware of who
10 those victims are, but I gave, as an officer of the
11 court -- we will contact those victims.

12 I will explain whatever sentence Your Honor gives and
13 explain to them that is probably the justice they'll have
14 to take. They'll have to take that justice for them, too,
15 but under the victim's rights, I have to do that first.

16 THE COURT: Okay, I understand.

17 MR. MEADORS: Okay.

18 MR. STRICKLER: With that, that's the full
19 understanding of it.

20 THE COURT: Mr. Marrero, you have heard what's been
21 stated by your counsel and by the Solicitor. Now, is that
22 the full agreement, it's my understanding you have with
23 the Solicitor's Office, in order to enter these pleas on
24 these two charges today?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Has anybody promised you anything other
2 than that in order to get you to plead guilty?

3 THE DEFENDANT: No, sir.

4 THE COURT: Has anybody threatened you, coerced you
5 or forced you to plead guilty against your will?

6 THE DEFENDANT: No, sir.

7 THE COURT: Are you satisfied with the manner in
8 which your attorneys have advised and represented you in
9 these cases?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you and your attorneys fully
12 discussed the charges against you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have your attorneys told you the
15 witnesses and evidence the State has available to present
16 at trial to prove your guilt? Of course, most of them
17 have already been presented, but there are others that
18 they have not yet presented, but have your attorneys gone
19 over those potential witnesses and evidence that the State
20 has available? Have they gone over that with you?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Has your attorney discussed with you any
23 possible legal defenses that might be available to you if
24 you complete your trial today?

25 THE DEFENDANT: Excuse me?

1 THE COURT: Have your attorneys discussed with you
2 any possible legal defenses that would be available to you
3 if we continued with the trial?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Have you told your attorneys the names of
6 any and all witnesses you know of that your attorneys
7 could subpoena and bring to trial to assist you in your
8 defense at your trial?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: In other words, have you told them about
11 any witnesses you know of that would be helpful to you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Are you today under the influence of any
14 mind-altering substance, such as alcohol, drugs or
15 prescription medications, which interfere with your
16 judgment or ability to understand what you're doing in
17 court today?

18 THE DEFENDANT: No, sir.

19 THE COURT: Do you have any mental, emotional, or
20 nervous condition that interferes with your judgment or
21 ability to understand what you're doing in court today?

22 THE DEFENDANT: No, sir.

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

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Are you, in fact, guilty of these two
2 charges?

3 (Pause).

4 THE DEFENDANT: Honestly, Your Honor, I -- I -- I am,
5 but at -- at the time when it happened, and this is the
6 God honest -- the God's honest truth, I was -- I was not
7 in my right mind. I blacked out. I came to after the
8 shot was fired.

9 THE COURT: Did -- let me ask you this.

10 THE DEFENDANT: I'm guilty.

11 THE COURT: Let me ask you, again, are you guilty of
12 these two charges?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And, of course, you had the benefit of
15 the tapes and everything else that's been presented in
16 this break, you understand?

17 Please -- I think I've heard most of the facts. Is
18 there anything else we need to put on --

19 MR. MEADORS: I think so. Just for record, she
20 will --

21 THE COURT: Yes, sir.

22 MR. MEADORS: -- Ms. McDuffie will go over the
23 pathologist, who is sitting in the office. I think cause
24 of death we need to establish, although it's obvious that
25 he died.

1 MS. McDUFFIE: Your Honor, the cause of death was a
2 single gunshot wound to the head which pierced his brain,
3 ultimately leading to death.

4 THE COURT: All right. Is there any facts you wanted
5 to tell me about as far as the -- a bullet is concerned or
6 any tests run? Do you have any idea?

7 MS. McDUFFIE: The bullet was -- was removed from his
8 brain. It matched the .380 shell casing that was found at
9 the scene.

10 THE COURT: All right. Anything else you want to put
11 on the record?

12 MR. MEADORS: Beg the Court's indulgence.

13 (Pause).

14 Judge, I don't think so. I think I can summarize the
15 victims in a moment just for them, but as far as
16 factually, I don't believe so, no, sir.

17 THE COURT: Okay. All right.

18 Mr. Marrero, you have heard what the Solicitor has
19 just stated to the court. Of course, we've had testimony
20 in this case of witnesses and evidence presented during
21 the trial up to this point, and you have heard what they
22 said with regards to a bullet and the cause of death. Do
23 you disagree in any way with what they say happened in
24 this case?

25 THE DEFENDANT: About what the pathologist said?

1 THE COURT: Yes, sir.

2 THE DEFENDANT: No, sir.

3 THE COURT: I find the decision of the defendant,
4 Jaime Marrero, to plead guilty to these two charges to be
5 made freely, voluntarily, and intelligently. He's had the
6 representation of competent attorneys with whom he says he
7 is satisfied.

8 I find the facts presented to the Court by way of
9 trial and otherwise today by the Solicitor's Office fully
10 support and substantiate the guilty pleas in this case,
11 and I'll accept the pleas which were freely and
12 voluntarily made.

13 Now, Mr. Marrero, if you disagree with the proceeding
14 in which we're currently involved, you have ten days from
15 today's date within which to file a Notice of Intent to
16 Appeal. Do you understand your right to appeal today's
17 proceeding?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Let me go ahead and hear with regard to
20 the victim. Anything the victims wish to say?

21 MR. MEADORS: Your Honor, I think I can sum this up.
22 The mom is sitting back here. She is kind of hard of
23 hearing, Judge. This is Ms. Sue Grandstaff.

24 Sue, if you'll just stand up. That's Will
25 Grandstaff's mother.

1 I think I can summarize. Obviously, she loves him
2 and she misses him. I think what she wanted me to convey
3 is that he loved that store. That was like his kid. It
4 really was. That was his life, that store.

5 There was only \$17.64 in that till. I wish he had
6 given it up, and that's what's so sad about this case, but
7 he had actually, we believe, and it came out through
8 testimony, he told people, "I'm not -- I'm not letting
9 anybody rob me."

10 I think he had been a victim before where he had
11 given something up before, so that was like his child, and
12 he gave his life for it. I don't know what else to say.
13 She misses him. I don't know what else to say.

14 Judge, next to me is his aunt, Rebecca Priester. She
15 worked there at the store also, and I think will tell you
16 he loved that store and that job and interacted with
17 customers.

18 I've gone over with them this sentence of a cap of
19 40. She understands that and understands all of the
20 possibilities and is okay with whatever Your Honor does.
21 She is a fine person. I think she just has a few words
22 she wants to say.

23 THE COURT: Yes, ma'am.

24 THE AUNT: Actually, I just wanted to say thank you
25 for being so impartial and fair.

1 (Crying).

2 I'm sorry.

3 THE COURT: That's okay. Just take your time.

4 (Pause).

5 Yes, ma'am.

6 THE AUNT: I just wanted to thank everybody for all
7 of the hard work and for the justice for my nephew, from
8 myself and my sister. God knows I hold no hard feelings
9 towards anybody.

10 THE COURT: Thank you, ma'am.

11 MR. MEADORS: Your Honor, it's been a long road, as
12 all of these cases are with the victims, and at the
13 most -- normally in the times, we had -- you know, it just
14 gets emotional, but she is a fine person and obviously is
15 in full agreement with this cap.

16 With think it's a fair offer, a cap of 40. I want to
17 thank you also for putting up with us and your patience,
18 too.

19 Judge, Ms. McDuffie has his prior record. I don't
20 know if the Captain has got anything to add.

21 THE INVESTIGATOR: Your Honor, from the Sheriff's
22 Department's position, Your Honor has seen the facts and
23 evidence. The video sort of speaks for itself.

24 We don't have many homicides captured on video. I
25 would just yield to Your Honor's experience and wisdom.

1 I'm confident you'll make the right decision. We'll go
2 along with whatever you decide.

3 THE COURT: Yes, sir.

4 MS. McDUFFIE: Your Honor, the defendant's prior
5 record is a 1998 unlawful carrying of a weapon; a 2002
6 driving under the influence; a 2005 disorderly conduct,
7 and the other pending charges which Mr. Strickler
8 indicated.

9 MR. MEADORS: And, Your Honor, we don't have any
10 direct knowledge of -- I trust Mr. Strickler about the
11 federal -- if that was a conviction or when it was. I
12 just don't have any knowledge of that, but I'm sure he'll
13 add to that.

14 Chief Ewing is here. I don't know if he has anything
15 else to add. I want to thank him and all of the victim
16 advocates, J.M. and Ace, and Ms. Outen. That's all we
17 have. Thank you, Judge.

18 THE COURT: All right. Thank you.
19 Counsel?

20 MR. STRICKLER: May it please the Court, Your Honor.
21 Doug Strickler, I am actually the third attorney to
22 represent Mr. Marrero on this set of charges.

23 He was initially represented by Elizabeth Franklin,
24 who was with our office. She left to go to Appellate
25 Defense. He was then represented by Ms. Danielle Payne,

1 who stopped by briefly yesterday to see how things were
2 going because Jaime is the sort of person who -- he
3 inspired that degree of commitment to him from the people
4 who interacted with him on a daily basis in their
5 representation.

6 I took the case over, one of the few cases I took
7 over from the people leaving the office when Ms. Payne
8 left earlier this year. Then I associated with Mr. May on
9 this case this summer to assist me in preparation.

10 I'm going to turn it over to Mr. May as far as the
11 mitigation goes in this situation. I can tell you that
12 Jaime has been a pleasure to interact with on a personal
13 basis.

14 He, obviously, is highly emotional at this point in
15 time, and he is highly emotional, not just for himself but
16 due to his reflection on the incident itself, Your Honor.

17 I understand that the cap is what's recommended, and
18 I'm going to just turn things over to Mr. May to address
19 other aspects of the litigation.

20 THE COURT: Yes, sir.

21 MR. MAYE: Yes, sir. May it please the Court, Jim
22 May.

23 Your Honor, for the last four months I've associated
24 with Jaime at least weekly, if not daily. Jaime has been,
25 as Mr. Strickler said, a pleasure. It's been an honor to

1 associate with him.

2 He states that he did this. To be honest, I -- I
3 would have no reason to ever think he would have done
4 this. He has been truly a pleasure. Jaime Marrero stands
5 before you. Jaime is the father of Jaime, Jr. Jaime
6 served in our country's Navy.

7 Your Honor, as I said to you in chambers, Jaime and I
8 were born about 20 days apart. Whatever you give him,
9 even if you give him the minimum by statute, that means he
10 spends more time in prison than we've walked the earth.
11 This is hard because I mean, I like him.

12 Beg the Court's indulgence for one second.

13 (Pause).

14 Your Honor, he wrote a -- 4:16 says, "Let us come
15 before -- come wholly to the throne of grace that we may
16 attain mercy and find grace in this time of need." That's
17 where Jaime is, Your Honor.

18 I would ask that you show grace and mercy on him.
19 Respectfully, Your Honor, we'd ask for 30 years.

20 MR. STRICKLER: If I may, Your Honor.

21 THE COURT: Yes.

22 MR. STRICKLER: Just very briefly. I just look out
23 here, and I see Ms. Franklin sitting in the audience, whom
24 I referenced earlier again.

25 In an indication to the effect that Jaime has a --

1 with the people associated with him, I had no contact with
2 her as far as that.

3 Jaime, do you want to say a few words to the Court?
4 If you would, please, Your Honor.

5 THE COURT: Yes, sir, Mr. Marrero.

6 THE DEFENDANT: First off, I want to truly, truly
7 apologize to the -- to the victim's family,
8 Mr. Grandstaff's family.

9 MR. STRICKLER: Address the Court.

10 (Pause).

11 THE DEFENDANT: Okay. I truly want to apologize. At
12 the -- at the time -- as I stated before, at the time when
13 the shot was fired, that's what brought me back to.

14 I didn't mean to -- I didn't mean to go through all
15 of this process and waste everybody's time, but I wanted
16 to get back to my son, and I apologize. I'm sorry. I'm
17 sorry.

18 MR. STRICKLER: Thank you, sir.

19 THE COURT: Thank you, sir.

20 MR. MAYE: Thank you, Your Honor.

21 MR. MEADORS: Judge, there's other one other
22 individual I'd like to thank. Leir operated the
23 equipment. I just didn't want him to think I left him
24 out, too.

25 THE COURT: Okay. Well, let me say, too,

1 Mr. Marrero, that I think the evidence clearly established
2 your guilt in this case. There's no question in the
3 Court's mind about that at the end of the day, and
4 certainly, just listening to the telephone call and the
5 tape that the incident occurred, the voices were clearly,
6 in the court's own mind, very similar.

7 You know, the court is satisfied of your guilt in
8 this case. I will tell you that I do not recall -- and
9 I've tried many murder cases, but I don't recall ever
10 giving less than life without parole in a case where a
11 person was shot, had no way to defend themselves. I can't
12 remember ever giving anything less than life without
13 parole. That's probably -- if a jury had come back with a
14 conviction, that's probably what I would have given you.
15 I can't remember ever not doing that, okay.

16 I take into consideration all of the facts in this
17 case, and come out with what I think is an appropriate
18 sentence in this case.

19 Nothing is going to bring back the young man who is
20 deceased. There's not anything we can do about that. My
21 sympathies go out to the family about that loss. I'm
22 sorry about that.

23 On case number 06-GS-40-3620, Jaime Marrero, having
24 pled guilty to murder, the sentence of the Court is you be
25 committed to the State Department of Corrections for a

1 determinate term of 38 years.

2 This sentence will run current with the sentence of
3 06-GS-40-3621 and the federal sentence that he has pending
4 if he's able to serve it first. I have no way of knowing
5 that. If he's able to serve it first, this, of course,
6 will be running concurrent. If not, then this would be
7 consecutive. He wouldn't serve the federal one until he
8 served this one now. He's given credit for all jail time
9 served in this case.

10 Case number 06-GS-40-3621, Jaime Marrero, having pled
11 guilty to attempted armed robbery, the sentence of the
12 Court is you be committed to the State Department of
13 Corrections for a determinate term of 20 years.

14 This sentence will run concurrent, again, also with
15 the federal sentence, if he's able to serve it first, and
16 again, he's given credit for the jail time he has served.

17 Good luck to you, sir.

18 MR. STRICKLER: Thank you very much, Your Honor.

19 THE COURT: Please bring the jury in.

20 (WHEREUPON, the jury came into open court at
21 approximately 11:10 a.m.)

22 (WHEREUPON, State's Exhibits Nos. 73-79 were marked
23 for identification only.)

24 THE BAILIFF: The jury is present, Your Honor.

25 THE COURT: Good morning. Madam Forelady, members of

1 the jury panel. I know I've kept you back there a long
2 time without coming out, but there's good news at the end
3 of that.

4 So in the interim this morning, we've been able to
5 resolve this case. So it has been resolved, and so it
6 will not be necessary for you to decide the case in order
7 for us to complete the trial because it has been resolved.

8 I want to take this opportunity to thank you for your
9 service this week. Thus far, you have been an excellent
10 jury, been on time, paid attention all the way through
11 trial.

12 We deeply appreciate your service and your --
13 everything you contributed to the trial this week. I'm
14 going to again thank you for your service and sacrifice.

15 We understand your being here requires sacrifice on
16 your part. Believe me, as the Court system, we do not
17 take that sacrifice for granted.

18 We appreciate all of your cooperation and your
19 patience. I'm going to free you up at this time and ask
20 you, if you would please, return to the jury assembly
21 room. There's some decision to be made from there as to
22 what needs to be done.

23 Hopefully, maybe you won't have to serve on another
24 jury this week. In any event, thank you very much for
25 your service, and you're free to leave.

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit 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 and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of General Sessions for
Richland County, South Carolina, on the 25th day of
September, 2008.

April 28, 2012

Karen Ambroziak

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

COURT OF COMMON PLEAS

JAIME MARRERO)
PETITIONER,)

v.)

TRANSCRIPT OF RECORD
09-CP-40-2523

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

January 14, 2013
Columbia, South Carolina

B E F O R E :

THE HONORABLE G. THOMAS COOPER, JUDGE

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

ETHAN R. WARE, ESQ.
AMBER MATELLA, ESQ.
Attorney for the Petitioner

ROBERT D. CORNEY, ESQ.
Attorney for Respondent

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter
Typed for Elizabeth Harris

INDEX

	Page
Opening remarks by Mr. Corney	3
JAMES HUNTER MAY:	
Direct examination by Mr. Ware	5
Cross-examination by Mr. Corney	51
Redirect examination by Mr. Ware	69
Recross-examination by Mr. Corney	74
JAIME MARRERO:	
Direct examination by Mr. Ware	75
Cross-examination by Mr. Corney	92
Closing remarks by Mr. Ware	103
Closing remarks by Mr. Corney	107
Reply remarks by Mr. Ware	113

(There were no exhibits submitted.)

1 MR. CORNEY: May it please the Court.

2 THE COURT: You may proceed.

3 MR. CORNEY: Your Honor, the State calls
4 the post-conviction relief application of Jaime
5 Marrero. It's docket number 2009-CP-40-2523. Mr.
6 Marrero was true bill indicted in June 2006 term
7 Richland County grand jury for attempted arm robbery
8 and murder. He proceeded to jury trial
9 September 25th, 2008, before Judge Alford. After
10 three days of trial Mr. Marrero changed his plea to
11 a guilty plea to attempted armed robbery and murder
12 as indicted for a recommended cap from the State for
13 43 -- for a 40 year cap sentence, excuse me. He was
14 sentenced to 38 years imprisonment for the murder
15 and 20 years for the attempted armed robbery to run
16 concurrently with each other. There were some other
17 pending unrelated charges that were nol prossed that
18 are mentioned on the record by Mr. Strickler. He
19 did not have direct appeal but filed a timely PCR
20 application in April 7th of 2009. He is represented
21 today by Mr. Ethan Ware and Ms. Amber Matella, and I
22 will turn it over to them at this point.

23 MR. WARE: May it please the Court.

24 THE COURT: Mr. Ware.

25 MR. WARE: Your Honor, I'm Ethan Ware and

1 to my left is Amber Matella. We're with McNair Law
2 Firm. We represent Mr. Marrero in his
3 post-conviction relief request. We'd like to state
4 for the Court that the basis of this is ineffective
5 assistance of counsel so we've requested as our
6 first witness Mr. Jim May.

7 THE COURT: Let ask you this, Mr. Ware, I
8 have his application. Have there been any
9 amendments to his application as of today?

10 MR. WARE: There was an amendment filed
11 earlier in December but not since December, Your
12 Honor.

13 THE COURT: Well, have you got a copy of
14 that?

15 MR. CORNEY: It's not part of that packet
16 I handed up, Your Honor? If not, I can —

17 THE COURT: All I have is the transcript,
18 the applicant's application, the sentencing sheets,
19 his history at the Department of Corrections, and
20 the State's return. I don't have an amended —

21 MR. CORNEY: I apologize, Your Honor.
22 I've got the original copy here, and if we could —

23 THE COURT: Just hand it up. I'll have my
24 clerk —

25 MR. CORNEY: Thank you, Your Honor.

PW - J. MAY - DIRECT

1 THE COURT: ---copy it.

2 MR. CORNEY: That's the other one. It's a
3 filed copy that I received. I apologize for not
4 having that correct.

5 THE COURT: That's quite all right.

6 All right, Mr. Ware, call your first
7 witness. Go ahead and call your witness.

8 MR. CORNEY: We'd like to call Jim May.

9 WHEREUPON,

10 **JAMES HUNTER MAY,**
11 having been duly sworn by the Court, testified as
12 follows:

13 THE COURT: Have a seat. State your full
14 name for the record please.

15 THE WITNESS: My name is James Hunter May.
16 I go by Jim.

17 **DIRECT EXAMINATION**

18 BY MR. WARE:

19 Q Mr. May, do you recognize the gentleman to my
20 right?

21 A Yes, sir.

22 Q Who is he?

23 A Jaime Marrero.

24 Q Have you ever represented him before?

25 A I did, in 2008.

PW - J. MAY - DIRECT

1 Q When did you graduate from law school?

2 A May of 2007.

3 Q Do you have any law related jobs during law
4 school?

5 A I clerked with the Public Defender's Office and I
6 clerked for Timothy Quinn of the law office of
7 Timothy Quinn.

8 Q And after you finished law school where did you
9 go to work?

10 A Public Defender's Office.

11 Q Was this your first case—

12 A No.

13 Q —with Mr. Marrero?

14 A No.

15 Q So you began working at the Public Defender's
16 Office in what month and in what year?

17 A I began working for the Public Defender's Office
18 in May of 2006. I was sworn into the bar in
19 November of 2007. I worked there throughout the
20 time that I was in law school. After my second year
21 in law school in the position of a clerk I took the
22 bar. After the bar I continued clerking there until
23 I was sworn in.

24 Q And what month and year were you assigned to
25 represent Mr. Marrero?

PW - J. MAY - DIRECT

1 A We tried him in September so I would have been
2 assigned to represent him most likely in June,
3 though, several months before.

4 Q Was this a capitol murder case?

5 A Originally it was tagged as a death penalty case
6 by the Solicitor's Office because -- well, it was an
7 execution on video tape; however, they never
8 actually served death penalty notice.

9 Q Was that tag, if you will, as a capitol murder
10 case ever withdrawn to your knowledge?

11 A Well, when I say tag it is that the Solicitor's
12 office has the ability to say we're looking at case
13 X for the potential to go capitol. No, no, there
14 was never a service of notice of capitol punishment
15 on Mr. Marrero's case. It was only through
16 discussions between the office noted that this is a
17 case that they think meets the standard, there's the
18 aggravating factors, and this is a case that they
19 are intending to look at to go capitol. However,
20 there was never any kind of notice given that they
21 actually were seeking the death penalty. It appears
22 that they were more using that as a leverage tool to
23 try to get Mr. Marrero to plead to life at which
24 time he would -- every time, according to
25 Mr. Strickler who was the attorney who represented

PW - J. MAY - DIRECT

1 him the vast majority of the time, he would decline
2 that.

3 Q How many cases had you tried before Mr. Marrero's
4 case?

5 A Maybe 4. 3 or 4, I ---

6 Q 3 or 4? Had you tried one to jury verdict?

7 A Yes.

8 Q How many other cases had you been involved prior
9 to Mr. Marrero's case?

10 A When I was sworn in I was given 350.

11 Q How many of those came to this courtroom?

12 A The vast majority.

13 Q Before Mr. Marrero's trial?

14 A Yeah, I mean, it is -- it is a triage unit to a
15 large degree.

16 Q So you have a lot of stuff going on?

17 A Without a doubt.

18 Q Who other -- what other counsel was involved in
19 this case on behalf of Mr. Marrero, if any, from the
20 Public Defender's Office?

21 A Yes, sir. Originally Betsy Franklin was assigned
22 this case. When Ms. Franklin left the office it was
23 assigned to Danielle Payne. When Ms. Payne left the
24 office Mr. Strickler and I had the case.

25 Q And when was that? When did Ms. Payne leave the

PW - J. MAY - DIRECT

1 office?

2 A Again, to the best of my recollection sometime
3 around June of 2008.

4 Q And Mr. Strickler had responsibilities on this
5 case as well, is that what you testified to?

6 A Yes.

7 Q What were those responsibilities?

8 A Well, I mean, he is the chief public defender so
9 he oversees any case and seeing as the nature of
10 this case, Mr. Strickler was one of the two
11 attorneys on record.

12 Q Did he interview any witnesses?

13 A I have no idea.

14 Q Did he participate in the trial by giving an
15 opening statement?

16 A He participated in trial as that he was handling
17 all law enforcement witnesses. I was handling all
18 lay witnesses, and he was going to handle the
19 pathologist. I also did the openings, the closings,
20 and all motions. And he was going to be there to
21 assist if I needed anything.

22 Q Who was responsible for making objections?

23 A Depends on whose witness was on the stand.

24 Q With respect to Ms. Fuller's testimony?

25 A That was I; that was me.

PW - J. MAY - DIRECT

1 Q With respect to Mr. Elliott's testimony?

2 A Mr. Ellis?

3 Q Ellis, excuse me.

4 A That'd be me. Any lay witness I had. Any law
5 enforcement witness Mr. Strickler had. We never got
6 to the pathologist, but he was going to have the
7 pathologist as well.

8 Q Who had the responsibility for testimony of Mr.
9 Marrero?

10 A I did.

11 Q Did you ever call him?

12 A We didn't get that far. We were.

13 Q Who was responsible for the closing argument?

14 A That was going to be me.

15 Q So Mr. Strickler had very little to do with this
16 case; is that a fair statement?

17 A No, sir, it's not.

18 Q Okay. Who had primary responsibility for meeting
19 with the Solicitor's Office during the course of
20 this trial and beforehand?

21 A I'd say it's probably Doug, Mr. Strickler. I
22 would attend all meetings. But seeing as he is the
23 chief public defender and we were going against the
24 deputy solicitor, Mr. Strickler handled the vast
25 majority of the meetings.

PW - J. MAY - DIRECT

1 Q So you were just a standby person during those
2 meetings?

3 A It just, I mean I -- when I was given the case or
4 when Mr. Strickler asked me to help try this case,
5 Mr. Strickler asked me, told me that this is a
6 trial, this is going to be a trial. The offer is
7 life; they could still serve the death penalty
8 notice. If we can try it we need to try it so that
9 way that we get a chance to get something besides
10 death or life.

11 Q Did you know it was not a life -- I mean, excuse
12 me, did you know it was not a death penalty case
13 before the opening argument?

14 A Well, yeah. It was not a bifurcated trial.

15 Q So you weren't worried at that point about it
16 being a --

17 A No.

18 Q --capitol offense?

19 A No -- when -- no, no, no. For there to be a
20 capitol trial there's an entire different procedure
21 that happens. That procedure never was instituted
22 in this case because death notice was never given.
23 Because that procedure was never instituted with
24 death notice being given, it was a run-of-the-mill
25 murder trial. However, the State had always

PW - J. MAY - DIRECT

1 indicated that there was never being any offer
2 except for life.

3 Q With all that you had going on during this time,
4 what were the other cases that you were involved in
5 prior to Mr. Marrero's trial?

6 A As far as trials?

7 Q Actual trials. You mentioned there were four?

8 MR. CORNEY: Your Honor, I'm going to
9 object to that. I don't see the relevance of how
10 that plays in his representation of Mr. Marrero and
11 his effectiveness at trial, with Mr. Marrero's
12 trial. I mean, that's just not relevant whatsoever.

13 THE COURT: Overruled. Go ahead.

14 THE WITNESS: We tried Otis Krimel (ph),
15 We tried --

16 BY MR. WARE:

17 Q Was that a murder case?

18 A No, sir. This was the first murder I was ever a
19 participant in.

20 Q I see. What was the Otis case about?

21 A It was a domestic violence. There was another
22 domestic violence and a burglary, as well as a dog
23 fighting case that also had trafficking of cocaine.
24 To the best of my knowledge those are the three.
25 There may have been additional trial in there. I

PW - J. MAY - DIRECT

1 mean, in my time at the Public Defender's Office I
2 tried roughly 20 trials. And to be honest with you
3 I tried several cases before Jaime's. I can't tell
4 you if there were three or four. There were at
5 least three.

6 Q The incident alleged in this case took place on
7 September 28th, 2004?

8 A Sure, I'll take your word for it.

9 Q Was Jaime Marrero criminally or mentally insane
10 at the time of the alleged crime?

11 A Not to the best of my knowledge.

12 Q Why not?

13 A Through my interactions with Mr. Marrero, Mr.
14 Marrero is a highly intelligent, mentally stable
15 person. He -- there was never any indication, nor
16 was there any indication to any of the, the best of
17 my knowledge counsel that he, that represented him
18 before I did.

19 Q Did you --

20 A There was never any indication that Mr. Marrero
21 showed any signs besides he was a bright, very
22 capable, very affable, very likeable. I mean, he
23 was a very likable, likable person. For the
24 standard in South Carolina to be, not be -- not be
25 criminally responsible or mentally competent, there

PW - J. MAY - DIRECT

1 is absolutely no question in my mind that at the
2 time that I represented him that never presented
3 itself.

4 Q Did you ever ask him if he was?

5 A I was told it's a trial.

6 Q I'm sorry?

7 A I was told by Mr. Strickler that the case was a
8 trial.

9 Q That the case was in trial?

10 A Was a trial.

11 Q Was a trial?

12 A There was ---

13 Q What does that mean? I'm sorry, I did not
14 understand. When you say it is a trial what do you
15 mean?

16 A There's different ways that you have to handle
17 clients to ethically be able to present, put them on
18 the stand. If Mr. Marrero had told me that he did
19 it, I could not have put him on the stand and suborn
20 perjury. We ---

21 Q So did you ever ask him to know whether or not he
22 was insane?

23 A In, in the preparation, yes, we talked about it a
24 lot.

25 Q Was he or was he not?

PW - J. MAY - DIRECT

1 A Was he what?

2 Q Insane?

3 A No.

4 Q Did you ask him?

5 A There was never any indication to ask him.

6 Q Did you refer to him to a mental health
7 professional for evaluation at any time?

8 A There was never any evidence to support such a
9 claim. No.

10 Q Did you ever investigate the possibility that
11 there was a mental issue with respect to Mr.
12 Marrero?

13 A Mr. Marrero — no, no, sir, I did not. I — Mr.
14 Marrero was never — there was never any indication
15 whatsoever that Mr. Marrero had any kind of mental
16 defect to warrant that. Mr. Marrero, again, is
17 arguably the client that I associated with the most,
18 not only our age. We're very closely, a lot in age.
19 But also he was — no, there was never any, never
20 any question about mental competency or criminal
21 responsibility.

22 Q Can I ask you some questions about that?

23 A You can ask me whatever you want, Mr. Ware.

24 Q Did you ever ask him about his childhood?

25 A We went over his childhood in preparing his

PW - J. MAY - DIRECT

1 direct testimony, yes.

2 Q Did you ask him about his relationship with his
3 parents ----

4 A I was ----

5 Q ---and whether he was in treatment as a child for
6 anything?

7 A No, sir, I did -- we talked about briefly his
8 background as well as -- now it is, I know it's our
9 office's practice though I cannot testify to this
10 case, it's our office practice once a person is
11 quote/unquote tagged as a potential death penalty
12 case, a complete workup is done in preparation for
13 any kind of death penalty case. I know that is the
14 general practice at which time all kinds of mental
15 health records as well as. I know that we obtained
16 his military service records in the eventuality that
17 there was a potential that it would to trial as a
18 capitol case. Again, I -- that is the general
19 practice of our office. I cannot testify that that
20 occurred here, though I do know that there was
21 capitol workup done in those type -- in cases such
22 as that they look into that.

23 Q May I ask you some more questions?

24 A Yes, sir.

25 Q Did you know his parents had divorced at a very

PW - J. MAY - DIRECT

1 young age?

2 A I knew that his father was in the military and
3 his mother lived on the outskirts of Columbia along
4 378.

5 Q Did --

6 A Yes, sir.

7 Q Did you know he went into mental counseling as a
8 child as a result of that?

9 A No, sir.

10 Q Did you know that he was treated at that time?

11 A No, sir.

12 Q Did you ask him at all about abuse as a child?

13 A No, sir, because at the time it was a criminal
14 trial for murder.

15 Q That's -- my only question is did you ask?

16 A And I just told you no. At the time it was a
17 criminal trial for murder.

18 Q Did you ask whether or not he'd been sexually or
19 physically abused at all?

20 A That has no bearing on a criminal trial for
21 murder.

22 Q So you did not investigate it?

23 A I did not investigate his, any kind of trauma
24 that might have been suffered.

25 Q You said you knew of his military service.

PW - J. MAY - DIRECT

1 A Yes.

2 Q What did he serve? What war did he serve?

3 A I knew that he was in the navy.

4 Q And what war did he serve?

5 A I have no idea. He was in the navy. He served
6 on the air craft carrier fixing engines and ---

7 Q So you do not know whether he served in a war
8 or not?

9 A No, sir. I know that was he ---

10 Q He's ---

11 A I know that he was in the military on a aircraft
12 carrier. He, it might have been -- I know that he
13 was working on a aircraft carrier and I know why he
14 was discharged.

15 Q Do you know if he ever was involved in the war?

16 A I do not.

17 Q Do you know whether anyone close to him was
18 injured or died during a war?

19 A I know the only person that he talked about
20 getting injured or died was at a club off 601.

21 Q Do you know whether he was discharged and, if so,
22 why?

23 A I believe he was discharged for testing positive
24 for marijuana. That's my recollection.

25 Q Did you ever ask him about his military service?

PW - J. MAY - DIRECT

1 A. We briefly talked about the military service in a
2 method, in a manner to build up his direct
3 testimony.

4 Q. Did you ever ask him about his family life when
5 he left for the military?

6 A. No.

7 Q. Did you ask him what condition it was in when he
8 returned?

9 A. No.

10 Q. So you didn't investigate anything about his
11 situation prior to this trial or what could have
12 occurred on or about September 28th, 2004 and what
13 the basis of it was, did you? There is a no prison law

14 A. Sir, the video tape is a person executing
15 somebody.

16 Q. That's not what I asked you.

17 A. Well, wait a second, let me, I can answer the
18 question. The videotape is somebody executing
19 somebody on video tape. There is no diminished
20 capacity defense in South Carolina. The question is
21 is, if it's gonna to be a trial how is the best
22 chance we have to win, what's the best chance we get
23 this young man free. There is no diminished
24 capacity. There was no indication he had any kind
25 of mental defect. We investigated the case itself.

PW - J. MAY - DIRECT

1 I talked to Mr. Marrero extensively in preparation
2 for direct. Did we investigate what kind of
3 childhood he had, no, because it wasn't relevant to
4 the case.

5 Q Mr. May?

6 A Yes, sir.

7 Q Is being insane relevant to a case?

8 A He wasn't insane. There is no doubt ---

9 Q Are you a psychiatrist or a psychologist who can
10 render that opinion, or is that just what you
11 believed based on your position as an attorney three
12 months after you were admitted to the bar?

13 A It was actually longer than that, but it's also
14 from 60 plus sessions of meeting with Mr. Marrero.
15 There was no doubt.

16 Q Did you move at any time to have Mr. Marrero
17 evaluated for his mental capacity during this trial?

18 A There was no reason to.

19 MR. WARE: Your Honor, we understand you
20 have a copy of the transcript.

21 THE COURT: I've got the trial transcript
22 and I just picked up the transcript of the plea
23 colloquy so what are you referring to? What do you
24 want me to look at?

25 MR. WARE: Well, I'd like Mr. May to refer

PW - J. MAY - DIRECT

1 to the transcript of the plea as well as the
2 testimony of Ms. Fuller.

3 THE WITNESS: You need to provide me one.

4 THE COURT: Here's the plea transcript.

5 MR. WARE: I have an extra copy. May I
6 approach the witness, Your Honor, to provide him
7 one?

8 THE COURT: Sure. And which witness?

9 MR. WARE: Ms. Fuller.

10 THE COURT: Is she in the plea transcript
11 or in the trial transcript?

12 MR. WARE: She's in the trial transcript,
13 the last witness.

14 THE WITNESS: If you'll refer me to what
15 page, sir.

16 THE COURT: Now you have the. — well, just
17 let Mr. Ware tell you where he's going.

18 Fuller? Did you say Fuller?

19 BY MR. WARE:

20 Q We'll start with Ms. Fuller. Please refer to
21 page 266. If you would please look at lines 13
22 through 21.

23 THE WITNESS: Okay.

24 THE COURT: I'm following along too so
25 don't go too fast.

PW - J. MAY - DIRECT

1 BY MR. WARE:

2 Q Ms. Fuller testified when asked by the solicitor
3 in this case what Mr. Marrero said regarding the
4 events of September 28th; and she testified, quote,
5 he blacked out, he wasn't in his right mind, he made
6 a mistake. My question for you, Mr. May, is would
7 not it have been reasonable to investigate whether
8 or not Mr. Marrero was mentally incapacitated or
9 otherwise mentally effected at the time of this
10 event?

11 THE COURT: Mr. Ware, just for my benefit

12 —

13 MR. WARE: Yes, sir.

14 THE COURT: —who's Ms. Fuller? I
15 mean...

16 MR. WARE: Ms. Fuller was the State's key
17 witness who —

18 THE COURT: Eyewit— I mean, lay witness?

19 MR. WARE: Was not a eyewitness, was a
20 witness for the State who testified that Mr. Marrero
21 was her boyfriend, and two years after the event
22 said certain information that implicated him in the
23 September 28 events. Two years after the incident.
24 And one of this things that the State asked her was,
25 what did he tell you. And she says, he told me he

PW - J. MAY - DIRECT

1 blacked out.

2 THE COURT: Okay, I just have to put it in
3 context.

4 BY MR. WARE:

5 Q Would that have been reasonable for her to think
6 that?

7 A To fully -- to fully answer this question there's
8 information that is attorney/client privilege that I
9 can answer the question; however, I believe Mr.
10 Marrero needs to know he needs to waive that
11 privilege.

12 MR. CORNEY: And Your Honor, just for
13 purposes of the record, the State would just submit
14 that Mr. Marrero just by filing the PCR application
15 has already waived his attorney/client privilege
16 with Mr. May.

17 THE WITNESS: This would also -- this
18 would be through Ms. Payne.

19 MR. CORNEY: Through Ms. Payne. Under
20 code section 17-27-130 upon filing a PCR application
21 he's waived attorney/client privilege to the extent
22 to the attorney's ability to respond to allegations
23 that are brought before him so I would just request
24 the Court instruct Mr. May to disclose those
25 conversations with Mr. Marrero.

PW - J. MAY - DIRECT

1 MR. WARE: May I be heard on that, Your
2 Honor?

3 THE COURT: Yeah.

4 MR. WARE: I would be a little concerned
5 if he's going to testify to hearsay from another
6 attorney. What Mr. Marrero waived, it seems to me,
7 was, were attorney privilege information at the time
8 of this trial and who was his lawyer at the time of
9 the case.

10 MR. CORNEY: His allegations are as to the
11 investigation leading up to it. If it's in the file
12 Mr. May reviewed in preparation for the trial, then
13 that's, that's all something he can testify to.

14 MR. WARE: But our question is only as to
15 the reasonable investigation that Mr. May should
16 have done regarding Mr. Marrero, not what Ms. Payne
17 ---

18 THE COURT: He can answer.

19 MR. WARE: ---should have done or someone
20 else.

21 THE COURT: He can answer that.

22 MR. CORNEY: Thank you, Your Honor.

23 THE WITNESS: So just for clarification so
24 I don't...

25 THE COURT: Just answer the question.

PW - J. MAY - DIRECT

1 THE WITNESS: What did I do? I can tell
2 you I did not look into his mental health
3 background. I did not.

4 BY MR. WARE:

5 Q Did anyone else in your office?

6 A Yes.

7 Q Who?

8 A I believe that Ms. Payne did.

9 Q How do you know that?

10 A Because Ms. Payne told me she looked at all
11 avenues regarding what Mr. Marrero told him — told
12 her.

13 Q Did she tell you she had him evaluated for mental
14 capacity at the date of the incident?

15 A No, sir.

16 Q To your knowledge was he by anyone in your office
17 —

18 A I do not know.

19 Q —referred to that purpose?

20 A I cannot say either affirmatively or deny it, no.

21 Q If you would please turn to page 232 of the
22 transcript beginning at line 7 through 14. This is
23 again questions by Mr. Meadors to Ms. Fuller about
24 what took place in the hotel room two years after
25 the incident.

PW - J. MAY - DIRECT

1 A Yes, sir.

2 Q He asked, were you in the hotel room, and she
3 says yes. He then questions in line number 11:
4 "And how did he tell you he felt about it, or what
5 did he say he wanted to do to himself if anything?"

6 A He said he wanted to kill himself. That's her
7 direct testimony.

8 Q Did you stop the trial either after the previous
9 statement and ask for a mental evaluation or after
10 this statement and ask for a mental evaluation?

11 A No.

12 Q If you will turn back to page 229. This is
13 referring to at the time when they were living
14 together, Ms. Fuller and Mr. Marrero. In lines 18
15 through 24 she describes an incident involving Mr.
16 Marrero. She testifies: "He came home. He was
17 very disturbed. He was in a frantic state of mind.
18 He was just really, I don't know. He was just, he
19 wasn't himself. He was kind of hysterical, just I
20 don't know. He was just really, he seemed a little
21 fearful." Did you object at that time and ask for
22 an opportunity to have Mr. Marrero evaluated for
23 mental illness at that point in time?

24 A No, sir.

25 Q Do you remember Mr. Marrero's plea testimony?

PW - J. MAY - DIRECT

1 A The colloquy from the plea? Some of it. What
2 page would you like me to look at, sir? Is this
3 regarding the "blacked out and I just came to"?

4 Q Yes, it is.

5 A Can you ---

6 Q Do you remember that testimony?

7 A I remember it like it was yesterday.

8 Q What did he say when asked whether or not he
9 committed this crime?

10 A What'd he say to the judge?

11 Q Yes.

12 A He said, I just came to.

13 THE COURT: He said what?

14 THE WITNESS: He said he pulled the
15 trigger. He said once I pulled the trigger I came
16 to and I saw him fall. Before that I don't
17 remember.

18 BY MR. WARE:

19 Q Let me read it for you on page 293.

20 A Give me one second, sir, one second.

21 Q Lines 4 through 8. This is at the plea
22 transcript 293, page 293, lines 4 through 8.

23 THE COURT: All right, hold on. My plea
24 transcript is numbered 1 through 21. So in other
25 words, it's not ---

PW - J. MAY - DIRECT

1 MR. WARE: The one I have, Your Honor, is

2 ---

3 THE COURT: Okay.

4 MR. CORNEY: And there's one at the end of
5 the trial transcript. It is to my response
6 referring to what we had---

7 THE COURT: What page number?

8 MR. WARE: Number 293, Your Honor.

9 THE COURT: Okay. I didn't realize there
10 was a plea transcript at the end of the trial
11 transcript. What line?

12 BY MR. WARE:

13 Q 4 through 8. "Honestly, Your Honor, I, I, I, I
14 am but at, at, at the time when it happened and this
15 is the God's honest, the God's honest truth, I was,
16 I was not in my right mind, I blacked out." It
17 seems like there was a pattern with respect to that
18 testimony. Did you stop the trial at that point and
19 ask Mr. Marrero, ask to refer Mr. Marrero for a
20 mental evaluation?

21 A No, sir.

22 Q Would that have been reasonable to have done that
23 at any moment once you heard those words about
24 blacking out and didn't know, I was in my right
25 mind, or he was not in his right mind? Wouldn't it

PW - J. MAY - DIRECT

1 have been reasonable to at least to have
2 investigated that, Mr. May?

3 A Not with any of the interactions I had with Mr.
4 Marrero, no, sir, it would have not have been.
5 However, in reading it in a vacuum, yeah, he says he
6 blacked out. However, when one watches the video I
7 don't believe anybody would have ever not found him
8 criminally responsible for that video.

9 Q Wouldn't you say Mr. Marrero has been prejudiced
10 by you not making that request?

11 A No, sir.

12 MR. CORNEY: I'm going to object to that
13 question and ask that be stricken from the record.
14 That's a legal conclusion on this case. That's what
15 the judge -- Your Honor is here to determine.

16 THE COURT: Sustained.

17 BY MR. WARE:

18 Q Did you receive any notice -- or what type of
19 notice did you receive before Ms. Fuller's
20 testimony?

21 A We met with Judge Alford I believe on Friday
22 afternoon and --

23 Q Before the trial started?

24 A Yes, sir, the trial started on Monday. We met
25 with Judge Alford on Friday afternoon, and as we

PW - J. MAY - DIRECT

1 were leaving the meeting John Meadors asked that
2 Mr. Strickler and I go to a jury room with him. And
3 he cited something inapplicable rule called the rule
4 of fairness and said that they had just found Hannah
5 Fuller in a treatment facility in somewhere in south
6 Georgia I believe -- that could be wrong -- but I
7 believe it was somewhere in south Georgia, and that
8 they were intending to call her and that her
9 testimony had changed from the original statements
10 given to law enforcement when Mr. Marrero was
11 arrested.

12 Q Did you request her testimony be precluded from
13 trial? Did you ask to strike it?

14 A We asked for a continuance and we were denied.

15 Q Did the judge deny it?

16 A Yes.

17 Q In that pre-meeting before the trial started did
18 you have a conversation with the judge, or were you
19 participating in that meeting?

20 A Yes.

21 Q Were you present regarding everything preparing
22 for trial during all the various meetings with the
23 judge?

24 A Yes, sir.

25 Q What meetings did you have besides that one

PW - J. MAY - DIRECT

1 Friday before the trial started on a Monday?

2 A We also had one on Monday; that was it. They
3 brought Judge Alford down from, I believe, York
4 County to try the case.

5 Q Did Mr. — did Judge Alford ask what the case was
6 about at any of these meetings?

7 A He sure did.

8 Q Who did he direct that question to?

9 A The State.

10 Q What did the State reply to your recollection?

11 A The State said this is a case, this is a murder
12 trial, we have him on video.

13 Q And what did you say in response to that?

14 A Well, Judge Alford says, then why are we trying
15 this case if he's on video. And I said because it's
16 not him on video. Just for the Court's edification
17 there's a video of — it's a Kangaroo Gas Station on
18 378. On the video two masked men enter the video.

19 The clerk comes into the video screen. The clerk is
20 pistol whipped, asked — the person asked to give
21 money, asked time and time give me the money, the
22 masked man does, at which time the victim Mr.

23 Grandstaff says I said no. And the lighter skinned
24 male says fine, pulls the trigger, and the victim
25 drops right there on the floor.

PW - J. MAY - DIRECT

1 Q In all of those videos both men involved in it
2 were masked; is that correct?

3 A That is correct.

4 Q My question to you is, with Judge Alford having
5 heard that from the Solicitor's Office what do you
6 think he meant when he said, why are we here?

7 A If somebody is on video tape why is he not, why
8 is he not pleading? However, this is a masked — I
9 explained there were two masked people and that Mr.
10 Marrero is not one of them.

11 Q Did anybody at that time suggest the plea was
12 appropriate?

13 A No.

14 Q Did the judge say anything about the plea being
15 appropriate?

16 A No.

17 Q Did you ask the judge be recused at that point?

18 A No.

19 Q During the trial at any time with your bench
20 meetings with the judge or meetings in chambers?

21 A There was one meeting in chambers. It was
22 Thursday morning when Judge Alford called us back
23 and said, asked, and told the State to make this boy
24 an offer.

25 Q And what — is that all he said, just out of the

PW - J. MAY - DIRECT

1 blue make this boy an offer?

2 A He said with the way the trial is going and with
3 Ms. Fuller's testimony about Mr. Marrero's remorse
4 please make, this boy needs to get an offer. I told
5 him I told the judge, I was like, I don't believe
6 he's going to take it, he didn't do this. And
7 Mr. Strickler said let them go find out if they can
8 make an offer.

9 Q Did the Solicitor's Office — was, in your
10 opinion and what you observed, was the Solicitor's
11 Office being directed to go get a plea permission?

12 A Yes, sir.

13 Q Did they have any choice about it?

14 A Sure. They could have said no.

15 Q And what did they ultimately do?

16 A They came back after discussing it with the
17 victim's family and offered a cap of 40.

18 Q So they, in fact, went out and requested
19 permission for a plea?

20 A Yes.

21 Q And what did you do at that point?

22 A I went down and sat down with Mr. Marrero at
23 counsel table.

24 Q Did the judge instruct you to do that, or did you
25 just do it on your own volition?

PW - J. MAY - DIRECT

1 A As a criminal defense attorney you have a duty to
2 relay any offers to your client to make him fully
3 aware of the revocations of a plea.

4 Q Tell us about that exchange. The Solicitor comes
5 back in and says, I have permission for a plea, what
6 happened next in the chambers?

7 A In the chambers I said I don't believe he's going
8 to take it, but I'll go relay it to him. We went
9 outside —

10 Q Did the judge say anything during that time
11 period to you?

12 A I do not recall.

13 Q So you took it out to Mr. Marrero?

14 A Yes, sir.

15 Q What took place then? Was Mr. Strickler with you
16 first of all?

17 A He came down and he said I want to sign Mr.

18 Marrero up. I sat on the other side. He said, Mr.

19 Marrero looks at me and goes, what's going on Jim.

20 I said, they made you an offer, they made you an

21 offer of a cap of 40. And he said, what do I do?

22 And I told him that if you did this you need to

23 plea. If you didn't you need to — we need to

24 reject it, we need to try to walk you out the front

25 door. At some point, well, what should I do. I

PW - J. MAY - DIRECT

1 told him that again. He's like, well, last night
2 you said we were going to try to win. And I said,
3 well, we're going to try to win; but if you did
4 this, you need to get, you need to be a free man to
5 see your child at some point. However, if you
6 didn't, you don't need to plea to this at which
7 point I believe he started crying. Mr. Strickler
8 started talking to him as well, said I —

9 Q What did Mr. Strickler say?

10 A He said, son, I know it seems like it's the end
11 of the world and I know that it seems like you're
12 going to be an old man when you get out; but let me
13 tell you, that's not much older than I am and I feel
14 I have a lot of life left. If you did this you
15 should plea. At which point at some point we
16 talked. I can tell you in no uncertain terms I was
17 crying like a child along with Mr. Marrero. And —

18 Q Did he —

19 A —at some point he asked to talk to his, I think
20 it was his sister-in-law who was in the back of the
21 courtroom. He went and talked to his sister-in-law;
22 and then he said, I did it, I need to plead.

23 Q Did the judge at any time communicate from the
24 Bench while you were discussing this with Mr.
25 Marrero?

PW - J. MAY - DIRECT

1 A Yes, sir.

2 Q What did he do?

3 A It was either he, or somebody came out. But it
4 was his directive to say, well we need to, we
5 either, we either need to try this case or he needs
6 to plead but we need to make a decision.

7 Q Going back to inside the chambers —

8 A Yes, sir.

9 Q —who came up with the number 40 years?

10 A John Meadors.

11 Q Did the judge say 40 years?

12 A No, sir, John Meadors.

13 Q Did the judge indicate any minimum number of
14 years or maximum number of years in those
15 conversations?

16 A John Meadors said we have been — we are giving
17 an offer of the cap of 40. That's...

18 Q What did the judge say with respect to that?

19 A He said that's sounds like fair. I can't tell
20 you what I want to give him, but that sounds like a
21 fair offer.

22 Q When you came back out to meet with Mr. Marrero
23 did anybody, you or Mr. Strickler, say an evaluation
24 of his chances of success before the jury?

25 A Yeah, we talked about it.

PW - J. MAY - DIRECT

1 Q What did you say?

2 A We talked about Hanna's testimony as being
3 damning.

4 Q Did you give him a percentage chance of winning?

5 A You can't give a percentage chance for a jury.

6 Q No one said, you have a 99.9 chance of losing
7 this case?

8 A Nobody would ever give a percentage chance
9 because you don't know what a jury is going to do.

10 Q I'm asking you at that day did someone say that
11 to Mr. Marrero?

12 A No, be—

13 Q In your presence?

14 A No.

15 Q Are you sure?

16 A Because that's not going — I've never given a
17 percentage chance of saying somebody is going to
18 win, and I can tell you I've never heard
19 Mr. Strickler do it. So in my presence, no, sir,
20 that did not occur.

21 Q Answer my question.

22 A I'm answering it.

23 Q That's my only question.

24 A I'm answering it.

25 Q If Mr. Marrero was told he didn't have a chance

PW - J. MAY - DIRECT

1 to win or such a very little chance to win, would
2 that have been something you would have wanted to
3 investigate further for him or have some ability to
4 communicate with him further about---

5 A Mr. Marrero ---

6 Q ---outside of the time constraints given by the
7 Court?

8 A Mr. ---

9 MR. CORNEY: Your Honor, I'm gonna object
10 to that question. That's purely speculation, and
11 Mr. May has already said he never heard that happen.
12 I mean, he's saying what if. That's a hypothetical.

13 THE COURT: All right, I sustain the
14 objection, move on.

15 MR. WARE: Thank you, Your Honor.

16 BY MR. WARE:

17 Q My question goes to the amount of time you gave a
18 man to make a life changing decisions, not you but
19 the Court. And my question is were you time
20 pressured to make the decision at all?

21 A Yes.

22 Q How many minutes were you out talking with Mr.
23 Marrero, an hour?

24 A I wouldn't think so; but I, to be honest with you
25 ---

PW - J. MAY - DIRECT

1 Q 30 minutes?

2 A To be honest with you I do not know the amount of
3 time. If I was to guess I'd say maximum 30 minutes.

4 Q Did you ever indicate to Mr. Marrero that if he
5 ever wanted to see his son again he needed to plead
6 guilty?

7 A I said if you're guilty so that you know that you
8 will be a free man, you should plead guilty.

9 Q Do you think Mr. Marrero believed you when you
10 said that?

11 A I don't understand the question.

12 Q Do you think he believed you when he told -- when
13 you told him that as your legal -- as his legal
14 counsel?

15 A If he's guilty he should plead guilty so he could
16 be a free man?

17 Q Yeah.

18 A I would assume that he would believe that because
19 that is a correct statement of the facts; however,
20 he was also told that if he didn't do it he needs to
21 not plead guilty and we need to walk him out the
22 front door.

23 Q Mr. May, do you remember the sentence in this
24 case generally we can go to --

25 A 38 years.

PW - J. MAY - DIRECT

1 Q ---the plea sentence -- excuse me?

2 A 38 years.

3 Q And that's for the charges related to what took
4 place on September 28th, 2004?

5 A That's correct.

6 Q Were there other charges pending in this case
7 that the judge brought up or mentioned?

8 A There was an attempted arm robbery that he got 20
9 conse--concurrent. He had a lynching second that
10 was dismissed. There may have been another petty
11 crime that was dismissed with the lynching second.
12 He as well was under sentence from the federal court
13 for a cocaine trafficking, I believe, which he got
14 five years in front of Judge Currie.

15 Q Okay. Did you discuss the federal sentencing
16 with Mr. Marrero during your brief time together
17 before the plea?

18 A We were ful-- we talked about it, not briefly, we
19 talked about it extensively in trial preparation.

20 Q What did the judge tell you about the federal
21 sentence, what would occur with respect to the
22 federal sentence if he were to plead?

23 A Well, if you're in State custody, he'd never been
24 in federal custody, so therefore you do State
25 custody beforehand. You do federal, state custody,

PW - J. MAY - DIRECT

1 and the he'll can get transferred to the Bureau of
2 Prisons to do his remaining sentence at the
3 conclusion of the State's case.

4 Q Did the judge ever discuss with you outside of
5 the plea the federal sentencing and its effect on
6 his plea?

7 A I don't believe so. We may have discussed it
8 briefly in chambers after we said that he had signed
9 up. I can't — I'm not sure one way or the other.
10 I know that we worked actively to try to get Mr.
11 Marrero into federal custody both immediately after
12 his trial and then actually at one point with
13 discussing it with the attorney general about trying
14 to — how to resolve that because the judge
15 definitely wanted him to get the five, get the five
16 years and not get the five additional years at the
17 end of the 38 years.

18 Q Okay. Explain that. Why would he get five
19 additional years?

20 A Because he's in state custody. Just as I just
21 testified, when you're in state custody you do your
22 State custody and then you go do federal custody;
23 however, if you're ever transferred to Federal
24 custody, Federal custody time and State custody time
25 run concurrent. The Bureau of Prisons does not

PW - J. MAY - DIRECT

1 calculate State time in their calculations; however,
2 South Carolina Department of Corrections does.

3 Q And you -- did you communicate to Mr. Marrero
4 that he would have to serve five ---

5 A Yes.

6 Q ---additional years in federal penitentiary?

7 A There's a chance that we were working -- we
8 worked to try get him ---

9 Q There was ---

10 A ---tried to get him into federal custody. I
11 believe that's in the sentence that Judge Alford
12 gives is that he talks about, I don't know if I can
13 order this but if at all possible try to get
14 concurrent time. It was a issue that we discussed
15 at length because that was something we had
16 addressed in his direct testimony. He understood
17 that he was going to be transferred from Bureau of
18 Prisons one way or the other at the conclusion of
19 his State term of incarceration via pretrial
20 detention or being found guilty at trial.

21 Q Did you indicate in any way to Mr. Marrero that
22 his five years would be served first in federal
23 penitentiary?

24 A Yes.

25 Q And then currently with that that would be

PW - J. MAY - DIRECT

1 reduced from the 38 years ultimately he would have
2 to serve for the murder charges?

3 A All right. I think that we just need -- I need
4 to make sure I understand your question.

5 Q If you will refer then to the transcript pages
6 303 -- I'm sorry, 302, beginning on line 23 at the
7 very bottom?

8 A Yes, sir, it's the sentence.

9 Q And this is the sentence that is presented on I
10 believe it was September 28th, 2008.

11 A Yes, sir.

12 Q And at the top of the next page there's a
13 reference to the federal sentence.

14 A That's correct.

15 Q It strikes me unusual that nowhere in the
16 transcript did I find a reference to this federal
17 crime until the plea and then all of a sudden
18 there's a discussion about, I don't know if it can
19 be served first, if it can concurrent, it might be,
20 it may not. I'm not a judge and I'm not a criminal
21 judge, but it seems to me that's a pretty simple
22 thing to understand and a pretty significant
23 component of a plea agreement whether a man has five
24 more years or five less years so I don't understand
25 why that was not resolved. Can you clarify for us

PW - J. MAY - DIRECT

1 ---

2 A As I ---

3 Q ---why no one addressed that to Mr. Marrero?

4 A As I just said, you have to be transferred to
5 federal custody to get concurrent -- get time for
6 federal charges. Mr. Marrero, for whatever reason,
7 normally federal charges -- I do not know why his
8 federal attorney pled him early, but he received a
9 five year sentence. He was in State custody.

10 Ms. -- at the end of this case I contacted Judge
11 Currie's chambers and tried to see how we could
12 effectuate getting him in federal custody. She
13 referred me to his federal attorney whose name is
14 John Delgado. We discussed the different ways to
15 try to get him there. Ultimately, the only thing
16 that we --- we never could figure out how to get him
17 to State, I mean, to Federal custody. The only
18 thing that we ever figured out talking to Brian
19 Petrano, the former AG at PCRs, is that
20 theoretically there could be a paperwork shift that
21 Mr. Marrero could withdraw his plea. Momentarily
22 the State consent. Then he would actually have no
23 bond. He'd go technically into federal custody.
24 It'd just be a paperwork switch. That ---
25 Q But there's been no paperwork switch ---

PW - J. MAY - DIRECT

1 A Because right now ---

2 Q He's still in the state penitentiary ---

3 A Because right now he has a pending claim in the
4 State of South Carolina.

5 Q So if his understanding of the plea was that he
6 was going directly to federal penitentiary ---

7 A I do not believe that was ever his understanding
8 of the plea. I could be wrong, but that was never
9 his understanding of the plea, or I'd never -- let
10 me rephrase that. I cannot testify to what his
11 understanding was. I never took any information
12 that Jaime and I talked about as that he thought he
13 was going right into federal custody.

14 Q During the course of the trial, Mr. May?

15 A Yes, sir.

16 Q Let me ask you a couple of questions about some
17 of the testimony and your handling of some of the
18 witnesses.

19 A Please do.

20 Q If you will refer to page 225 of the transcript.
21 You will just have to take my recollection of the
22 testimony as it's flowing at this moment in time in
23 the trial but, as you can see, in the reference to a
24 US Air flight at the top of page 225 there was some
25 discussion back and forth between Hanna Fuller, the

PW - J. MAY - DIRECT

1 witness testifying, and the Solicitor John Meadors
2 about her loss related to her family and receiving
3 money as a result of that loss. Question beginning
4 on line 6: "And out of that money you were giving
5 Jaime how much? Answer: "Six thousand dollars."
6 "Was that, what was that for?" Answer: "To buy
7 drugs." Question: "Now did there come a point —
8 had he ever mentioned to you he killed somebody?"
9 Answer: "Yeah." No objection to the question by
10 Mr. May. Looking at that question now, is it
11 leading?
12 A We objected a lot in the beginning. Judge Alford
13 was going to let Mr. Meadors lead. There's times
14 when you object and there's times when you don't.
15 It's being a criminal defense attorney.
16 Q In front of a jury that's a pretty important
17 question; isn't it, Mr. May?
18 A Can you tell us when that was when he first
19 mentioned that to you? Is that where you're talking
20 about?
21 Q Line 11 through 13. He's been discussing the
22 loss of Ms. Fuller's family —
23 A Okay..
24 Q —and receiving money as a death benefit, and
25 out of the blue he says what?

PW - J. MAY - DIRECT

1 A Now did he ever tell you that he killed somebody?

2 Q Yeah. That's a pretty leading question; isn't
3 it?

4 A Okay. You're objecting to he says can you please
5 tell us what whatever conversation he had with you
6 about him killing somebody.

7 Q Did you --

8 A Leading doesn't -- a projection of leading
9 doesn't preclude the testimony; it just precludes
10 the form of the question.

11 Q Did you object to that testimony?

12 A It's not in the transcript.

13 Q Turn to page 258.

14 A Yes, sir.

15 Q Beginning on line 15 through 21. The Solicitor
16 and Ms. Fuller are still exchanging tes-- she's
17 testifying still in front of the Court and Mr.
18 Meadors is asking the questions. And after that
19 we're at line 15. Did you say, "Well, I know you
20 didn't do that. Did you know you were going to
21 record them? This is regarding you were going to be
22 recording them." This is regarding a telephone call
23 between Mr. Marrero and between Ms. Fuller while Mr.
24 Marrero is incarcerated. And he -- and she answers,
25 "Yes." And then he says: "And did you say that for

PW - J. MAY - DIRECT

1 the reason then so the recording would pick it up
2 after you made that comment about," and she answers,
3 "Yes". Did you object to that testimony?

4 A Yes.

5 Q Why did you object to it?

6 A Because at that time Mr. Meadors was testifying.

7 Q Did he strike -- did the judge strike that from
8 the record?

9 A Let me see. It does not appear as such. There's
10 a bench con-- there's a Bench conference.

11 Q On pages 236 to 247 there's discussion about an
12 audio tape from a recording in -- of telephone calls
13 between Mr. Marrero and Ms. Fuller while he's
14 incarcerated. Was that tape ultimately admitted
15 into evidence?

16 A Yes.

17 Q Now you objected to that a number of times as I
18 recall; is that correct?

19 A You'd have to point it to the transcript.

20 Q Okay. Let's go over to pages, beginning at pages
21 236 the jury was excused. And the judge begins and
22 enters discussion with Mr. Meadors and Mr. McDuffie
23 and then Mr. May. And then you suggest that certain
24 process of expediting and reviewing the tape, and
25 then eventually after some back and forth the judge

PW - J. MAY - DIRECT

1 rules on page 245 beginning on line 17 through 21.

2 A I'm sorry, what page, I apologize.

3 Q Page 245, line 17 through 21. "Well, counsel,
4 out of abundance of caution I don't think I'm going
5 to let the conversation in with regard to talking
6 with the police or not talking with the police, that
7 assertion of the right to an attorney, not to talk
8 to the police." But then he says on page 247 he's
9 going to let the remainder in on line 20: "So I'm
10 going to allow it to that extent." And he allows
11 the audio tape in.

12 A Okay.

13 Q You objected to that, correct?

14 A It appears I was objecting under a Dole violation
15 from my brief skimming.

16 Q Now when the trial, when the plea was made, is
17 there a procedure whereby Mr. Marrero still has some
18 rights with respect to the trial?

19 A No.

20 Q What are those?

21 A He doesn't.

22 Q Doesn't he have a right to a direct appeal?

23 A Not to the trial itself. You preclude that when
24 you plead.

25 Q Did he have any right whatsoever with respect to

PW - J. MAY - DIRECT

1 a direct appeal?

2 A To the plea itself; not to the trial.

3 Q Did you discuss that with him?

4 A I have no -- I don't know.

5 Q Weren't you reminded that you should discuss it
6 with him by the Court on the day he pled?

7 A If it's in the transcript, then yes.

8 Q If you'll look at page 2--

9 A There was no objection raised in the plea
10 colloquy itself.

11 Q If you'll look at page 295, lines 13 through 17.

12 I'm sorry, 13 through 16. "Mr. Marrero, if you
13 disagree with the proceeding in which we're
14 currently involved you have ten days from today's
15 date within which to file a notice of intent to
16 appeal." Did you discuss that with Mr. Marrero
17 after the plea?

18 A I don't know. I can't say I did; I can't say I
19 didn't. I spent the better part of the following
20 day at the jail with Mr. Marrero as well as I went
21 down into holding with Mr. Marrero following the
22 plea for, I guess, between one-and-a-half to two
23 hours. I don't know. I can't say one way or the
24 other.

25 MR. WARE: Thank you, Your Honor. We have

PW - J. MAY - CROSS

1 nothing more for Mr. May at this time.

2 THE COURT: Mr. Corney.

3 MR. CORNEY: Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 BY MR. CORNEY:

6 Q Mr. May, do you remember meeting with
7 Mr. Marrero to discuss the charges he was facing?

8 A We met approximately between 50 and 60 times.

9 Q 50 and 60 times. Is that typical for a murder
10 case or would you say that's more or less than you
11 generally meet with defendants?

12 A That's probably typical for my type of murder
13 case that is going to trial at present, that is someone
14 going to trial.

15 Q All right. During the course of your meetings
16 and I know Mr. Ware was asking you about his
17 competency. Did you have any concerns at any point
18 in time as to his ability to understand your
19 conversations or participate in conversations?

20 A Never.

21 Q Any reason you thought he needed to be evaluated
22 for criminal responsibility, competence?

23 A Zero.

24 Q And without a mental evaluation here in front of
25 us today there's no way -- there's no -- never been

PW - J. MAY - CROSS

1 any testimony at least up to this point from any
2 psychiatrist or psychologist saying Mr. Marrero was
3 insane or incompetent, correct?

4 A I can't imagine there would ever be such
5 testimony.

6 Q There was a whole lot of testimony throughout the
7 course of this trial about drug use, correct?

8 A There is, there was.

9 Q And that was kind of -- that was a solid basis of
10 this case in a lot ways is drug use, correct?

11 A That was pretty much the defining characteristic
12 that, that had these individuals together.

13 Q And there was testimony from some witnesses,
14 co-defendants, some other people that were with Mr.
15 Marrero the night this allegedly occurred that they
16 had been doing drugs that night, right?

17 A There were three co-defendants who testified as
18 well as a fourth person who said he disposed of the
19 weapon.

20 Q Okay. And there was testimony that Mr. Marrero
21 was high on cocaine and ecstasy the night of this
22 incident?

23 A That's correct.

24 Q And voluntarily intoxication is not a defense at
25 trial; is that correct?

PW - J. MAY - CROSS

1 A It is not.

2 Q So the fact that he might have wiped out on drug
3 use that night wouldn't have been anything he could
4 bring to trial to get off of these charges?

5 A That is correct.

6 Q Any indication you could have developed insanity
7 or temporary insanity defense at trial?

8 A None.

9 Q I want to talk about just very briefly some of
10 the witnesses that testified at trial.

11 A Okay.

12 Q I think we said there were, as I said a minute
13 ago there was a co-defendant and two other people
14 that were in the car with Mr. Marrero the night this
15 occurred?

16 A There were three co-defendants.

17 Q Three co-defendants. And the three of those
18 co-defendants testified at trial?

19 A That's my recollection.

20 Q All three of those co-defendants identified Mr.
21 Marrero in the courtroom as the person who entered
22 the Kangaroo gas station?

23 A That's correct.

24 Q And there was a videotape that was played during
25 the course of this trial?

PW - J. MAY - CROSS

1 A Several times.

2 Q I think you referred to it earlier as the
3 surveillance videotape from the Kangaroo gas
4 station, correct?

5 A Yes, sir.

6 MR. CORNEY: And Your Honor, at this point
7 in time I've got a copy of the video. I'd like to
8 just enter it in as I.D, for identification
9 purposes, play it to see if Mr. May can identify it
10 as the surveillance tape according to discovery
11 file.

12 MR. WARE: Your Honor, may I be heard on
13 that?

14 THE COURT: Yes, sir.

15 MR. WARE: The basis for our
16 post-conviction relief is not related in any way to
17 the videotape as being proposed here for admission.
18 This was a challenge to the voluntariness of his
19 plea given the partiality of the judge, the lack of
20 information he received. It's also about his lack
21 of a mental evaluation and whether that inherently
22 was ineffective assistance of counsel. It's also
23 about the failure of the counsel involved to provide
24 certain information to him about what this plea
25 meant in the context of five additional years he

PW - J. MAY - CROSS

1 didn't anticipate.

2 This is not a retrial of this case. We —
3 when we, as I think counsel pointed out earlier,
4 filed this post-conviction relief request it was to
5 certain limited information, not to the underlying
6 facts of the trial or the allegations presented or
7 the evidence presented. Now had we challenged the
8 videotape or the truth of the matter in the video
9 tape then we'd be the first to allow that to be
10 admitted for purposes of what Mr. Corney has to say.
11 But for purposes of our post-conviction relief it
12 has no relevance in our mind.

13 THE COURT: What's the relevance, Mr.
14 Corney?

15 MR. CORNEY: Your Honor, the relevance is
16 this was in Mr. May's discovery file. It has
17 everything to do with how he prepared for trial, his
18 discussions with Mr. Marrero, what that he thought
19 the jury may believe as his incompetence or insanity
20 at the time, how he behaved on the videotape. There
21 were four different witnesses that identified Mr.
22 Marrero based on his voice and his physical
23 attributes in the videotape during the course of the
24 trial. It has everything to do with Mr. May
25 relaying his plea offer to Mr. Marrero, instead

PW - J. MAY - CROSS

1 advising him if he's guilty he needs to plead
2 guilty.

3 THE COURT: I think that information
4 should be pretty clear in the trial transcript.
5 I'll sustain the defendant's objection. I don't see
6 any need to re-try the case.

7 MR. CORNEY: Thank you, Your Honor, that's
8 fine.

9 BY MR. CORNEY:

10 Q Mr. May, you were able to review that
11 surveillance videotape in your preparation for
12 Mr. Marrero's case?

13 A I've watched it probably four or five hundred
14 times.

15 Q Based on your viewing of that videotape and the
16 testimony that's presented at trial from these three
17 codefendants, how would you describe that videotape
18 and how it played out at trial?

19 A The best thing we had going for with on the
20 videotape is that Mr. Marrero was booked into Alvin
21 S. Glenn in the very near surrounding time around
22 that videotape, and he was booked in weighing 240
23 pounds. It is evident that the person on the
24 videotape does not weigh 240 pounds. I mean, there
25 is, there's no doubt about that. That was largely

PW - J. MAY - CROSS

1 what we had to work with as far as challenging the
2 direct evidence; that, and then Mr. Marrero's
3 fingerprints were never found in the store. And the
4 person who pulled the trigger and killed
5 Mr. Grandstaff clearly was not wearing gloves. That
6 was largely our best defense in challenging the
7 evidence.

8 Q Okay. But again, there were three witnesses that
9 identified that were familiar with his voice and had
10 grown up with Mr. Marrero, known him for a number of
11 years, 15, 16 years, that identified his voice off
12 the videotape as him, correct?

13 A I don't know how many there were. I know there
14 were three people who were with him in that car —
15 or who testified they were with him in the car that
16 night.

17 Q There were people that identified his voice on
18 the videotape that had known him for many years?

19 A That is correct.

20 Q And would it be fair to describe that
21 surveillance videotape as essentially an execution
22 of this, of the defense's making?

23 A I don't think there's any—

24 MR. WARE: Objection.

25 THE COURT: Overruled, go ahead.

PW - J. MAY - CROSS

1 THE WITNESS: I don't think there's any
2 other way to describe it.

3 BY MR. WARE:

4 Q You think that would have been, to say the least,
5 damaging to Mr. Marrero in front of the jury if they
6 believed it's him on the videotape?

7 A If it's him then it's hard to overcome that. I
8 mean, it was — I mean, it's an awful, awful tape.
9 However, it was the crux of our defense that it was
10 not Mr. Marrero.

11 Q All right. Have you had a chance to review the
12 transcript, at least parts and portions of it, and
13 recall your cross-examination of witnesses?

14 A I mean, I recall them. I mean...

15 Q Do you feel you did a sufficient job of
16 cross-examining those witnesses?

17 A I think that we cross-examined — I think our
18 theory on the case was — our theory of the case was
19 a little novel in that the fact we were using South
20 Carolina case that only cited the ninth circuit.
21 Our theory was that Chris Ellis and Anthony Weston
22 had contrived this plan. We had introduce— well,
23 we were bringing forth, entered evidence that they
24 had relayed to other people that they had killed
25 other people before in the past and laid the blame

PW - J. MAY - CROSS

1 at the feet of a third party. We brought that
2 forward and the Court was going to allow us to bring
3 that forward through the testimony of Freddie Culler
4 (ph). We actually proffered his testimony. The
5 judge ruled it to be admissible. I'm sure in the
6 transcript was also the recollection of the judge,
7 for lack of a better term, scolding Mr. Strickler
8 and I for having come up with this novel way to
9 introduce this evidence and not alerting the Court;
10 yet, he gave the State overnight to try to find
11 authority not to allow it, however, in the end he
12 allowed it. I think that we had a viable defense;
13 however, the testimony of Mst. Fuller severely
14 weakened our defense.

15 Q During the course of those, the cross-examination
16 of those witnesses, you were able to bring out a
17 fair amount of inconsistencies between the
18 statements of police and the testimony from the
19 stand, correct?

20 A I believe with Chris Ellis, the last question is
21 the truth, was anything that will set you free and he
22 agreed with that.

23 Q Okay, that was — I direct the Court's attention
24 to page 84. And I was actually just gonna ask you
25 about that. You actually got Chris Ellis, as you

PW - J. MAY - CROSS

1 said, to admit that the truth will set him free. He
2 was getting a deal for his testimony, and he
3 essentially admitted the truth is whatever will set
4 you free, correct?

5 A Correct.

6 Q Pretty damaging testimony to get one of the
7 State's key witnesses to admit on the stand,
8 correct?

9 A We thought so.

10 Q You were able to point out some other
11 inconsistencies in their testimony based on the
12 evidence such as the fact I think Tony Weston
13 testified that the defendants were wearing gloves
14 when they entered the gas station and you pointed
15 that out on cross-examination?

16 A If it's in the transcript. I mean, the big one
17 was Chris Ellis in that the truth is anything that
18 will set him free.

19 Q There were a lot of copies that all these
20 co-defendants were facing charges as well; is that
21 correct?

22 A Mont Ellis was facing murder who was — who
23 identified himself as the other assailant in the
24 store. Mr. Rice and Weston were each facing I
25 believe accessory after the fact.

PW - J. MAY - CROSS

1 Q So your strategy on cross-examination was
2 essentially called their credibility into issue,
3 also called into question their motives regarding
4 testifying?

5 A Correct, to at least to cross-examine them on the
6 idea of collusion between them. They're all family
7 members if I recall correctly. Mr. Rice, Mr.
8 Weston, and the Ellises were all family members. At
9 the time, Mr. Ellis, Christopher Ellis, who is the
10 one who actually alerted authorities to Mr. Marrero
11 was facing a whole lot of time in a drug
12 prosecution. He had hired -- they are jail calls.
13 He had hired Todd Weatherford. Todd Weatherford was
14 demanding more money, and he was actually pushing
15 Mr. Marrero to get him more money so that way that
16 he can get out because the solicitor at the time,
17 Theodore Luckton (ph), was not having -- was not
18 going to give the deal that Mr. Ellis wanted, but
19 there was the thought that Mr. Weatherford would
20 give, get the case away from Mr. Luckton. And that
21 was the reason why he needed, that Mr. Marrero
22 needed to give him the money. So our thought was
23 that this was a way to get the case, to get Mr.
24 Ellis, Mr. Christopher Ellis in the best possible
25 place to have him be a snitch. And that was our

PW - J. MAY - CROSS

1 theory of the case.

2 Q Essentially Chris Ellis was mad at Mr. Marrero
3 for not providing for his family while he was on the
4 outside?

5 A Correct. And then we tied it to the other murder
6 that allegedly Mr. Ellis and Mr. Weston had done and
7 got that in through prior inconsistent statements.

8 And I believe at the time the case — I can't
9 remember the case name but the case stood for the
10 proposition that there is no 404(b) analysis to a
11 prior inconsistent statement. The prior
12 inconsistent statement is for itself that the person
13 is a liar, so therefore, whatever the matter, the
14 inconsistent statement was about, is irrelevant.

15 And then you can bring in extrinsic evidence to
16 prove it. Our extrinsic evidence, I questioned
17 Mr. Weston and Mr. Christopher Ellis on that issue.
18 And our extrinsic evidence that we were bringing in
19 was the testimony of Mr. Frederick Culler as well as
20 Mr. Marrero said that he heard him say that if they
21 ever got in trouble they were going to set somebody
22 else up for it.

23 Q And there was some testimony I think you elicited
24 through a pretty lengthy in-camera process as to
25 some of these codefendants having previously set up

PW - J. MAY - CROSS

1 somebody for a murder and recognized that?

2 A Right.

3 Q Based on your recollection of your
4 cross-examination you think you did a sufficient job
5 or effective job of bringing out this potential
6 motive for them to lie and their credibility?

7 A I felt -- I thought we tried the case as well as
8 you could with the facts given.

9 Q Let me go back just a minute. I think you
10 testified before to something about there was an
11 issue with attorney/client privilege waiver. You
12 said Ms. Payne had disclosed information to you
13 regarding her discussions with Mr. Marrero; is that
14 correct?

15 A That's correct.

16 Q Based on those discussions what was your
17 understanding of what she had found out from
18 Mr. Marrero?

19 MR. WARE: Objection, narrative. Register
20 again objection to attorney/client privilege. This
21 is hearsay testimony. If the counsel for the State
22 wanted to have Ms. Payne here we would have welcomed
23 that opportunity to cross-examine her.

24 MR. CORNEY: And Your Honor, I didn't ask
25 what she said. I just said what was your

PW - J. MAY - CROSS

1 understanding of where he stood when she took over
2 the case. I'm not asking what Ms. Payne said,
3 what's his understanding and where he went from
4 there.

5 THE COURT: All right, limit your
6 cross-examination to that alone.

7 MR. CORNEY: Yes, Your Honor. I'll
8 rephrase that question.

9 BY MR. CORNEY:

10 Q Based on what Ms. Payne had told you when took
11 over the case and your discussions with Mr. Marrero,
12 did you see any reason to have him evaluated at any
13 point in time?

14 A No.

15 Q And you're confident with that decision that you
16 didn't have him evaluated?

17 A Yes.

18 Q As far as failing to object to leading questions,
19 is there anything stopping the solicitor from just
20 rephrasing the question and asking it again to get
21 the same result?

22 A He should have. He is notorious that he cannot
23 answer -- cannot ask a question that was not
24 leading. And oftentimes circuit court judges will
25 just allow it because that's what John Meadors does.

PW - J. MAY - CROSS

1 is he leads.

2 Q You feel any of those questions that he didn't
3 object to or pointed out to by Mr. Ware were the
4 lynchpin of the case, it just changed the ultimate
5 result?

6 A No, I mean, the whole question came down to the
7 credibility of Hanna Fuller. I think that we did an
8 adequate job of discrediting the Weston/Ellis
9 family. It came down did they believe her.

10 Q Did you at any point in time in plea negotiations
11 and your discussions with Mr. Marrero guarantee he'd
12 be getting concurrent time with these federal and
13 state sentences?

14 A No.

15 Q Do you feel that he sufficiently understood it
16 would be really up to the Department of Corrections
17 and the federal institution on whether he served one
18 or the other or how they were served?

19 A I mean, it's out of our hands. I mean, I know
20 the Court wanted him to get concurrent time. I
21 wanted him to get concurrent time. As of I believe
22 our conversation with you two days ago, I mentioned
23 the fact that I hoped that he'd get concurrent time
24 but it hasn't happened yet.

25 Q And you feel that he sufficiently understood

PW - J. MAY - CROSS

1 that, that it was kind of, there was no guarantees
2 essentially?

3 A I believe he did. If he didn't then I -- to my
4 best of my knowledge he did.

5 Q Do you feel you gave Mr. Marrero all the advice
6 and information necessary for him to make a
7 voluntary, intelligent decision on whether to keep,
8 proceed with the trial or plead guilty at that
9 point?

10 A There's no doubt in my mind.

11 Q And do you think that he had sufficient
12 understanding of his rights he was waiving and the
13 defenses he was waiving, and he could have continued
14 proceed to trial if he had gone on?

15 A I believe he did.

16 Q And Mr. May, I know you've been through the PCR
17 process a fair amount having been a former public
18 defender. Is there any ---

19 A It's only my second one ever actually.

20 Q Oh, I apologize and I take that back. Is it your
21 understanding, is there any duty to affirmatively
22 advise a guilty plea defendant of his right to
23 appeal following a guilty plea?

24 A I have no -- I don't know that answer one way or
25 the other. It's generally my practice that whenever

PW - J. MAY - CROSS

1 I met with somebody that we would. However, we'd
2 always tell them, however, if we don't raise an
3 objection there's really nothing to appeal.

4 Q Okay. And I wanted to point to — and I don't
5 know if you still got a copy of it up there with you
6 or if you might remember it. In the guilty plea
7 Judge Alford makes a comment about kind of his,
8 after the plea is entered, his understanding of the
9 evidence and how it proved Mr. Marrero is guilty.
10 Do you recall that?

11 A In all honesty I was crying at the time. I don't
12 recall that.

13 Q Do you have a copy of the plea transcript up
14 there with you?

15 A I have what has been provided to me by Mr. Ware.

16 Q Okay, let me — I've got the page references to
17 the actual plea transcript. Let me find the linear
18 version. I beg the Court's indulgence just one
19 moment, Your Honor. Okay, that'll be on page 302 at
20 the top there.

21 A Yeah, I see it.

22 Q Judge Alford specifically says, "Mr. Marrero, I
23 think that the evidence clearly established your
24 guilt in this case." Do you recall that? Do you
25 recall that comment by Judge Alford?

PW - J. MAY - CROSS

1 A I do.

2 Q And below that he says essentially had Mr.
3 Marrero been convicted of this he would have given
4 him life without parole is pretty much what Mr. —
5 what Judge Alford, excuse me, says on the record,
6 correct?

7 A That's what he says.

8 Q And Mr. Marrero obviously knew that life without
9 parole is a realistic possibility at sentencing?

10 A He always — he always knew that life without
11 parole was a realistic possibility. We discussed it
12 ad nauseam in preparing for his testimony.

13 Q Okay. That played a pretty big role in his
14 decision to plead guilty, I think, based on your
15 testimony he wanted to see his son again?

16 MR. WARE: Objection.

17 THE COURT: Overruled, go ahead.

18 THE WITNESS: I would assume so. Again, I
19 remember it like it was yesterday sitting down with
20 him saying if you did this you need to plead so that
21 way you can see your son. If you didn't, we need to
22 go tell them and my — pardon my language — go tell
23 them to fuck themselves and we walk out the front
24 door. He started crying; he said he did it.

25 MR. CORNEY: I believe that's all the

PW - J. MAY - REDIRECT

1 questions I have, Your Honor. Thank you very much.

2 THE COURT: Any redirect?

3 MR. WARE: Just a couple of quick
4 followup.

5 **REDIRECT EXAMINATION**

6 BY MR. WARE:

7 Q You said that the credibility and the testimony
8 of Hanna Fuller was fairly important to this case;
9 is that correct?

10 A I, in my, in my personal belief about this case
11 that was everything.

12 Q Was her testimony what the jury was most attuned?

13 A I have no idea. You'd have to send that
14 questionnaire to the jury.

15 Q Then why was she such an important part of the
16 case?

17 A Because she was the only person who had no stake
18 in the outcome.

19 Q So when the attorney for the State of South
20 Carolina says, did he ever mention that he killed
21 somebody, wouldn't that bring you to your feet and
22 object?

23 A To what, highlight it, so that we can just
24 rephrase the question?

25 Q No, sir, you can stop her from getting that

PW - J. MAY - REDIRECT

1 information before a jury that does not know —

2 A Again, it's the difference between form and
3 substance. The substance was not objectionable;
4 it's the form.

5 Q The substance is a man's guilt or innocence.

6 A No, sir, the substance of that question was did
7 he — did Mr. Marrero tell Ms. Fuller that he had
8 ever killed somebody. That substance is not
9 objectionable. What is objectionable is the form of
10 the question.

11 Q Correct.

12 A The form of the question was objectionable, yes,
13 it was. Is that the lynchpin of the case, no. And
14 I believe if you look at the cross-examination of
15 Ms. Fuller, we did the best possible
16 cross-examination pulling out the fact that she
17 didn't remember a lot of stuff, that she constantly
18 blacked out, and that she would take other people's
19 words for the events that occurred in her life and
20 she would supplant that into her own, as her own
21 memory. That is what -- that's the way we attacked
22 it. However, her testimony was the only unbiased
23 testimony, and had they believed her that she
24 remembered it fully and accurately, then that was
25 damning evidence against Mr. Marrero.

PW - J. MAY - REDIRECT

1 Q Over my objection I'm going to paraphrase the
2 counsel for the State's summary of the statements
3 about life without parole. He said that it's a big
4 part of the reason why Jaime Marrero pled guilty.

5 A He was facing 30 years to life, yeah.

6 Q Do you agree with that, that that was a big part
7 of the reason?

8 A Had he been facing 0 to 10 I don't know if he'd
9 have pled.

10 Q Let me ask you this, how many times did you tell
11 him it was life without parole?

12 A A lot.

13 ~~MR. WARE: Your Honor, may I approach?~~

14 ~~THE COURT: Sure.~~

15 MR. WARE: I'd like to introduce into --
16 I'd like to present to the witness a document for
17 review.

18 THE COURT: All right.

19 BY MR. WARE:

20 Q Mr. May?

21 A Yes, sir.

22 Q Do you recognize these documents?

23 A I do not.

24 Q They're a collection of forms completed by
25 various health professionals.

PW - J. MAY - REDIRECT

1 A Okay, I'll take your word for it.

2 MR. WARE: Your Honor, we requested these
3 from the State of South Carolina as the medical
4 records of Jaime Eduardo Marrero, the defendant in
5 this case. I'd ask Mr. May to turn to the very last
6 page and ask him if he recognizes that form.

7 THE WITNESS: No, sir.

8 BY MR. WARE:

9 Q Have you ever seen it before?

10 A It's dated 9/30/08.

11 Q How close to that was the date of the trial—

12 A Maybe the 23rd.

13 Q —that you were involved?

14 A Maybe the 23rd.

15 Q Say that again?

16 A Maybe the 23rd. I can't recall.

17 Q Do you recall the date of the plea?

18 A I do not. It appears that September 25th is the
19 date of the transcript that you provided me.

20 THE COURT: The plea sheet says the 25th,
21 just for —

22 MR. WARE: 25th?

23 THE COURT: Yes, sir, that's the plea—

24 BY MR. WARE:

25 Q So this would have been just been a few days

PW - J. MAY - REDIRECT

1 after the trial in any event; is that correct,
2 Mr. May?

3 A That's what --if that date's correct it would be.

4 Q Above the dotted line midway down the page do you
5 recognize that signature?

6 A I believe that it appears to be Jamie's.

7 Q Is the top portion of the page stating that this
8 is a record of Jaime Marrero?

9 A That's what it says.

10 Q There's a series of questions there about Mr.
11 Jaime -- Mr. Marrero's mental capacity as an inmate
12 and one of them is checked yes. What does that say?

13 MR. WARE: Your Honor, I would object.

14 THE WITNESS: Depressed --

15 MR. WARE: --to that.

16 THE WITNESS: --at times.

17 MR. CORNEY: I would object to that. I
18 don't know whether he can interpret these. If we
19 wants to bring somebody from SCDC from medical
20 record to say what these mean, that's okay. I mean,
21 they speak for themselves, and I don't think that
22 Mr. May should be interpreting what they say.

23 THE COURT: Well, I --

24 MR. WARE: I agree with that, Your Honor.
25 My question was simply the date of this particular

PW - J. MAY - RECROSS

1 form.

2 THE WITNESS: He just pled, he just
3 received a 38 year sentence, I'd be depressed.

4 THE COURT: Well, he's answered the
5 question. Go ahead.

6 MR. WARE: No further questions, Your
7 Honor.

8 MR. CORNEY: One more question, Your
9 Honor.

10 **RECROSS-EXAMINATION**

11 BY MR. CORNEY:

12 Q Mr. May, does depression -- in your experience
13 defending defendants in your time with the Public's
14 Office is depression indicative of capacity for
15 trial or, you know, anything along those lines?

16 A Nope.

17 MR. WARE: That's all I have, Your Honor.

18 THE COURT: All right, come down, sir.
19 Next witness.

20 MR. WARE: We'd like to call Jaime
21 Marrero.

22 THE COURT: Come around, Mr. Marrero.
23 WHEREUPON,

24 **JAIME MARRERO,**
25 having been duly sworn by the Court, testified as

PW - J. MARRERO - DIRECT

1 follows:

2 THE COURT: Have a seat. State your full
3 name for the record.

4 THE WITNESS: Jaime Marrero.

5 **DIRECT EXAMINATION**

6 BY MR. WARE:

7 Q Mr. Marrero, are you the defendant in the case
8 that we're discussing today?

9 A Yes, sir.

10 Q I'd like to get a little information about your
11 childhood and your background for the record if you
12 don't mind. Now, how many brothers and sisters did

13 you have?

14 A Two brothers and one sister.

15 Q And where did you live?

16 A In Columbia, here in Columbia.

17 Q Are those both blood brothers and sisters or
18 stepbrothers and sisters?

19 A Well, it's no different to me and my brother but
20 different fathers. One of my brothers we have the
21 same father but my sister and my oldest brother, we
22 have -- they have different fathers now.

23 Q What was your childhood like growing up?

24 A It was -- it was pretty rough. My parents
25 divorced and my father was in the military at the

PW - J. MARRERO - DIRECT

1 time. My mom, she would go out partying a lot, she
2 was never at home, so my brother was always left to
3 take care of us and we used to fight all the time.
4 There was an incident when I was about 7 years old
5 where a neighbor had tried to molest me and had not
6 been for another neighbor intervening he would have,
7 and I had to go through counseling for that.

8 Q Mr. May ever ask you about your childhood or
9 about that incident?

10 A No, sir.

11 Q When your parents were going through the divorce
12 was there any counseling given to you at that time?

13 A I don't remember about that counseling. I don't
14 recall. I know I had went -- I went to a lot of
15 counseling on the issue as far as the, me, about you
16 know, getting molested. But there might have been a
17 few but I don't recall. My brother, my brother, he
18 told me about a lot of episodes where we had
19 counseling, but I really don't remember that. A lot
20 of things were really in and out blacking out.

21 Q How old were you when you were married the first
22 time, Mr. Marrero?

23 A 18.

24 Q Who was your wife at that time?

25 A Tasheka Wells.

PW - J. MARRERO - DIRECT

1 Q How many years were you married?

2 A Well, from '99 to -- well, we're actually still
3 married. I never divorced her.

4 Q Okay.

5 A Well, we separated in 2001 I believe at the
6 end -- no, at the end of 2001 or beginning of 2002
7 when I came back from Iraqi and during Freedom.

8 Q Tell us a little bit about Iraqi and during
9 Freedom. What branch of this military did you
10 serve?

11 A The U.S. Navy.

12 Q What was your position at the navy?

13 A I was a jet engine mechanic.

14 Q What rank did you have? --

15 A At that time I had -- well, when I got discharged
16 I got discharged as a E-4, but I was a E-5 equip to
17 a sergeant.

18 Q Did you see any service during the Iraqi war?

19 Did you see any service during the Iraqi war? Did
20 you serve at all during that time?

21 A Well, we were actually the first to respond to
22 911 attack. I was on the USS Enterprise and we
23 initiated attacks against Afghanistan.

24 Q Where were you physically located on the ship?

25 A I was on the flight deck where everything was

PW - J. MARRERO - DIRECT

1 going on.

2 Q Did you see any of the military action?

3 A Well, we -- they brought a lot of bombs and came
4 back empty, I mean. And we were privy to -- we had
5 a actual screen on the ship where they would show
6 the footage from the jets where the pilots were
7 bombing and they were talking, talking about the
8 cite that they were bombing, and we seen a lot of
9 places getting blown up.

10 Q Did you see anybody injured or hurt during that
11 time?

12 A It was a little bit prior to that, but I had a
13 shipmate that had his head split open by the
14 airplane that I worked on. And I worked on A2C
15 helicopter and they had very large propellors still
16 be in it. They upgraded now. Now they have smaller
17 propellors but, the propellors probably a little bit
18 longer than my arm. And he misjudged when we had a
19 tire blow out and he misjudged it. When he was
20 putting wheel chocks and chaining it down, he
21 misjudged it and when it came out the belt hit him
22 and split his head wide open.

23 Q Did you go to any counseling as a result of that?

24 A Not that I can recall.

25 Q Did Mr. May ever ask you about that incident or

PW - J. MARRERO - DIRECT

1 your service during your time together?

2 A No, sir.

3 Q When you came back from the war what was the
4 state of your marriage at that point?

5 A Well, my wife, she had affair on me. She told me
6 the month before I got back she couldn't hold out
7 and she end up having an affair on me and she got
8 pregnant and was having another man's baby.

9 Q Did Mr. May ever ask you about that?

10 A Not that I recall. I don't believe he did.

11 Q Did he ever ask you if you'd been to counseling
12 at all for any of these incidences as a child in the

13 military or as a result of your family life?

14 A No.

15 Q Did he refer you to anyone to have an evaluation
16 done of you as a result of those incidents?

17 A No, sir.

18 Q Did he refer you to anyone at any time for
19 questioning about medical or mental illness?

20 A No, sir.

21 Q What about Ms. Payne, the prior attorney, did she
22 ever ask you about that?

23 A No, sir.

24 Q Did she ever refer you to anyone for a mental
25 evaluation?

PW - J. MARRERO - DIRECT

1 A No, sir.

2 Q Did anyone at any time from the Public Defender's
3 Office ask you questions about your mental capacity
4 for the events of September 28th, 2004?

5 A No, sir, nobody. When I arrived at the Alvin S.
6 Glenn Detention Center I was placed on -- the
7 medical staff. They had placed me on suicide watch.
8 I was there for probably a week-and-a-half before
9 they actually let me back in the population.

10 Q Did they -- did you tell or advise Ms. Payne or
11 Mr. May about that?

12 A No, no, sir.

13 Q Did they ever ask you about it?

14 A No, nobody asked me about it.

15 Q The testimony of Ms. Hanna Fuller was according
16 to the transcript read this morning, that you
17 blacked out, that you were not in your right mind on
18 the days leading up to or as part of the incident of
19 September 28th, 2004. What do you mean -- what did
20 she mean by that? Do you know? Do you remember
21 anything about September 28th, 2004?

22 A (No verbal response.)

23 Q Answer so the court reporter can hear from you.

24 A No, no, sir, I don't.

25 Q Why not?

PW - J. MARRERO - DIRECT

1 A Only, the only — the only thing I can recall is
2 when the shot was fired.

3 Q Mr. Marrero, you were consulted periodically
4 during this trial by your counsel. Did you speak
5 with them before the trial began and regarding the
6 conversation the judge had with them? Did they ever
7 bring that to your attention?

8 A On the fourth, on the third day it was — it was
9 brought to my attention. Mr. May was I believe on
10 my right-hand side and Mr. Strickler was on my
11 left-hand side. And Mr. May, Mr. May informed me,
12 he said I didn't realize how strong here testimony

13 was going to be. And after he said that, you know,
14 Mr. Strickler chimed in and Mr. Strickler said, son,
15 you have a 99.9 percent chance of walking out here
16 with a life sentence and you have a .1 percent of
17 getting a hung jury and that's not likely. That was
18 said to me. And —

19 Q Did he give you any chance of winning the case?

20 A From when he was coming — when he was coming to
21 see me he was real, he was real gun-ho and I really
22 thought that, you know, he was going to help me out.
23 And then at the end he just, he changed, he totally
24 changed. He wasn't the guy that was in these mock
25 trials that I was seeing when he was coming to see

PW - J. MARRERO - DIRECT

1 me at the county jail. Like I said, then -- then
2 Mr. May chimed in. Mr. May said, you know, if you
3 want to see your son again, and he didn't -- this is
4 going to be your only chance to get back to your
5 son.

6 Q Did you believe him?

7 A Yes, sir.

8 Q When it came time for the discussion with your
9 attorney about the potential plea how much time were
10 you given in your estimate to consider the plea?

11 A It wasn't very long at all. I mean, I asked, I
12 asked to speak with my family and we were up this
13 side. These benches would have been on this side in
14 the other courtroom. And I was up there talking
15 with my sister-in-law. The next thing I know, you
16 know, I'm in tears, I'm very emotional at this time.
17 And the next thing I know he beating the gavel. The
18 judge was beating the gavel and saying, well, it's
19 time to continue the trial. And I, I really felt
20 that I didn't have long at all. It was either I was
21 going to do this now or it -- I was going to have to
22 go to trial.

23 Q Before the case began were you aware there was a
24 conversation between the legal counsel for the State
25 and the legal counsel for you and the judge in the

PW - J. MARRERO - DIRECT

1 judge's chambers?

2 A Before the case began?

3 Q Yes.

4 A No, I wasn't aware of that one.

5 Q Okay.

6 A I wasn't aware of that one. There was one
7 that -- that one I just became aware of. There was
8 one, the same conversation on the third -- the
9 fourth day when I came in before I took the plea
10 agreement. I was told, look, the judge made the
11 Solicitor come back with a plea. He said it's clear
12 of this young man's guilt and I want a plea, and
13 this is what was related to me and --

14 Q Now who said that, Mr. --

15 A Mr. May told me that that's what the judge had
16 told them in chambers.

17 Q Now the plea that you entered appears to bring to
18 issue some confusion over a federal sentence and a
19 state sentence either running concurrently or
20 consecutively. Do you know what those terms mean?
21 You know what concurrently means?

22 A In the way -- yes, sir, I do, I understand the
23 concurrent and consecutive. In the way it was
24 explained to me by Mr. May, and I was adamant about
25 this having to be a condition of the plea, he -- I

PW - J. MARRERO - DIRECT

1 said, I had the five year federal sentence. And
2 Mr. May explained to me, he said, well it's
3 basically the way I understood it was it was
4 formality to have to say that if this could happen
5 or whatever. But he said do not worry, I'll get you
6 into federal custody and that you will be running
7 that time concurrent. We'll run our time concurrent
8 with the feds.

9 Q Had you known it was going to be 43 years instead
10 of 38 would you have pled?

11 A No, sir.

12 Q Had you known that the judge was encouraging the
13 solicitor to go get a plea and you were being told
14 you had no chance of winning, had you known that you
15 had a chance of winning would you have pled?

16 A No, sir. Can I make a point?

17 Q Yes, sir.

18 A Mr. May, even during my time at the jail I lost a
19 lot of weight and I went from 250 pounds, 258 pounds
20 actually to 176 pounds, and he actually made a
21 comment here as well. He told me, he said, you
22 know, now that -- I want you to make sure you eat
23 because you're not looking well. He even, he told
24 me that himself.

25 Q And this is between the time of your arrest and

PW - J. MARRERO - DIRECT

1 the time of the trial?

2 A Yes, sir. Yes, sir.

3 Q What were your feelings about why you were losing
4 so much weight, Mr. Marrero?

5 A I was depressed. I couldn't believe what was
6 happening. Sheriff Leon Lott, he kept appearing on
7 news and he actually made a comment. He was telling
8 the public that, you know, he was gonna seek the
9 death penalty on this case, and the whole time that
10 I'm awaiting on trial that's what everybody is
11 telling me. Everybody they saying, look there's no
12 deal, either you take this life sentence or they're
13 gonna take that. This is my understanding the whole
14 two-and-a-half years I'm in trial, I mean, I'm
15 waiting on trial.

16 Q Did Mr. May do anything to dissuade you from
17 understanding that? Did he ever tell you, no, this
18 is not a capitol murder case, this is —

19 A Well, it was—

20 Q —not that type of case?

21 A I don't quite understand that aspect; but he was
22 telling me, he was telling me that, oh well, you
23 know, we, it's, it's still in the air. They haven't
24 served you. They haven't served the paperwork; it's
25 still in the air. And every time I'm asking and

PW - J. MARRERO - DIRECT

1 that's the same thing he's telling me, yeah, it's
2 still in the air. The cap— the death penalty is
3 still in the air.

4 Q Now after the plea was entered, you heard my
5 questions today of Mr. May about whether he
6 discussed a direct appeal with you. Did you ever
7 recall having a conversation with Mr. May where he
8 advised you you had an opportunity to appeal the
9 plea that you just entered?

10 A Mr. Ware, I was actually confused when the judge
11 said, made that comment to me, when he said that you
12 had ten days to appeal this because I asked Mr. May.
13 I said, Mr. May, I didn't think I was entitled to a
14 direct appeal. And he said, well yeah, you know,
15 the judge has to tell you that but I don't see where
16 the Court erred.

17 Q Did Mr. Strickler ever discuss a direct appeal
18 with you?

19 A No, sir.

20 Q Did anyone from the Public Defender's Office ever
21 contact you —

22 A Can I make a comment on that? Can I make a
23 comment on that please?

24 Q Yes, you may.

25 A Mr. Strickler didn't come down to see me at all.

PW - J. MARRERO - DIRECT

1 Mr. Strickler, he might have appeared one time and
2 that was maybe to tell me that I was being assigned
3 -- I can't remember in all actuality, let me back
4 up. I can't remember why he came down there, but it
5 was a very brief visit. I never interacted with Mr.
6 Strickler until the trial. Mr. May was the main
7 counsel as he was the one coming to see me. He was
8 the one preparing the case. I'm thinking -- I
9 actually wasn't -- I knew Mr. Strickler was the head
10 chair, but I was under the impression that Mr. May
11 was my attorney.

12 Q Did anyone ever tell you this was Mr. May's first
13 murder trial?

14 A Yes, Mr. May actually told me. He said, they
15 said -- I actually was under the impression he had
16 six victories in as far as going to trial. I
17 thought, I was under impression that he had a pretty
18 impeccable record as far as going to trial. And he
19 told me that this was basically him -- basically he
20 was getting his feet wet with his first murder case.

21 Q When you go back and put all of the facts
22 together and you're sitting in this area of the
23 courtroom waiting to discuss the plea, did you feel
24 like the Court was pressuring you to make a
25 decision?

PW - J. MARRERO - DIRECT

1 A I did. I definitely felt pressured and when --
2 honest to God, when the comment came up about my
3 son, about mom, you know, the only thing I'm hearing
4 is my only chance of getting back out there and
5 spending time with my son. I mean, everything just
6 weighed on. I mean, Mr. May, he can even testify as
7 to -- he can even tell you how much I love my son.
8 That's all I ever talked about to him.

9 Q Did you have any conversation with Mr. May that
10 suggested, or Mr. Strickler, that suggested you had
11 a chance of winning this case before you entered
12 your plea?

13 A Oh, yes, sir. Mr. May really was adamant. He
14 was really, you know.

15 Q Then what changed, --

16 A What changed?

17 Q --Mr. Marrero?

18 A Well, he came and told me there was a
19 99.9 percent chance, and I didn't feel that I had
20 any other choice.

21 Q Thank you, Mr. Marrero.

22 A Oh, I'm not -- I have some other points I would
23 like.

24 Q Please, go ahead. Tell us what you feel.

25 MR. CORNEY: Your Honor, I know it's one

PW - J. MARRERO - DIRECT

1 bite at the apple; but I mean, it's got to be
2 questions. He can't just sit up there and read off
3 something he's got in front of him, prepared
4 testimony.

5 THE COURT: Well, it's got to be — is
6 it — you know what he's talking about? It has
7 something to do with his application?

8 MR. WARE: Yes, sir. He has some
9 questions he — and answers regarding his
10 application, yes, sir.

11 THE COURT: Well, go ahead, but I may have
12 to sustain.

13 MR. CORNEY: Your Honor, I —

14 THE COURT: I don't know what it is.

15 MR. CORNEY: I just don't want him to read
16 off anything. I mean, prepared testimony before he
17 came in. He's reading off something up there. I
18 haven't seen it. I don't know what it is.

19 MR. WARE: May I approach the witness.

20 THE COURT: Sure.

21 MR. WARE: And I will take the questions
22 and —

23 THE COURT: All right, fine, go ahead.

24 MR. CORNEY: Thank you, Your Honor, I
25 apologize.

PW - J. MARRERO - DIRECT

1 BY MR. WARE:

2 Q Mr. Marrero, at any time did you advise the
3 Public Defender's Office about your blackouts and
4 about your not being in your right mind?

5 A I advised Ms. Payne.

6 Q Okay. Did she refer you to mental evaluation
7 after that at any time?

8 A She left the office right after.

9 Q As a result of your service in the war did you
10 ever have any dreams or other experiences after the
11 war or as part of it that gave you concern?

12 A I'd have dreams. I had dreams of getting blown
13 up a lot, and I'd have dreams of getting shot. I
14 got shot while I was on leave. I dream a lot about
15 stuff like that.

16 Q When you were on leave explain that to us. You
17 mean you were still in service and you were on
18 leave?

19 A I was still in service and I came home on leave.

20 Q How was your friend killed?

21 A Well, I came home on leave and we went to a local
22 bar off 601 and altercation occurred and a guy, a
23 gentleman shot my best friend and shot me in the
24 process and I ended up in a -- as a result being
25 covered in his blood, and I tried to administer CPR

PW - J. MARRERO - DIRECT

1 to him and to revive him and did it to no avail.

2 Q Which did this occur, Mr. Marrero?

3 A I want to say it was in 2003.

4 Q So just before the events that brought you to
5 court today?

6 A Yes, sir.

7 Q Did you ever tell Mr. May about this incident?

8 A Mr. May was aware of that.

9 Q Did he ever refer you to mental counseling or any
10 evaluation as a result of what you told him?

11 A No, sir.

12 MR. WARE: I have no further questions,

13 Your Honor.

14 THE WITNESS: I believe — I'm not — I'm
15 not really understanding, you know, how this
16 procedure is going. I thought I was supposed to be
17 able to address, I mean, get everything out in the
18 open. I feel, I sort of feel like I'm being rushed
19 right now, but I know case law does state as in
20 Bateman versus Barnette where if mental illness was
21 an issue —

22 THE COURT: There's what?

23 THE WITNESS: There should — if there was
24 any mitigating circumstances they could have pointed
25 to a mental issue.

PW - J. MARREO - CROSS

1 MR. WARE: You're referring to a case that
2 you read called Bateman versus Barnette?

3 THE WITNESS: State versus Luehrs (ph),
4 yes, sir.

5 MR. WARE: Right. We'll discuss those
6 cases with the Court at the appropriate time. Your
7 Honor, I think he's talking about preparation of
8 legal briefs —

9 THE COURT: Okay.

10 MR. WARE: —related to the arguments.

11 THE COURT: All right.

12 BY MR. WARE:

13 Q Is there anything else you want to bring up about
14 your mental condition at the time of the incident?

15 A Just the fact that they were aware that I — the
16 Public Defender's Office was aware that I had
17 blackouts. The State's key witnesses even
18 testified; I testified to the fact. And the fact
19 that I was on suicide watch. I feel that somehow
20 that should have rung a bell with somebody.

21 Q Please answer any questions the State's attorney
22 has for you.

23 A Yes, sir.

24 **CROSS-EXAMINATION**

25 BY MR. CORNEY:

PW - J. MARREO - CROSS

1 Q Mr. Marrero, I'll be real point blank with you.

2 You are guilty of this murder; aren't you?

3 A This is not a trial on whether I'm guilty or
4 innocent. This is -- this actually, if I'm not
5 mistaken, is a hearing on whether my attorney was
6 ineffective or not.

7 Q I want to ask you this question, when you told
8 Judge Alford during the plea that you were guilty of
9 killing the victim in this case, correct?

10 A I did.

11 Q You did, okay. And you were under oath that day,
12 correct?

13 A Yes, sir.

14 Q Judge Alford said that the evidence to him proved
15 pretty substantially you were guilty of the crime,
16 correct?

17 A That's what he said.

18 Q Based on the three days of trial that he had
19 heard?

20 A Actually he said that before the trial.

21 Q And he said that at the end of the trial during
22 your plea; didn't he?

23 A He did.

24 Q And he also said that if you were convicted he
25 was most likely given you life without parole,

PW - J. MARREO - CROSS

1 right?

2 A He did.

3 Q So Jim May, if he ever did, as you allege say
4 that you were going to get life without parole if
5 you were convicted, I mean, that's not too
6 farfetched. Judge Alford said himself he was going
7 to give you life without parole if you were
8 convicted; didn't he?

9 A That's -- say that again.

10 Q Judge Alford himself said that he'd probably give
11 you life without parole if --

12 A Yeah.

13 Q --you were convicted? So Jim May telling you
14 that is probably not that farfetched, was it?
15 Probably pretty good advice?

16 A It was -- from where he was at initially when he
17 was coming to see me to the day of the hear-- the
18 trial, the first day of trial and at the plea
19 agreement, he was totally different from when he was
20 coming and coming to see me in the county jail. So
21 in all, in all honesty I didn't feel that he was on
22 my side anymore.

23 Q Okay. As I remember Mr. May before, you had
24 three co-defendants testify at trial against you for
25 the State, correct?

PW - J. MARREO - CROSS

1 A Yes, sir.

2 Q That's a yes? Okay. I just want to make sure
3 the court reporter takes it down.

4 A Got you, understand.

5 Q And each of those three testified it was you and
6 Mont Ellis that entered the Kangaroo that day and it
7 was you that shot and killed the victim in this
8 case; isn't that correct?

9 A That was the testimony.

10 Q Okay. Specifically it was off page 288 Chris
11 Ellis says he knows your voice, knows the kind of
12 language you use, and he'd seen the tape and he said
13 that that was you on the tape, correct?

14 A That's what he said.

15 Q Tony Weston said he knows your voice, he knows
16 you, and he's known you for a long time, and he says
17 that's you on the videotape as well, correct?

18 A Well, he said that. They also -- in their
19 testimony they also were quite different. All of
20 them were testifying and different things. They
21 were saying different things about -- in their
22 testimony they was contradicting one another.

23 Q Right, but they both --

24 A But yeah, he said that.

25 Q They both said they knew your voice, they'd known

PW - J. MARREO - CROSS

1 you for years, that was you, they could tell your
2 voice and they could tell your body style, that was
3 you, correct?

4 A He said that..

5 Q Hanna Fuller, your former girlfriend, also
6 watched the videotape and said that's you. She
7 knows your appearance and she knows your voice, and
8 that's you on the videotape, correct?

9 A She didn't say that at first, but at the trial
10 she did say that.

11 Q She did say that, okay. During Chris Ellis's
12 cross-examination Mr. May got Chris Ellis to say the
13 truth was whatever could set him free, correct?

14 A I don't remember.

15 Q That's on page 84 of the trial transcript. I
16 don't know if you got a copy of it but.

17 A I don't.

18 Q If the record reflects that you wouldn't dispute
19 it, would you?

20 A No.

21 Q And if you did say that's a pretty big thing to
22 get him to admit to in front of the jury; don't you
23 think?

24 A Yeah, I mean...

25 Q He'll say whatever it takes for him to get set

PW - J. MARREO - CROSS

1 free from jail? He was willing to lie on the stand.

2 Don't you think that's a big deal?

3 A Yes.

4 Q You were doing a fair amount of drugs about the
5 time of this incident, were you?

6 A I was.

7 Q Cocaine and ecstasy on the night of the incident?

8 A Okay.

9 Q So it's your contention you blacked out and don't
10 remember anything that night, correct?

11 A (No verbal response.)

12 Q And when you came to, and I think you said you
13 came to and the shot was fired?

14 A Yes.

15 Q You didn't remember anything before that?

16 A No.

17 Q So when that shot was fired you saw that victim
18 fall on the ground, I mean, naturally your response
19 is I better go to the police, right, I don't know
20 what just happened, I blacked out, I'm better go to
21 the police, correct?

22 A Aren't we getting into trial, I mean, aren't we
23 getting into trial again?

24 Q I'm asking you about your testimony a minute ago.

25 You said you blacked out is your contention so I'm

PW - J. MARREO - CROSS

1 asking you when you came to —

2 A I already answered that. I already answered
3 that. Now you're reevaluating on it.

4 Q Well, I'm not gonna answer your questions. I'm
5 asking you a question. When you come to after
6 blacking out, you don't realize what happened —

7 MR. WARE: Your Honor, we'd object to
8 badgering the witness. I do think he's answered the
9 questions about the blackout a couple of times.

10 MR. CORNEY: I don't think he's answered
11 the question as to what he did as a result of this.
12 I'm asking him — his contention is he blacked out
13 and came when the shot was fired. I want to know
14 why he didn't go to the police, why he didn't do
15 anything to substantiate this claim and how he's
16 brought up that he blacked out at the time this
17 happened.

18 THE COURT: I'll let him answer it if he
19 can. Answer the question if you can, sir.

20 THE WITNESS: Well, I mean, that was seven
21 years ago. I mean, I can't tell you everything that
22 I did seven years ago.

23 BY MR. CORNEY:

24 Q And you said something a minute ago about your
25 friend being shot and killed. I think you were shot

PW - J. MARREO - CROSS

1 in that incident as well at a bar off the interstate

2 ---

3 A Yes.

4 Q ---off the highway? And there was testimony
5 elicited about that during the course of the trial;
6 wasn't there? A whole lot of testimony about that's
7 why per Chris Ellis had ---

8 A Yes, sir.

9 Q ---a motivation to lie against you ---

10 A Yes, sir.

11 Q ---because it was his brother or cousin that was
12 shot and killed, ---

13 A His cousin.

14 Q ---and they feel it was your fault? Because that
15 came out in front of the jury, all that came out,
16 correct?

17 A Yes.

18 Q So I just want to make sure I got this straight.

19 Your contention today is you've had bad dreams,
20 you've been depressed, you've done all these --- you
21 know, you've, you saw horrible things while you were
22 at war and so you were incompetent at the time you
23 entered your plea. Is that your contention today?

24 I'm just trying to understand your allegations.

25 MR. WARE: Your Honor, the petition speaks

PW - J. MARREO - CROSS

1 for itself.

2 THE COURT: I'll let him answer. Answer
3 it if you can.

4 BY MR. CORNEY:

5 Q That's your contention today? You saw horrible
6 things during the war, you had bad, dreams and
7 you're depressed and so you should have been
8 mentally evaluated?

9 A What I'm saying, sir, is through my time being
10 incarcerated and through reading multiple cases I'm
11 seeing mitigating circumstances that would have
12 point, pointed to a possible mental illness issue,
13 and it was never explored on my behalf. That's what
14 I'm trying to say.

15 Q You were mentally incompetent to stand trial, is
16 that what you're trying to say?

17 A I can't -- I'm not a doctor, sir. I don't, I
18 can't tell you that.

19 Q During your plea hearing Judge Alford went
20 through with you and kind of asked you about your
21 background, kind of asked you about, you know, you
22 know what's going on here on today, are you on any
23 drugs or anything like that. You said that you were
24 ready to go forward, you understood everything,
25 correct?

PW - J. MARREO - CROSS

1 A Well, I was informed and -- I was informed that,
2 you know, if I didn't proceed in that manner that I
3 could, I could get the whole 40. There's a
4 possibility I could get the minimum, and I was
5 trying not to hinder me being able to get that
6 minimum so I was complying. I was answering his
7 questions as he asked me.

8 Q All right. And he asked, Judge Alford
9 specifically asked you if you were under the
10 influence of any mind altering substances, drugs or
11 alcohol, anything that was gonna interfere with your
12 ability to understand what you were doing, and you
13 said no, correct?

14 A Yes.

15 Q All right. He said do you have any mental,
16 emotional, or nervous conditions that interfere with
17 your judgment or ability to understand what you're
18 doing here in court today and you said no, sir,
19 correct?

20 A I told him that; but as I said, I'm not a doctor
21 so.

22 Q And you also told Judge Alford you were satisfied
23 with Mr. May's representation in representing you;
24 didn't you?

25 A I did.

PW - J. MARREO - CROSS

1 Q So that's -- you're coming in here today saying
2 that's not true, you weren't satisfied with his
3 representation?

4 A After reading and studying cases I am seeing that
5 there was a level of ineffectiveness and I believe.

6 Q All right, and one last question. You told the
7 Court that you were pleading guilty of your own free
8 will. It was your decision to plead guilty and your
9 decision alone, and you had decided to do that,
10 correct?

11 A I did.

12 MR. CORNEY: That's all the questions I
13 have, Your Honor. Thank you very much.

14 THE COURT: Anything, redirect?

15 MR. WARE: No further questions, Your
16 Honor.

17 THE COURT: I'm sorry, did you have
18 anything further?

19 MR. WARE: No further witnesses.

20 THE COURT: Oh, I'm sorry.

21 You can come down, sir.

22 I thought you were going to redirect. Did
23 you say no further witnesses?

24 MR. WARE: No further witnesses, Your
25 Honor.

1 MR. CORNEY: Your Honor, no witnesses on
2 behalf of the State. I just reserve one minute for
3 just a very brief closing, Your Honor.

4 THE COURT: All right, you may proceed.
5 Mr. Ware.

6 MR. WARE: Your Honor, we renew our
7 request and petition for post-conviction relief in
8 this case, not because of the details of the
9 transcript or the mirage that's been made that the
10 language used by the judge or the witness or the
11 different specifics that have been brought out. But
12 we bring it, we bring this request for
13 post-conviction relief because Mr. Marrero was not
14 provided an adequate opportunity to have his mental
15 capacity evaluated. It's undisputed the testimony
16 of the key witness, the one that everybody says is a
17 big part of this case, Ms. Fuller, testified he
18 wasn't, quote, in his right mind, that he blacked
19 out. He testified to that. Yet nowhere at the
20 Public Defender's Office did anyone ask the
21 question. He told them about his childhood, the
22 molestation. He told them about the counseling and
23 the treatment. He told them about the war
24 incidences, the loss of his good friend. He told
25 them about the family situation and the infidelity

1 which must have been devastating to a veteran to
2 come home to. And that was just a year before this
3 incident took place.

4 No one in the Public Defendant's Office
5 took the time to say, Mr. Marrero, let's have a look
6 at whether or not what took place in 2004 a year
7 later had anything to do with your mental capacity
8 at the time of the incident. In addition, there is
9 some suspicion, Your Honor, based on the information
10 that is raised with through Mr. May as to what took
11 place behind closed doors in the chambers and what
12 was said to the Solicitor and what was said to Mr.
13 May about this case as to whether this particular
14 court had been impartial through the process or
15 engaged in directly or indirectly influencing the
16 plea agreement in this case. They may have entered
17 into the negotiations. We're not behind closed
18 doors, but it's clear that ---

19 THE COURT: There's no record of it
20 either.

21 MR. WARE: Behind — before this case
22 started Mr. May testified that when the Solicitor
23 was asked what this case was about, he said it's
24 murder on a videotape; and the judge says, why are
25 we here. There's a predisposition that's raised in

1 my mind, or in my mind there's a question of
2 predisposition that Mr. Marrero needs to plead.
3 Halfway through the trial the judge pulls the
4 attorneys in and advises the Solicitor's Office, you
5 need to get a plea and get permission from a plea.
6 They talk about the years. He comes back in with
7 permission and then Mr. May goes out, and Mr.
8 Marrero sits at this chair or that chair in the
9 corner and is told 99.9 percent conviction,
10 .1 percent hung jury, there's no other alternative.
11 Then he's told if you ever want to see your son
12 again you accept this plea.
13 If this — this is not a lawyer who knows
14 understands the ramifications of what those two
15 things are really being said to him. But it seems
16 to me he, he gets the message I better plead, and
17 the judge has just told them by banging the gavel
18 it's time to go. I think time is a relevant factor
19 under the cases under the Harden case and the Cross
20 and — I believe the Cross case there is direct
21 information given to a judge about how far you can
22 go and be involved in the process of a plea
23 arrangement. And I'm concerned that the — in
24 either indirectly, maybe not directly but
25 indirectly, the pressure put on Mr. Marrero was such

1 that he was forced to take that plea and he felt
2 that he was compelled to do so.

3 In addition, the counsel acknowledged that
4 he did not object or he gave up objecting to leading
5 questions halfway through the trial. But the most
6 important witness, the one the State says is the
7 most important, the one Mr. May says is the most
8 important, Hanna Fuller is led down a path talking
9 about her family loss and then says, didn't he kill
10 somebody, and Mr. May sits here and says nothing.
11 That's pretty important point for a jury to hear,
12 and it's a pretty important point to miss. He
13 missed a few others. The judge allowed an audiotape
14 in of conversations between him which had
15 implications of whether the attorney was involved in
16 those discussions or should be counseled before
17 the -- before he makes any further discussion with
18 Mr. May, and yet the judge allows that to proceed
19 and Mr. May does not object to it.

20 He had no opportunity to review or
21 evaluate Ms. Hanna Fuller's testimony before she
22 testified. The Friday before the trial starts on
23 Monday she shows up as a witness. The judge,
24 certainly in his discretion, ruled that she should
25 be allowed to testify, but Mr. May was foreclosed

1 the opportunity. And so when you add the witness
2 surprise, the plea time limit, the conversation by
3 the judge about why are we here, and the statement
4 go out and get a plea, and then he sits here with
5 99.9 percent and, oh by the way, if you ever want to
6 see your son again you'll plead. It seems to us,
7 Your Honor, the plea was no longer voluntary; it was
8 coerced at that point. And despite what he said on
9 the transcript, in his mind he was being forced to
10 accept the decision he did not intend to make.
11 Your Honor, we would ask the petition be
12 granted for all of these reasons. Mr. May is a fine
13 attorney. We have a great deal of respect for him.
14 But there are some things he did in his first murder
15 case that cost this man his freedom, and we think
16 they ought to be rectified. At the very minimum,
17 the Court's decision to tack on five additional
18 federal years when they were supposed to be served
19 concurrently should be rectified for Mr. Marrero,
20 and he should be remanded to the federal
21 penitentiary immediately so that time can be served
22 concurrently. Thank you, Your Honor.

23 THE COURT: Mr. Corney?

24 MR. CORNEY: Yes, sir, Your Honor, very
25 briefly. If I may approach, I bring up a case law

1 relating to the standard in PCR for failure to seek
2 a mental evaluation. It's Jeter v. State, versus
3 State, 308 South Carolina 230 is the cite of that.
4 And the case specifically finds first that in this
5 particular case in Jeter the court found that trial
6 counsel is not deficient in its performance where he
7 relied, reasonably relied on his own perceptions
8 based on his discussions with the defendant in that
9 case, did not have him mentally evaluated prior to
10 the trial of the plea. Your Honor, Mr. May said he
11 met with Mr. Marrero 50 to 60 times during which he
12 had in-depth numerous discussions and repeatedly —
13 you heard his testimony — repeatedly testified
14 there was no reason, I never sought to have him
15 evaluated. I would say that that's a — that's no
16 deficiency. He reasonably relied on his perceptions
17 just as in the Jeter case. The Jeter case goes on
18 to say on the second prong of Strickland v.
19 Washington which is our guiding case for
20 post-conviction relief. The petitioner needs to
21 only demonstrate a reasonable probability he is
22 either insane at the time of the shooting or
23 incompetent at the time of this plea. Your Honor, I
24 don't think there's been anything presented here to
25 provide that reasonable probability that it was one

1 or the other. He said he suffered from depression.
2 He said he — some post-traumatic distress disorder
3 or something along those lines from his time served
4 in the war. None of that is incompetence or
5 insanity. I mean, he's proved nothing to this Court
6 to show he was incompetent or insane, even perhaps
7 bringing a mental evaluation's finding one of those
8 two things. He hasn't brought mental record or
9 mental health history records or anything along
10 those lines other than his bare testimony in that
11 regard. And even if his testimony is relied upon by
12 this Court it's not binding on incompetence or
13 insanity. He was on cocaine and ecstasy at the time
14 he committed this murder essentially. An
15 involuntary — or voluntary intoxication as Your
16 Honor is well aware, is not a defense in the State
17 of South Carolina. There's nothing that Mr. May
18 could have done from that regard, and I would
19 respectfully submit that Mr. Marrero has not met his
20 burden as against the mental evaluation portion of
21 that.

22 As far as the objection to the leading
23 comments, I don't think I even need to address to
24 this Court the substance of what the testimony was
25 from Ms. Fuller. It was gonna come in one way or

1 another. It's a matter of rephrasing the question
2 and asking it again and it comes back out. Mr. May
3 specifically said, I didn't object to it because I
4 didn't want to highlight the testimony. If I
5 objected he was gonna rephrase and she was still
6 going to give that testimony and then I've
7 highlighted that testimony to the jury. The State
8 would submit that's a reasonable strategy in not
9 objecting to it and there's no prejudice. As I
10 stated a moment ago, the Solicitor just wanted to
11 rephrase the question and got the same substance of
12 the testimony in. It was admissible testimony.

13 THE COURT: Should the Court have done,
14 taken that testimony in-camera and made at least a
15 403 analysis of whether or not that testimony should
16 be allowed? I mean, it sound---

17 MR. CORNEY: Your Honor ---

18 THE COURT: You know, I agree with Mr.
19 Ware, it's pretty damning testimony.

20 MR. CORNEY: Absolutely. And I, you know,
21 as you know under Strickland v. Washington there's a
22 two prong analysis, and I'll just go straight to the
23 prejudice prong and say, had there been any 403
24 analysis done in-camera the testimony would have
25 come in. That's clearly far more probative than

1 prejudicial. It is very prejudicial, but any
2 testimony or evidence against a defendant is going
3 to be prejudicial. The probative value of that
4 sufficiently outweighs the prejudice, and it would
5 have come in under 403 and that's abuse of
6 discretion standard on appeal. I don't think that
7 would have been overturned by the Court of Appeals
8 so I don't think there's any prejudice, let alone to
9 go to the deficiency prong in that.

10 THE COURT: All right.

11 MR. CORNEY: Mr. May also provided what I
12 would submit and the State would submit his credible
13 testimony that this 99.9 percent conviction never
14 happened; that was never stated. Mr. May sat there
15 and testified, I never said that, I never heard
16 Mr. Strickler all the years working with the Public
17 Defender's office ever say anything about
18 percentage, I would never give a defendant a
19 percentage of conviction. The credible testimony,
20 the State submits, is that was never said, and I
21 think Mr. May addressed that effectively.

22 There seems to be some kind of, some kind
23 of argument that their trial court was biased, that
24 the trial court somehow acted improperly. Your
25 Honor, that's a direct appeal issue. It should have

1 been brought up on direct appeal. I don't — other
2 than to move for recusal I don't see where counsel
3 could have been ineffective in that regard. I guess
4 to step back, I didn't address Ms. Fuller's
5 testimony. Mr. May made a continuous request to the
6 Court; that's all he can do. The judge denied it.
7 There's not much else he can do after making
8 continuous requests finding out about Ms. Fuller's
9 testimony that's going to come in. The Court denied
10 it. That's a direct appeal issue at that point.

11 And as far as the direct, to failure to
12 advise to direct appeal, Your Honor, under *Rogue v.*
13 *Flores Ortega* and the line of cases from United
14 States Supreme Court and then trickling down to the
15 South Carolina State Supreme Court under *Dick (ph)*
16 *v. Weathers* and a whole line of other cases. I
17 don't have copies with me; I'll be happy to provide
18 the Court with them. It's been pretty well
19 determined that from a guilty plea there's no duty
20 for a plea attorney to actively advise their client
21 of the right to appeal absent extraordinary
22 circumstances. No extraordinary circumstances exist
23 here. Nothing was objected to on the record to
24 preserve for appeal. Mr. May had no, you know,
25 affirmative duty to advise Mr. Marrero of his right

1 to appeal from a guilty plea. I'll be happy to
2 submit a—

3 THE COURT: I don't need it.

4 MR. CORNEY: ---brief on that or case law
5 on that fact.

6 THE COURT: I don't need it.

7 MR. CORNEY: All that, Your Honor, and the
8 testimony that's provided in the record before this
9 Court the State would respectfully request that the
10 application be denied.

11 THE COURT: All right, thank you very
12 much. Anything further?

13 MR. WARE: Your Honor, I would only point
14 out that the case that was provided, Jeter, deals
15 with the competency to enter the plea and not the
16 competency to stand trial and all those standards
17 are related and similar. We would say that the
18 deficiency here was failure to evaluate from the
19 beginning. It seems to me that is the check that is
20 missed in this case.

21 THE COURT: All right. Thank you very
22 much. I will review the trial transcript and I'll
23 let you know. Mr. Ware, I assume you want -- you
24 would propose an order with substantive case law?

25 MR. WARE: Yes, Your Honor.

1 THE COURT: All right. Thank you very
2 much. And same, Mr. Corney?

3 MR. CORNEY: Absolutely, Your Honor.
4 Thank you.

5 THE COURT: Thank you very much.
6

7 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E O F R E P O R T E R

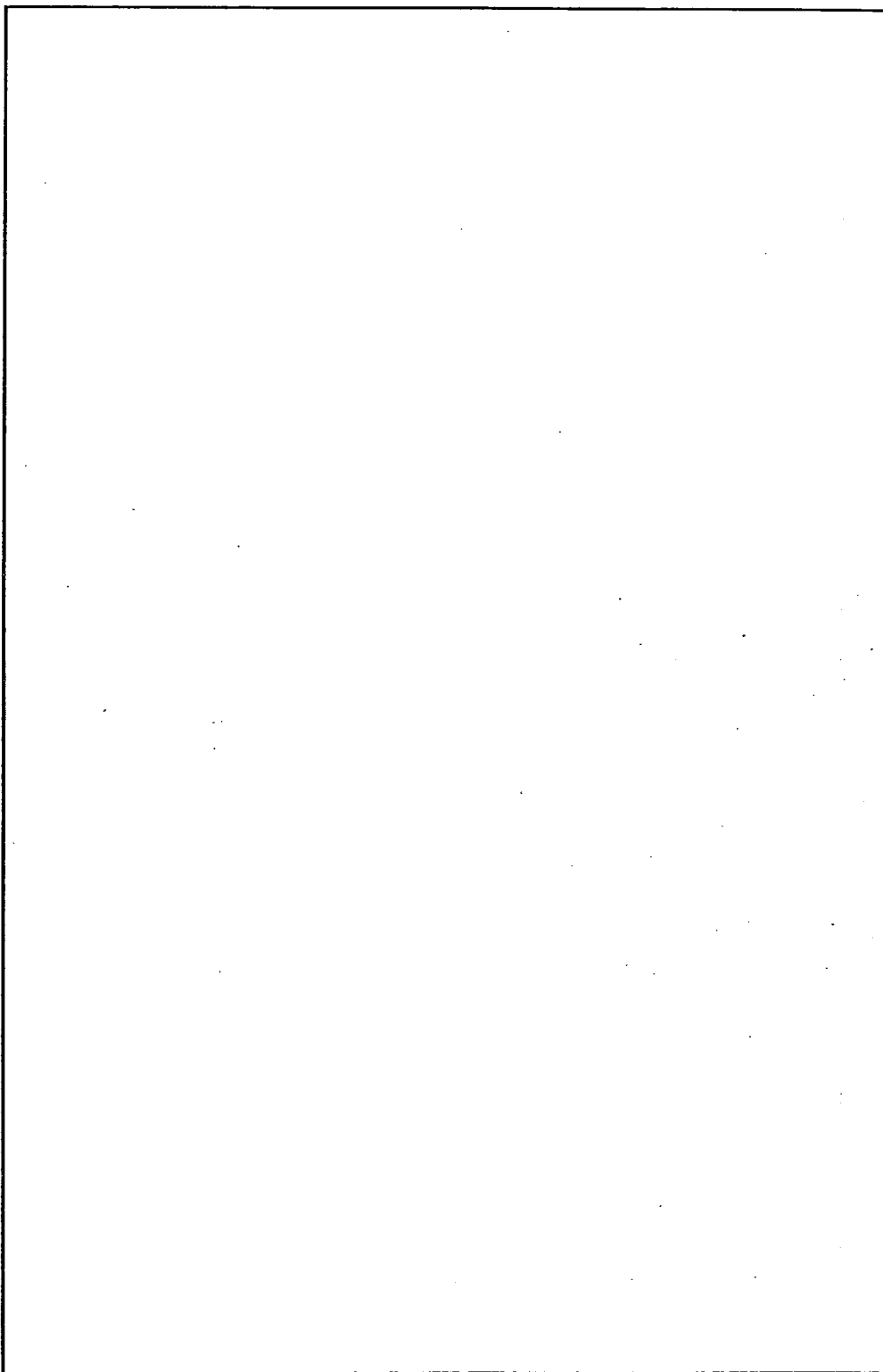
STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding was transcribed for Elizabeth Harris through a stenographic report from digital audio and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

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

Witness my hand at Florence, South Carolina, this 9th day of February, 2013.

FRANCES BAKIS-RAY, RPR



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Jaime E. Marrero, # 00330923,)

CASE NO. 2009-CP-40-2523

Applicant,)

v.)

MOTION TO ALTER OR AMEND THE
JUDGMENT

State of South Carolina,)

Respondent.)
_____)

Pursuant to Rule 59(e), SCRCP, Applicant Jaime Eduardo Marrero (Applicant), by and through his undersigned counsel, hereby moves this Court for reconsideration of its Order of Dismissal filed March 8, 2013 (Order), and received by Applicant on March 14, 2013, on the grounds this Court: (1) did not consider Applicant's argument the trial judge improperly initiated the plea proceedings, and (2) did not consider the trial judge improperly initiating the plea proceedings to be an extraordinary circumstance warranting defense counsel to advise Applicant of his right to appeal and to pursue an appeal.

DISCUSSION

I. Plea Not Freely and Voluntarily Made

The plea proceedings were inherently coercive because they were initiated by the trial judge, not by the parties, thus Applicant's guilty plea was not freely and voluntarily made. Further, Applicant's defense counsel's performance was deficient in not objecting to or intervening in the guilty plea initiated by the trial judge, thus depriving Applicant of his constitutional right to effective assistance of counsel. See U.S. Const., amend. VI.

In its Order, this Court correctly identifies Applicant's argument regarding the trial judge initiating the plea discussion: "Applicant contends the trial judge improperly ordered the state

extend a plea offer to Applicant” (Order 16.) However, the Court’s discussion of this argument limits the issue to whether defense counsel was ineffective for failing to move for the trial judge to recuse himself on account of judicial bias. (Order 17–18.) While Applicant did contend the judge exhibited bias in the pre-trial hearing, Applicant also argued the plea proceedings were coercive because the judge improperly initiated the plea discussions. See Transcript of Post Conviction Relief Hearing, January 14, 2013, 104:8–16 (“In addition, there is some suspicion, Your Honor, raised with through (sic) Mr. May as to what took place behind closed doors in the chambers and what was said to the Solicitor and what was said to Mr. May about this case as to whether this particular court had been impartial through the process or engaged in directly or indirectly influencing the plea agreement in this case.”). The Court did not address this specific ground for relief, and Applicant respectfully requests the Court reconsider and amend its Order to grant Applicant the relief requested in his Amended Application for Post-Conviction Relief for the reasons set forth below.

In Harden v. State, 276 SC. 249, 277 S.E.2d 692 (1981), the South Carolina Supreme Court adopted the ABA Standard 14-3.3 regarding responsibilities of a trial judge in guilty pleas. As the Supreme Court stated, the Standards were “designed to prevent both the fact and the appearance of the trial judge’s becoming an advocate against the desires of the defendant or the State of a particular resolution.” Harden, 276 S.C. at 257, 277 S.E.2d at 695. The Standards and the Harden case allow trial judges to participate in plea discussions as a neutral but state that such plea discussions involving the judge should be on the record in open court. Id. at 253–55, 277 S.E.2d at 694–95. They do not allow trial judges to initiate the plea discussions.

All the testimony in this case states the trial judge brought counsel into his chambers and instructed the solicitor to make a plea offer to the Petitioner. Tr. 32:19–33:8; 33:2–4; 83:7–16.

This discussion was not on the record and the plea discussion was not instituted at the desire of either the State or the defense—the plea came about solely because the judge wanted it. This is the sort of inherently coercive plea atmosphere the Supreme Court intended to avert when it adopted the Standards in the Harden case. Because the plea was initiated and pressed upon the parties by the trial judge, it was coercive and Applicant's resulting plea was not freely and voluntarily made.

Further, because the plea atmosphere was inherently coercive, anything Applicant said during the plea colloquy is immaterial. The Court in its Order makes frequent reference to Applicant's testimony during his plea colloquy with the judge. The colloquy cannot cure the constitutional infirmities in this case; however. By initiating and driving the plea discussions, the judge created a coercive atmosphere such that Applicant felt he had no choice but to accept the plea offer. In such a situation, a colloquy with the judge cannot reasonably be held to cure that coercion, and therefore the colloquy has no bearing on whether Applicant's plea was freely and voluntarily made.

Finally, in its analysis of whether Applicant has established prejudice, the Court should not rely upon the trial judge stating he would likely have given a sentence of life without parole had Applicant gone to trial and received a guilty verdict. That statement was made after Applicant had entered his plea; therefore, it could not have induced Applicant to plead guilty and should not be considered in the prejudice analysis.

II. A Direct Appeal Was Warranted

Because the plea was not freely and voluntarily made, defense counsel should have raised an objection and pursued a direct appeal. Failure to do so constitutes deficient performance and Applicant is prejudiced because he was unable to have the trial judge's error reviewed.

As this Court stated in its Order, defense counsel testified at the PCR hearing that he did not believe anything during the plea colloquy was objectionable. In light of the case law of this state clearly holding that judges should not initiate plea proceedings, defense counsel's failure to object during the plea process constituted deficient performance. As the Order states, defense counsel only need advise the defendant of his right to appeal from a guilty plea when "extraordinary circumstances" are present. Certainly, the fact the trial judge improperly orchestrated a guilty plea is an extraordinary circumstance warranting a direct appeal. Defense counsel's failure to object to the plea proceedings and protect Applicant's rights constitutes deficient performance.

If the judge had not initiated the plea discussions or had defense counsel objected in an effort to halt the discussions, Applicant would have proceeded to trial. Although the Court mentions that Applicant accepted a plea deal for an "advantageous sentence," the sentence received cannot be a factor in whether Applicant was prejudiced by his counsel's deficient performance or was coerced into a plea by the judge. The inquiry in this post-conviction relief proceeding is whether, but for defense counsel's deficient performance, Applicant would not have pled guilty and would have instead proceeded to trial. That burden has been met as Applicant testified he felt coerced into pleading guilty.

CONCLUSION

For the reasons set forth above, Applicant respectfully requests this Court reconsider its Order and amend its Order to grant Applicant a new trial because his guilty plea was not freely and voluntarily given, or to grant Applicant a belated direct appeal of the guilty plea because the trial judge improperly initiated the plea proceedings.

Respectfully submitted,

Ethan R. Ware, Esquire, S.C. Bar No. 7990
eware@mcnair.net

Amber B. Martella, S.C. Bar No. 78706
amartella@mcnair.net

McNAIR LAW FIRM, P.A.

Post Office Box 11390

Columbia, South Carolina 29211-1390

(803) 799-9800

By: 

Attorneys for Petitioner Jaime E. Marrero

March 21, 2013

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Jaime E. Marrero, # 00330923,)
)
Petitioner,)

CASE NO. 2009-CP-40-2523

v.)

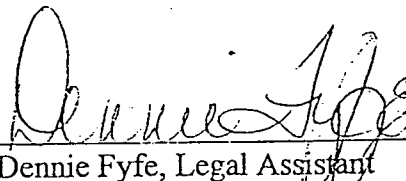
CERTIFICATE OF SERVICE

State of South Carolina,)
)
Respondent.)
_____)

FILED
2013 MAR 21 PM 3:45
CLARENCE W. MARRERO
C.C.P. & G.S.

I, Dennie Fyfe, an employee of the McNair Law Firm, P.A., do hereby certify that I have this date served one (1) copy of Motion to Alter or Amend on behalf of Jaime Eduardo Marrero, #330923, upon the following party or counsel of record or party by causing said copy to be deposited with the United States Postal Service, first class postage prepaid, properly affixed thereto and addressed as follows:

Robert D. Corney, Esquire
Assistant Attorney General
State of South Carolina
PO Box 11549
Columbia, SC 29211-1549



Dennie Fyfe, Legal Assistant

March 21, 2013

Columbia, South Carolina