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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Georgetown County

Honorable William H. Seals, Circuit Court Judge

---

DENNIS CUMBEE, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2020-000966

---

# APPENDIX

---

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

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Assistant Attorney General
1000 Assembly St.
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

# INDEX

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF GENERAL SESSIONS | |
| COUNTY OF GEORGETOWN ) | 2015-GS-22-00427 | |
| State, | ) | |
| | ) | |
| Plaintiff, | ) | Transcript of Record |
| | ) | |
| vs. | ) | December 12, 2016 |
| | ) | |
| Dennis Cumbee, Jr., | ) | |
| | ) | |
| Defendant. | ) | |

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

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

Richard D. Todd, Jr., Esquire
Attorney for Plaintiff

John M. Hilliard, III, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

(On the record, December 12, 2016. Defendant is sworn by the clerk.)

MR. TODD: The Court's indulgence, Your Honor.

THE COURT: All right.

MR. TODD: He's signing the plea sheet as we speak.

THE COURT: That'll be fine.

MR. TODD: Your Honor, we're on the record with State versus Dennis Cumbee. This is regarding indictment number 2015-GS-22-00427. He's been indicted for murder. Your Honor, he's going to plead guilty to that charge. The State is going to -- this has been a negotiated sentence for 35 years.

THE COURT: All right.

MR. TODD: In exchange for his plea the State will dismiss the other pending charges he has against him.

THE COURT: And what are the other charges?

MR. TODD: Your Honor, I believe there is a shooting into a dwelling that was pending before this case and a possession of a weapon during the commission of a violent crime.

THE COURT: All right.

MR. TODD: Your Honor, for your knowledge, the victim's family is here. At the proper time I believe his grandmother and mother would like to speak when you're ready, Your Honor.

THE COURT: All right. All right. Mr. Hilliard, you represent Dennis Cumbee on the charge of murder?

MR. HILLIARD: Yes, sir, Your Honor.

THE COURT: Have you discussed with your client the charge against him, his rights as a Defendant and the consequences of being convicted of this crime?

MR. HILLIARD: Yes, sir, Your Honor.

THE COURT: In your opinion does your client understand the charge against him, his rights as a Defendant and the consequences of being convicted of this crime?

MR. HILLIARD: Yes, sir, Your Honor.

THE COURT: And does he wish to plead guilty or not guilty?

MR. HILLIARD: Guilty, Your Honor.

THE COURT: Do you agree with his decision to plead guilty to this charge?

MR. HILLIARD: Yes, sir. I do.

THE COURT: Based upon the information you have, if this case proceeded to trial, do you feel that the State could prove your client's guilt beyond a reasonable doubt?

MR. HILLIARD: Yes, sir.

THE COURT: Has your client received a competency evaluation?

MR. HILLIARD: He has not, Your Honor.

THE COURT: Do you feel that he needs a competency evaluation?

MR. HILLIARD: No, sir, Your Honor.

THE COURT: All right. Sir, your name is Dennis Cumbee?

MR. CUMBEE: Yes, sir.

THE COURT: All right. Mr. Cumbee, you have been charged and indicted by the Grand Jury with murder, and according to your attorney you wish to plead guilty to this charge; is that correct?

MR. CUMBEE: Yes, sir. That's correct.

THE COURT: All right. Before I can accept your guilty plea I've got to go over some questions with you to be sure that you understand the charge against you, that you understand your rights as a Defendant --

MR. CUMBEE: Yes, sir.

THE COURT: -- that you understand the consequences of pleading guilty --

MR. CUMBEE: Yes, sir.

THE COURT: -- and I must be sure you're pleading guilty voluntarily.

MR. CUMBEE: Yes, sir.

THE COURT: Now, during the past 72 hours have you taken any medication --

MR. CUMBEE: No, sir.

THE COURT: -- consumed any alcohol or drugs or been under any influence that would affect your ability to know why you're here?

MR. CUMBEE: No, sir.

THE COURT: Do you understand why you're here today?

MR. CUMBEE: Yes, sir.

THE COURT: Is there anything about this hearing that you want to ask your lawyer or ask me before we proceed?

MR. CUMBEE: No, sir.

THE COURT: All right. Now, even though you've been indicted by the Grand Jury, under the Constitution of the United States you're presumed innocent of this crime, and you have the right to have your guilt or innocence determined by a jury trial of your peers. The State bears the burden of proving your guilt beyond a reasonable doubt. You do not have to prove your innocence and you cannot be compelled to testify against yourself. You also have the right to confront and cross examine anybody who testifies against you. If you choose you can present a defense to this charge, but when you plead guilty you give up all of those rights. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: And do you want to give up those rights and plead guilty to this charge?

MR. CUMBEE: Yes, sir.

THE COURT: All right. I understand that you've reached a negotiated sentence with the State, which means that if I accept your guilty plea and I accept the negotiated sentence I will sentence you to 35 years in prison. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: Do you understand that I'm not obligated to accept this negotiated sentence, but if I do not accept it you can withdraw your guilty plea, but please keep in mind that if you ever pled guilty to this charge without a negotiated sentence or if you went to trial on this charge and was convicted without a negotiated sentence then you could receive a sentence of -- well, if there's aggravating circumstances they could seek the death penalty. If there are no aggravating circumstances you could go to prison for the rest of your life without the possibility of parole. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: Do you also understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: Do you also understand that this crime is classified as a violent crime, and what that means is if you're ever convicted of another violent crime then that subsequence violent crime conviction you would not be eligible for probation and you would not be eligible for parole. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: Do you also understand that this crime is classified as a most serious crime. What that means is if you're ever convicted of two crimes classified as a most serious crime or if you're ever convicted of three crimes classified as a serious crime then that third serious crime conviction or that second most serious crime conviction the sentence can be enhanced to life in prison without the possibility of parole and the State'll use this guilty plea against you to show a most serious crime conviction on your record. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: You understand that for this crime you would not be eligible for parole. So if I impose the 35-year sentence you're going to have to serve the 35-year sentence. Do you understand that?

MR. CUMBEE: Yes, sir.

THE COURT: Knowing your rights as a Defendant, knowing the -- knowing the negotiated sentence to be imposed if accepted by the Court, knowing the maximum and the mandatory minimum sentences you could receive without a negotiated sentence, knowing that this is classified as a violent crime and a most serious crime and the consequences of those classifications, do you wish to plead guilty or not guilty to murder?

MR. CUMBEE: Guilty.

THE COURT: Has anybody promised you anything other than this negotiated sentence to get you to plead guilty?

MR. CUMBEE: No, sir.

THE COURT: Are you pleading guilty voluntarily?

MR. CUMBEE: Yes, sir.

THE COURT: Has anybody threatened you to get you to plead guilty?

MR. CUMBEE: No, sir.

THE COURT: Are you satisfied with your lawyer?

MR. CUMBEE: Yes, sir.

THE COURT: Are you pleading guilty to this crime because you committed this crime?

MR. CUMBEE: Yes, sir.

THE COURT: All right. I need you to listen carefully while the Solicitor gives me the facts of your case. Okay.

MR. CUMBEE: Yes, sir.

THE COURT: All right, sir.

MR. TODD: Thank you, Your Honor. On April 7th, 2015, at around 8:20 p.m. officers responded to 304 South Alex Alford Drive within the city limits of Georgetown. When officers arrived on scene they found Mr. Tory Thomas, the victim in this case, lying on the ground on his back in a pool of blood. Through investigation it was established that that night there had been a birthday party at 304 Alex Alford. There was a tent up. They were grilling, and a bunch of people had been

coming by pretty much all day, and they were planning on having people come by that night. There was approximately 15 to 20 people at the party at that time. A minor altercation, just a disagreement between two individuals had begun, and Mr. Thomas had actually made some statements about taking, taking the argument somewhere else. This was a very peaceful, enjoyable party. At that point in time it's my understanding that Mr. Cumbee had spoke up, and him and Mr. Thomas had began talking and having an altercation. The altercation changed course, however. Mr. Cumbee pulled a gun, pointed it at Mr. Thomas and began firing off shots. Through the investigation and through discussions with the forensics, it was established that Mr. Thomas was shot once through the shoulder likely looking back, four additional times in the back. All these injuries were non-life threatening. They were serious injuries, but enough to bring him down as he ran away to where he came to a place behind one of the trailers, kind of where a house is and a fence, kind of a narrow alleyway where he couldn't go anymore. The final shot through forensics was through his, through his head through the face less than two feet away. He had burn marks on his eyes and around his forehead, and through forensics, talking with the pathologist and the height disparity between Mr. Cumbee and the victim, Mr. Thomas, it is likely that Mr. Thomas was either on his knees or flat on his back with the final shot.

Through investigation we spoke to many people that were there. We spoke to several witnesses that saw Mr. Cumbee level his gun and saw them chase around. No one actually saw the fatal shot, but basically it was established that Mr. Thomas did not have a firearm, did not have a weapon. He was peacefully grilling, enjoying the party.

At that time Mr. Cumbee left the scene. Several others did scatter as well. Some people came back to give a statement. Mr. Cumbee eventually did turn himself in several days later after a somewhat of a manhunt where they put out that they were looking for him and people in the community knew that he was being looked for. He did turn himself in.

Your Honor, as far as a record I don't believe he has much of a record. This is a -- kind of an anomaly. Mr. Cumbee was in the service before that. So he, he seemed to be a normal individual. So this is a -- very much a senseless killing. From my understanding it had nothing to do with gangs or violence or really anything of any nature other than just senselessly killing someone because of an argument.

THE COURT: All right. All right. Mr. Cumbee, you understand what the allegations are against you?

MR. CUMBEE: Yes, sir.

THE COURT: Is that what happened in this case?

MR. CUMBEE: Yes, Your Honor.

THE COURT: All right. Mr. Hilliard, anything in

mitigation?

MR. HILLIARD: Yes, sir, Judge. A couple of things for the purpose of the record at the, at the outset, Mr. Cumbee was originally represented by a different lawyer and, and had this, had this offer out there from, from that lawyer and his dad -- I've known his dad for some considerable period of time, and his dad came to me and asked me to represent him in connection with this, with this case, and I agreed to, to undertake that. Myself and, and Jonathan, my paralegal here, we, we reviewed all the evidence and looked at all the information, looked at the forensics and all those, all those sorts of things that we could do in the case and came to the conclusion that as I said earlier, Judge, in all likelihood he would be convicted based on the forensics. We had thought about the prospect of a self-defense defense, and we've talked about various aspects of it, but in -- but the, the, the facts as outlined by the Solicitor are supported by the forensics and supported by the witnesses. We, we really would not have a defense. At the same time, as the Solicitor said, this is, this is an anomaly for Mr. Cumbee. I've had the opportunity to, to speak with him and talk with him and talk to -- these are his family members in the, in the back here, Judge, to talk with them. He's a, he's a good guy. He's -- there's no real explanation. There's no -- this is one of those things that, that happened. It didn't happen because he's a mean

person. It didn't happen because -- he's, he's not evidenced any, any, I guess, psychological manifestations in the past of, of anger or anything like that. His family tells me that, that he is -- he has been beat up on some occasions in the past, and maybe this is -- that's some explanation as, as he, -- but that's not, that's not an excuse. The point of all that is, Judge, he's just -- it's not him. It's not how -- it's not how he acts. It's not what he ordinarily does, and at the same time, he told me that, that of course he's guilty and he, you know, we, we, we hate it for both families. We hate that he has the 35 years. I've explained to them, and they asked me, "Well, can't you just at least please try to persuade the Judge to come under the 35," and I, of course, explained to the family that, that the Solicitor was making an offer based on the fact that he was going to get 35 years. The Solicitor doesn't want me to try to talk under it, and we certainly don't want the Solicitor to try to talk over it. So we've come to this, to this negotiation of 35 years. That's what he's going to get if Your Honor accepts the plea. The families both know that. One other thing I was thinking about this morning, Judge, when I was thinking about coming over here is, you know, what, what point is it for, for really us to say anything to the Court if we know that the result is 35 years, but I, I have learned -- I didn't believe this for a long time -- but I have learned that, that sometimes it's

important for people to hear things. It's important for people to have the opportunity to say things, even though it doesn't have any impact on the, the criminal justice outcome. So I say those things to, to let Mr. Cumbee and his father know that we have done the very best that we could to, to try to get him to a different spot. This is the best spot that, that he could get to that, that we felt like, and again, we hate it, but here we are. We're asking you to follow the negotiated sentence and give him the 35 years. Everybody in the sound of my voice understands it's 35 years.

THE COURT: All right. Mr. Cumbee, anything you want to say?

MR. CUMBEE: First off, Your Honor, I'd like to apologize to the victim family. Also I'd like to apologize to my family. Your Honor, as you heard here today, you know, I'm not a bad guy. I made a wrong decision, and unfortunately it affected a lot of lives. I'm personally sorry for that, and you know, Your Honor, that's all I have to say. Thank you.

THE COURT: All right. You say the victim wanted to speak or victim's family?

MR. TODD: Yes, Your Honor.

THE COURT: All right. They'll need to come forward to a microphone and give the court reporter their name.

Ma'am, your name?

MS. LONG: My name is Molly Simmons Long, and --

THE COURT: Could you spell your last name?

MS. LONG: Last name is L-O-N-G, Long.

THE COURT: Ms. Long, what would you like to say?

MS. LONG: Yes. Okay. Tory is my grandson, and as we all know, grandmothers love their grandson, and I would say it's hard, but this, too, shall pass. This, too, shall certainly pass, and it will take time, and one life is gone, but gone to a better place, and that one life still here and living among or living with that, I should say, it was hard for me because I'm conflicted, one life gone, and another life being placed without being able to move around, but the only thing that I have to say at this point is to each day you take one day at a time, one day at a time, and I've come to realize, especially at my age, that forgiveness is what I have to do to get through. That wasn't too hard to do, forgiving part, because that's only the type -- not just the type of person I am, but it's the type of person because of my belief. So any other feelings is under the surface, but the thing is young people, young people is -- it's just so hard for them during this lifetime at, at times and circumstances to choose the right decision and because of this unfortunate decision both families, both families are -- have to deal with what happened and we're doing the best that we can to deal with what be happened, and will continue to pray that things will be getting better. Thank you for allowing me to speak.

THE COURT: Thank you, ma'am. Yes, ma'am, your name?

MS. THOMAS: Good morning. My name is Joyce Thomas. I'm the mother of Tory Thomas.

THE COURT: All right. Ms. Thomas.

MS. THOMAS: The hurt, the pain, the loss, the aching of my heart I feel every day for my son. I wish this on no mother, not even Dennis' mother, Denise. I was very, very angry for the loss of my son, but I prayed on it. I'm not angry anymore. I pray to God to help me to heal my heart. There's no anger anymore. I thank for the little justice because the justice would never be served enough for the loss of my son, but I thank for the little bit of justice, but I want everybody to know, including Dennis, I pray that God have mercy on your soul. Like my mother saying, I am hurt. My family is hurt, but the other family is hurt, too. I just pray to God that this is not Georgetown. This is not going to be our history for us killing each other.

THE COURT: Thank you, ma'am.

MS. THOMAS: I thank you all so much.

THE COURT: All right. You said no prior criminal record?

MR. TODD: No, Your Honor. Nothing of any significance whatsoever.

MR. HILLIARD: Judge, would you hear from Mr. Cumbee?

THE COURT: No. I've always -- I hear from the victims

last. That's it.

MR. HILLIARD: All right.

THE COURT: Thank you.

MR. HILLIARD: Thank you, Judge.

THE COURT: All right. Mr. Cumbee, I will accept your guilty plea. I find that it's made knowingly, voluntarily, fully advised of your rights as a Defendant and the nature of the charge against you and the consequences of your guilty plea. I also find that there is a factual basis to support the charge against you. Likewise, I'll accept the negotiated sentence reached between you and the State. The sentence of the Court is that you be confined to the State Department of Corrections for 35 years. You'll receive credit for any time served thus far. All right.

MR. HILLIARD: Thank you, Your Honor.

THE COURT: Good luck to you. Thank you.

MR. TODD: Thank you, Your Honor.

(Adjourned.)

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of State versus Dennis Cumbee, Jr., held in the Court of General Sessions for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on December 12, 2016.

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

Grace L. Hurley

Grace L. Hurley, CVR-CM-M

Official Reporter

February 4, 2018.

**FORM 5**

STATE OF SOUTH CAROLINA )
)
County of Georgetown ) IN THE COURT OF COMMON PLEAS

Dennis Cumbee JR 370848 ) 2017 CP 22 01051
Full name and prison number (if any) of Applicant )

v.

State of South Carolina ) **APPLICATION FOR**

**POST-CONVICTION RELIEF**

FILED
GEORGETOWN COUNTY, S.C.
2017 DEC 11 PM 12:51
ALMA Y. WHITE
CLERK OF COURT

**INSTRUCTIONS ▪ READ CAREFULLY**

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

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

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

1. Place of detention Georgetown County Detention Center 2394 Brownsferry Rd.

2. Name and location of Court which imposed sentence Georgetown General Session Court, Screven Street Georgetown S.C. 29440

3. Name(s) of co-defendant(s) (if any) N/A

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

(a) 2015A2220200182/murder; 2015A2220200196/weapons

(b) _____

(c) _____

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

(a) December 12, 2016. Terms: 85% of a 35 year sentence.

(b) Guilty plea of 35 years for murder.

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ✓

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

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

Yes, I spoke with my lawyer after I accepted my plea deal and told him to put in appeal, but I do not know what court he appealed to.

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) I did tell my lawyer to appeal just don't know what court and/or paperwork he filed on my behalf. Have tried to contact him numerous times, to no avail.

(b) _____

(c) _____

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

(a) Violation of 6th amendment rights

(b) Violation of 14th Amendment rights

(c) _____

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

(a) My Counsel was ineffective.

(b) My Counsel, did not have an adequate amount of time

(c) to prepare for my case and wasn't able to look at my case thoroughly.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

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

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

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

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

(a) This is my first presentation to the Court, because

(b) I had a year to file for this appeal/PCR.

(c)

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

(a) your arraignment and plea? Yes

(b) your trial, if any? No trial

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered Ayes@ to one or more parts of (17), list:

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

i. Ceasar McKnight
106 E Main St, Lake City, SC. 29560

ii. John Hilliard
408 Cleland St. Georgetown, SC. 29440

iii.

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

i. Ceasar represented me at my arraignment and 2 bond proceedings

ii. John Hilliard represented me at 3rd bond hearing and guilty plea.

iii.

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

Time reduction and/or vacated sentence.

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

No.

Revised 3/2003

STATE OF SOUTH CAROLINA )
)
County of Georgetown )

2017CP2201051

VERIFICATION

I, Dennis Cumbee JR, 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.

Dennis Cumbee JR

SWORN to and subscribed before me this 7th day of December, 2017.

Janelle Spearman (L.S.)
*Notary Public*

My Commission Expires:

JANELLE T. SPEARMAN
Notary Public-State of South Carolina
My Commission Expires
August 26, 2025

FILED
GEORGETOWN COUNTY, S.C.
2017 DEC 11 PM 12:01
ALMA Y. WHITE
CLERK OF COURT

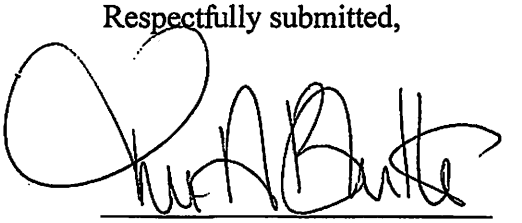
| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>COUNTY OF GEORGETOWN ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Dennis Cumbee, Jr., 370848, )<br>Applicant, )<br>v. ) | 2017-CP-22-01051 |
| State of South Carolina, )<br>Respondent. ) | AMENDMENT TO APPLICATION<br>FOR POST CONVICTION RELIEF |

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 11, 2017. Respondent filed a Return on February 9, 2018. In response to Section Four of Respondent's Return, Applicant would request a new trial or whatever relief the court deems proper.

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his guilty plea. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea.
2. Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence. Transcript pp. 7-8.

Respectfully submitted,



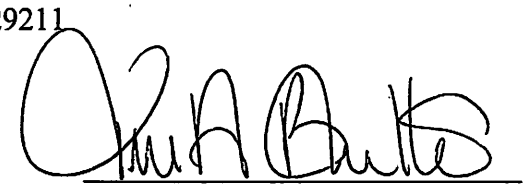
Tricia A. Blanchette
Attorney for Applicant
Bar #74904
PO Box 2147
Leesville, SC 29070

February 27, 2019

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>COUNTY OF GEORGETOWN ) | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT |
| Dennis Cumbee, Jr., 370848, )<br>Applicant, )<br>v. )<br>) | 2017-CP-22-01051<br><br>CERTIFICATE OF SERVICE |
| State of South Carolina, )<br>Respondent. ) | |

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed an Amendment in the mail on this this 27th day of February 2019 to Johnny James of the Attorney General's Office, at:

Office of the Attorney General
ATT: Johnny James, Ast. AG
Post Office Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070

February 27, 2019

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| COUNTY OF GEORGETOWN | ) | |
| Dennis Cumbee Jr., | ) | Case No.: 2017-CP-22-01051 |
| S.C.D.C. No. 370848, | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | **RETURN** |
| v. | ) | |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

In response to the application for post-conviction relief filed by Dennis Cumbee Jr. (Applicant) on December 11, 2017, Respondent would show this Court:

**I.**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2015 term of the Georgetown County Grand Jury for murder (2015-GS-22-00427).[1] The State's summary of facts, which Applicant affirmed, are as follows:

> On April 7th, 2015, at around 8:20 p.m. officers responded to [an address] within the city limits of Georgetown. When officers arrived on scene they found Mr. Tory Thomas, the victim in this case, lying on the ground on his back in a pool of blood. Through investigation it was established that night there had been a birthday party at [the address]. There was a tent up. They were grilling, and a bunch of people had been coming by pretty much all day, and they were planning on having people come by that night. There was approximately 15 to 20 people at the party at that time. A minor altercation, just a disagreement between two individuals had begun, and Mr. Thomas had actually made some statements about taking, taking the argument somewhere else. This was a very peaceful, enjoyable party.

[1] Applicant was also indicted at the March 2014 term for discharging a firearm into a dwelling (2014-GS-22-00294), unlawful carrying of a pistol (2014-GS-22-00295), at the March 2015 term for aggravated breach of peace (2015-GS-22-00122), and at the May 2015 term for possession of a weapon during the commission of a violent crime (2015-GS-22-00428). These indictments were all dismissed *nolle prosequi* as part of Applicant's plea.

> At that point in time it's my understanding that [Applicant] had spoke up, and him and Mr. Thomas had began talking and having an altercation. The altercation changed course, however. [Applicant] pulled a gun, pointed it at Mr. Thomas and began firing off shots. Through the investigation and through discussions with the forensics, it was established that Mr. Thomas was shot once through the shoulder likely looking back, four additional times in the back. All these injuries were non-life threatening. They were serious injuries, but enough to bring him down as he ran away to where he came to a place behind one of the trailers, kind of where a house is and a fence, kind of a narrow alleyway where he couldn't go anymore. The final shot through forensics was through his, through his head through the face less than two feet away. He had burn marks on his eyes and around his forehead, and through forensics, talking with the pathologist and the height disparity between [Applicant] and the victim, Mr. Thomas, it is likely that Mr. Thomas was either on his knees or flat on his back with the final shot.
>
> Through investigation we spoke to many people that were there. We spoke to several witnesses that saw [Applicant] level his gun and saw them chase around. No one actually saw the fatal shot, but basically it was established that Mr. Thomas did not have a firearm, did not have a weapon. He was peacefully grilling, enjoying the party.
>
> At that time [Applicant] left the scene. Several others did scatter as well. Some people came back to give a statement. Mr. Cumbee eventually did turn himself in several days later after a somewhat of a manhunt where they put out that they were looking for him and people in the community knew that he was being looked for. He did turn himself in.

Tr. 9-11 (one paragraph break added). John M. Hilliard, III, Esq. represented Applicant, and Richard D. Todd, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 12, 2016, Applicant pled guilty as indicted for murder. The Honorable Benjamin H. Culbertson accepted terms negotiated between Applicant and the State and sentenced Applicant to imprisonment for a term of 35 years. Applicant did not appeal his plea or sentence.[2]

[2] Applicant indicates that he affirmatively asked plea counsel to file an appeal, but is unaware of where it may have been filed. Respondent can find no record a notice of appeal was filed.

**II.**

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

1. Ineffective assistance of counsel, in that:
    a. "My counsel did not have an adequate amount of time to prepare for my case and wasn't able to look at my case thoroughly.

Applicant requests relief as follows:

- "Time reduction and/or vacated sentence."

Attached to and incorporated herein are the records of the Georgetown County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

**III.**

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its

"reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced 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, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief.

Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

**IV.**

In his prayer for relief, Applicant requests, in part, a time cut. This relief is unavailable in a post-conviction relief action. If this Court finds a defect in the original proceedings, the appropriate relief would be a new trial on the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969); see also Grant v. MacDougall, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964) (relief of absolute release not available); Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (no constitutional right to plea bargain). Where an applicant seeks only relief to which he or she is not entitled, "it is not incumbent upon [the] court to pass upon what relief, if any, he [or she] might, perchance, be entitled to." Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968). For these reasons, if the Application is not otherwise amended before the evidentiary hearing to reflect a desire for appropriate relief, Respondent would respectfully request this Court engage in a *thorough* colloquy with Applicant to apprise him of the relief available in a PCR. If at the hearing Applicant indicates no desire in appropriate relief but a desire to proceed, Respondent will at that time move to dismiss the Application.

**V.**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by*

*the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP; Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

**VI.**

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

[*Conclusion and signature on following page*]

**VII.**

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

February 9, 2018

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GEORGETOWN | ) | |
| | ) | |
| | ) | 2017-CP-22-1051 |
| DENNIS CUMBEE, JR., 370848, | ) | |
| | ) | |
| Applicant, | ) | |
| | ) | |
| vs | ) | AFFIDAVIT OF SERVICE BY MAIL |
| | ) | |
| STATE OF SOUTH CAROLINA, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by e-mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by e-mail:

**Steven W. Fowler, Esquire**
**Fowler Law Firm**
**730 Main Street, Unit 237**
**North Myrtle Beach, SC 29582**

DATED this 9th day of February, 2018.

Judy A.C. Carey, Legal Assistant
For Respondent

**STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS**

**COUNTY OF GEORGETOWN ) 2017-CP-22-01051**

| | | |
|---|---|---|
| DENNIS CUMBEE, | ) | |
| | ) | |
| Applicant, | ) | **Transcript of Record** |
| | ) | |
| vs. | ) | |
| | ) | MARCH 25, 2019 |
| STATE OF SOUTH CAROLINA, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

**B E F O R E:**

Honorable William H. Seals, Jr.
Georgetown County Courthouse
Georgetown, South Carolina

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

Tricia A. Blanchette, Esquire
**Attorney for the Applicant**

Johnny James, Jr., Esquire
**Attorney for State**

Sallie Beth Todd
**Circuit Court Reporter**

**I N D E X**

**E X H I B I T S**

| NO. | DESCRIPTION | ID | EV | PAGE |
|---|---|---|---|---|
| PL1 | Plea Offer dated 5/3/16 | | X | 8 |
| PL2 | Letter to client with offer dated 7/14/16 | | X | 9 |
| PL3 | Memorandum of Law | | X | 48 |

**THE COURT:** I'm ready when you are.

**MR. JAMES:** If it may please the Court?

**THE COURT:** Yes, sir.

**MR. JAMES:** Your Honor, this is the matter of Dennis Cumbee versus State of South Carolina, docket number 2017-CP-22-01051. Mr. Cumbee is present here in the courtroom today and is represented by Ms. Tricia Blanchette, Esquire. Mr. Cumbee was indicted at the May 2015 term of the Georgetown County Grand Jury for murder, in addition to discharging a firearm into a dwelling, unlawful carrying of a pistol, aggravated breach of peace, and possession of a weapon during the commission of a violent crime although all of those other charges were dismissed nolle prosequi. On that charge he was represented initially by Mr. Cezar McKnight, who is present here in the courtroom today. And ultimately, at his plea proceeding he was represented by Mr. John M. Hilliard, III, who is also present here in the courtroom today. Mr. Richard D. Todd of the 15th Circuit Solicitor's Office prosecuted the case. On December 12th, 2016 Mr. Cumbee plead guilty as indicted for murder. The Honorable Benjamin H. Culbertson accepted terms negotiated between the applicant and the state and sentenced him to 35 years. He did not appeal his plea or his sentence.

Your Honor, that is the procedural history and unless there are other further questions -- I did note that in the

original application Mr. Cumbee indicated his interest in a time reduction in the state's return. The state indicated that that form of relief was not available in a post-conviction relief action. My understanding upon review of the amendment to the application for post-conviction relief is that Ms. Blanchette discussed that subject with her client and that he wished to proceed seeking to vacate his guilty plea and remand for a new trial. With that stated, I'll go ahead and take my seat and give the floor to Ms. Blanchette.

**THE COURT:** Sounds good.

Ms. Blanchette.

**MS. BLANCHETTE:** Thank you, Your Honor. Tricia Blanchette on behalf of Dennis Cumbee. As the state did reference, we filed an amendment of March 1st of 2019. In that amendment I also treated it as a responsive pleading to the state's return and clarified that Mr. Cumbee is requesting a new trial and whatever the Court seems proper, or deems proper, but he is not just asking for a time cut as that is not available under the statute. I'll also ask him about that while he's on the stand today.

**THE COURT:** Okay. That'll be good.

**MS. BLANCHETTE:** Does Your Honor have a copy of our recent March 1st amendment there in front of you? I have a copy if it was not included in the packet.

**THE COURT:** That'd be good if you have it by chance.

**MS. BLANCHETTE:** Your Honor, may I approach.

**THE COURT:** Sure. Thank you. I appreciate that. Thank you. All right. If you'll just call your first witness whenever you're ready.

**MS. BLANCHETTE:** Yes, Your Honor. I would call Attorney Cezar McKnight to the stand.

**CEZAR MCKNIGHT, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

**THE CLERK:** Please be seated and state your full name for the record, please, and please spell it.

**MR. MCKNIGHT:** Cezar McKnight, Cezar E. McKnight. Cezar is spelled C-E-Z-A-R, McKnight is M-C-K-N-I-G-H-T.

**DIRECT EXAMINATION OF MR. MCKNIGHT BY MS. BLANCHETTE:**

Q: Mr. McKnight, what is your current profession?

A: I'm a lawyer.

Q: And how long have you been a lawyer?

A: Since 2002.

Q: Okay. And since 2002 until now, what is the primary focus of your practice?

A: The gravamen of my practice is mostly personal injury, but there's a significant part of it that is criminal defense.

Q: Okay. And the part of it that's criminal defense, do you recall representing Mr. Cumbee at some point in time?

A: I do.

Q: Okay. And how was it that you represented him? Were you

appointed or were you retained?
A: I was retained by Mr. Cumbee's parents.
Q: Okay. Do you remember approximately how many times you met with Mr. Cumbee himself?
A: At least three or four in the detention center. Because of the charges his bond was denied, and so I recall meeting with him at least three or four times ---
Q: During the -- I'm sorry.
A: --- not counting maybe one or two appearances in court. But it's been a while so at least three or four.
Q: During the course of your representation do you recall getting a written plea offer in his case?
A: I do.
Q: Okay.

**MS. BLANCHETTE:** Your Honor, may I approach the witness?

**THE COURT:** Yes, ma'am.

**BY MS. BLACHETTE:**

Q: Mr. McKnight, could you please identify what this appears to be for the record?
A: This appears to be a copy of the plea offer made by the 15th Judicial Circuit's Office specifically Mr. Richard Todd to my client at the time, Mr. Cumbee.
Q: And what is the date that appears on this?
A: The date on this is March 3rd, 2016.

**MS. BLANCHETTE:** Your Honor, at this time I would move

this copy of the plea offer ---

**BY MS. BLACHETTE:**

Q: Does that actually look like May, Mr. McKnight?

A: What did I say?

Q: Did you say March?

A: I'm sorry. I'm thinking about March. No, you're correct, ma'am. That is May 3rd, 2016.

**MS. BLANCHETTE:** Your Honor, at this time I would move to admit the plea offer dated May 3rd, 2016.

**THE COURT:** Any objections?

**MR. JAMES:** Without objection.

**THE COURT:** All right.

**MS. BLANCHETTE:** Your Honor, would you like a copy?

**THE COURT:** That would be applicant's number 1, without objection.

Yes, ma'am. Thank you.

**(APPLICANT'S EXHIBIT NUMBER 1 IS ADMITTED INTO EVIDENCE.)**

**BY MS. BLACHETTE:**

Q: And, Mr. McKnight, you already may have said it, but you recall receiving this plea offer from the state?

A: I did receive it from the state.

Q: Okay. And what was the terms of this plea offer?

A: According to what's written here it says, "If the defendant will plead guilty to the charge of murder that the

state will make the following offer of 35 years." From that it tells me the state is recommending a sentence of 35 years to my client.

Q: All right. Mr. McKnight, I'm going to hand you another document. Can you identify this for the record, please?

A: I can.

Q: And what does it appear to be?

A: It appears to be a copy of the letter that I received that goes along with this. What I did was I sent this plea offer to Mr. Cumbee in the detention center and this is the cover letter that I sent along with it explaining to him exactly what it was.

Q: And what's the date on the letter your sent to Mr. Cumbee?

A: Sure. July 14th, 2016.

**MS. BLANCHETTE:** Your Honor, at this time I would move the letter from Mr. McKnight to Mr. Cumbee dated July 14th, 2016 in as applicant's number 2.

**THE COURT:** Any objection?

**MR. JAMES:** Without objection.

**THE COURT:** All right. Applicant's number 2 is into evidence without objection.

**(APPLICANT'S EXHIBIT NUMBER 2 IS ADMITTED INTO EVIDENCE.)**

**BY MS. BLACHETTE:**

Q: And, Mr. McKnight, you did briefly explain how you sent this letter with that offer. And you've had a chance there to review your letter?
A: I have.
Q: Okay. And what is the specific advice you gave him regarding the amount of time he would have to serve, whether this was a day for day, 85, or 65 percent sentence?
A: In the letter I told him he had to do a mandatory 85 percent.
Q: Okay. Now, after this offer was received and this letter was sent, did you continue to represent Mr. Cumbee through to his guilty plea?
A: No, ma'am. Shortly after this I was relieved as counsel for Mr. Cumbee by Mr. Hilliard.

**MS. BLANCHETTE:** Your Honor, if I could beg the Court's indulgence one moment.

**THE COURT:** Yes.

**MS. BLANCHETTE:** Your Honor, I have no further questions of this witness.

**THE COURT:** All right.

State.

**CROSS EXAMINATION OF MR. MCKNIGHT BY MR. JAMES:**

Q: Mr. McKnight, did you at any other time discuss percentages or parole eligibility with your client in this matter?

A: I believe that I did. There were times that I met with him in the -- let's go back to prior to this. So, my normal practice is when I get a written notice, I send it to the client because I'm obligated to let them know that they have a plea offer. Now, prior to this I had been talking to Dennis about what the potential outcomes would be if we'd go to trial, what he was facing, and the like. So, I'm pretty certain that I mentioned to him before that hey, you're facing the charge of murder for which you could be given life. And I explained to him, I'm almost certain that I probably told him that it was 85 percent that he'd have to do. So, yes, this isn't the only time that I talked to him about possible sentence ramifications, this isn't it.

Q: Did you ever tell him that he would serve something other than 85 percent?

A: I don't believe that I did, and I realize that that's an error on my part. So, you know, now I understand that it's day for day. But I was correct in telling him it's most serious and if he ever got out, he was facing all of the other potential things that he could have; so, you know.

**MR. JAMES:** I have no further questions for this witness.

**THE COURT:** All right.

Any redirect?

**MS. BLANCHETTE:** No, Your Honor. And this witness is here due to the state's subpoena, but we do ask that he be

released.

**MR. JAMES:** I would agree that he should be released.

**THE COURT:** All right. You have a good day.

**MR. MCKNIGHT:** Thank you.

**THE COURT:** Thank you.

**MS. BLANCHETTE:** Your Honor, I would call Attorney John Hilliard to the stand.

**THE COURT:** All right.

**JOHN M. HILLIARD, III, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

**THE CLERK:** Please be seated and state your full name for the record, please.

**MR. HILLIARD:** My name is John M. Hilliard, III.

**DIRECT EXAMINATION OF MR. HILLIARD BY MS. BLANCHETTE:**

Q: Mr. Hilliard, what is your current profession?

A: I'm a lawyer.

Q: And how long have you been practicing law?

A: Since 1980.

Q: And since 1980 what has been the primary focus of your practice?

A: Mostly I do criminal defense. I was a law clerk for a Circuit Judge for a year when I got out of law school. After that I went to work as a prosecutor and on and off, I've worked for three of the last four elected prosecutors, and I do criminal defense mostly.

Q: And do you recall representing Mr. Cumbee in 2016?
A: I do.
Q: Okay. And how was it that you became involved in his case?
A: His dad called me and said that they had an offer from Ricky Todd of 35 years and whatever Cezar had been able to do, had not been able to get Ricky off of that. And so, they asked me if I would represent them, represent Mr. Cumbee, his son. And I indicated that I would do that. I explained to him that I didn't know whether I would be able to find anything different and that I wasn't making any representations about being able to do anything better than what Mr. McKnight had done. And sometimes it's harder to take on a case in the second spot than the first spot, because the prosecution has already made their offer. So, sometimes you can do better, sometimes you can't. So, Mr. Mumbee, Sr. hired me.
Q: Okay. Did you have the opportunity after Mr. Cumbee, Sr. hired you then to meet with Mr. Cumbee, Dennis Cumbee that's the applicant here today?
A: I did. I met with Mr. Cumbee and I had an associate and a paralegal go out and speak with him and we reviewed, we review the case, we reviewed the facts, and those sorts of things.
Q: And when you say you reviewed the case, did you review

the case for possible trial preparation, looking into defenses and strategies?

A: Absolutely. That's -- if I could have figured out a defense then that would have been a better -- that would have been the kind of entry into the plea negotiation that I would have needed. I needed something different than what had been developed by Mr. McKnight in order to get the prosecutor to change his mind.

Q: And in doing that, were you also looking into defenses because it was communicated to you by Mr. Cumbee that he would want to pursue a trial, that that was an option on the table for him?

A: I never really believed that that was an option in the case. When I say not an option, he's always entitled to a trial, no question. And I certainly, you know, I like trials better than guilty pleas anyway because there's no, you know, you do what you do and then you see how it turns out. But anyway, I didn't -- I didn't see any way to take this case to trial, but I did review it from that point of view, that perspective.

Q: Do you have a copy of the guilty plea transcript with you today, dated December 12th, 2016?

A: I don't honestly know if I do or not.

**MS. BLANCHETTE:** Your Honor, may I approach the witness and provide him a copy?

**THE COURT:** Sure.

**BY MS. BLACHETTE:**

Q: Just providing this to you, Mr. Hilliard, so when we refer to it, you'll have it there in front of you.

A: Okay. Thank you.

Q: Now, from your file can you tell us how far in advance of the guilty plea date that you were actually retained in this case? How long you worked on this case leading up to the guilty plea?

A: I don't remember. I was retained on August the 8th of 2016 and the guilty plea, it looks like, was December the 12th.

Q: Okay. Just trying to ask you about the events leading up immediately before the guilty plea; do you remember going to court with Mr. Cumbee on a bond matter the week before this guilty plea was entered? Or attempting to go to court on a bond matter?

A: I see that on December the 1st, 2016 we did an arraignment and at the arraignment they gave us one week to make a decision as to the guilty plea. So, December the 1st, 2016, that's a fairly ordinary procedure for this circuit. The arraignment is, I guess probably for wherever you come from, the idea is that the offer is put on the table in front of the Judge. The offer is explained to the defendant so that he can't ever come back on a PCR and say that he didn't know

what the offer was, and the whole thing is on the record. They gave us a week at that point to make a final decision. Ordinarily, you have to make a decision before the arraignment, but they gave us another week to talk about it, think about it, and make a decision.

Q: Okay. And do you remember meeting with Mr. Cumbee the Friday before the guilty plea was entered and indicating to him that he needed to make a decision, otherwise he was going to be proceeding to trial December 12th?

A: I'm certain that happened. I don't have the note -- for whatever reason I don't have that note in my notes, but I'm certain that happened.

Q: Okay. Do you recall meeting with him over the weekend before he entered his guilty plea to advise him about taking the guilty plea or proceeding to a trial?

A: Again, I don’t have that in my notes, and I don't have an independent recollection, but I'm confident that happened.

Q: Okay. You referenced the offer that was communicated to Mr. McKnight was 35 years and you were working trying to get the solicitor to come off of that offer. What was the offer that you were able to get for Mr. Cumbee?

A: Not a bit of difference, none.

Q: Okay. And the transcript will reflect the plea that was entered, but what advice did you give him regarding the 35 year offer, specifically regarding the amount of time he'd

have to serve before he entered his guilty plea?
A: I believed, and I told Dennis, that it was an 85 percent no parole offense. Experience had told me that there are no parole offenses, and this is a no parole offense. And I believed at the time that no parole offenses require the service of 85 percent. I believed that to be true at the time.
Q: And that's the advice you would have given him regarding the amount of time he'd have to serve if he entered this guilty plea?
A: I don't know that I would have called it advice, but at the same time I told him that that was the truth and I thought that was true.
Q: And I'm going to show you what's already been marked as applicant's number 2.

**MS. BLANCHETTE:** Your Honor, do I need to ask to continue to approach?

**THE COURT:** You're fine.

**MS. BLANCHETTE:** Okay.

**MR. HILLIARD:** I'm not scared of her, Judge.

**BY MS. BLACHETTE:**

Q: If you can see in that letter, Mr. McKnight also advises him that he would serve 85 percent. So, your advice was no different than Mr. McKnight's advice?
A: That's true. And I had Mr. McKnight's letter.

Q: Okay. So, nothing changed from what Mr. McKnight was telling him to what you told him?
A: No.
Q: Okay. I'll take that back, so we don't lose it.
A: Sure.
Q: And I handed you a copy of the guilty plea transcript there. Have you had an opportunity to review that prior to today?
A: I have. I read it.
Q: Okay. If you could look at page 7, beginning on line 14 of the transcript.
A: Yes.
Q: Beginning on line 14 the Judge tells Mr. Cumbee, "Do you also understand that this crime carries a mandatory minimum sentence, which means that the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?" And he says, "Yes, sir."

Did that comment by the Court make you clue in that this sentence may not be served at 85 percent?

A: It did not.
Q: And then if you could turn over to the next page, if you could look at page 8, please. And I'll give you the line number here in a second, beginning at line 12. Beginning on line 12 the Court says, "You understand that for this crime you would not be eligible for parole? So, if I impose the 35-

year sentence, you're going to have to serve the 35-year sentence. Do you understand that?" And Mr. Cumbee said, "Yes, sir."

Did those comments by the Court make you realize that this may not be served at 85 percent?

A: It didn't. And let me say two things at this point if I may. I am reminded by page 7 that one of the things that I was trying to do on behalf of Mr. Cumbee was to get off of the negotiated sentence aspect of it. I wanted the opportunity to -- I wanted the opportunity to try to get under 35 and closer to 30. The idea was that there was a 5 year window that I felt like if I could -- 30 being the minimum and 35 being negotiated, what that did was that kept me from having the opportunity to -- to ask the Judge for a 30 year sentence instead of 35. What I really was trying to get to was there was 35 negotiated, which meant I couldn't argue for 30. What I was trying to get to was that difference in the 5 years so that I could argue for the 30 and perhaps persuade the Judge. The state would say they recommend 35, I would try to get to the 30. That was the focus of what I was trying to do, which I had forgotten until I read that spot in the plea. But that was the idea and the focus of what I was trying to do on behalf of the defendant and his family. As to the other, my experience with the Department of Corrections, and I've had a lot of experience with the Department of Corrections. And my

experience with them is that we speak different languages, that they say day for day and day for day could mean 85 percent or no parole. You know, no parole is no parole, I get that part, but I believed at the time, and I was mistaken, but I believed at the time that 85 percent and day for day meant the same thing and they don't. But a lot of things, in my experience, the Department of Corrections says don't mean the same thing that I think they're talking about. So, that's -- and a lot -- and I know that the best practice is not to advise the client of what they're going to get because you really don't know ever what they're going to get because they change the rules. They can change the rules whenever. But, in this particular circumstance, this set of circumstances, what I said was 85 percent and the fact that the Judge said day for day did not cause me to believe that 85 percent was incorrect. I believed it at the time.

Q: Okay.

**THE COURT:** Do any of y'all have a copy of the transcript of the plea that I could look at? I don't see it --

**MR. HILLIARD:** I'm sorry, Judge. Here, I'll give you mine. I found mine in here.

**THE COURT:** Thank you.

**MS. BLANCHETTE:** Your Honor, at this juncture would it be good to ensure that you have everything that you need in your packet before I carry on? Is there anything else that --

**THE COURT:** I think that's the only thing I was missing. I hate to -- but I like to follow along with you.

**MS. BLANCHETTE:** I would love for you to follow along.

**THE COURT:** And so far, you've handed up everything but that. And you said line 12, what page?

**MS. BLANCHETTE:** Your Honor, we were on page 7, line 14.

**THE COURT:** Okay. I got that.

**MS. BLANCHETTE:** And then we were on page 8, line 12.

**THE COURT:** Okay. Thank you.

**MS. BLANCHETTE:** Uh-huh. (Affirmative response)

**BY MS. BLACHETTE:**

Q: Now, Mr. Hilliard, by way of his revised or his amendment, Mr. Cumbee has alleged that you were ineffective for misadvising him regarding the service of his sentence being 85 percent. He's also alleging that you were ineffective when you didn't move to withdraw. Did you not move to withdraw because you didn't realize at that juncture that your advice was incorrect?

A: Yes. I did not move to withdraw because I thought I was -- I still believed I was correct.

Q: Okay. And if you would have known that was incorrect would you have moved to withdraw after having a discussion with Mr. Cumbee if that's what he wanted you to do?

A: If he had wanted me to do that, I would have done it. Yes.

Q: Okay. And so, in your mind the Court's statements did not cure the advice or did not change the advice that you had given Mr. Cumbee. You still believed it was 85 percent.
A: True. Yes.
Q: Mr. Hilliard, do you remember anyone raising the question to you, whether it be the defendant or his family, after the hearing about the service of time whether it was 85 percent or day for day?
A: I don't recall that. No.
Q: Okay.
A: But I've known -- let me say this. I've known his family for a long, long time and if they said I said it, I believe them because they're truthful, honest, good people.

**MR. JAMES:** Objection.

**THE COURT:** Sustained.

**BY MS. BLACHETTE:**

Q: Mr. Hilliard, would you dispute -- would you dispute any testimony that the family may have contacted you about that afterward?
A: I would not.

**MS. BLANCHETTE:** Your Honor, if I could beg the Court's indulgence one moment.

**THE COURT:** Yes, ma'am.

**MS. BLANCHETTE:** Your Honor, I have no further questions for this witness. Thank you.

**THE COURT:** All right.

**CROSS EXAMINATION OF MR. HILLIARD BY MR. JAMES:**

Q: Mr. Hilliard, do you recall if your client asked you any questions during the course of the plea proceeding?

A: I don't think that he did.

Q: Do you recall if he asked you any questions after the Court's instructions on page 8, lines 12 to 16 that we've previously gone over?

A: I don't have any recollection of that.

**MR. JAMES:** I have no further questions for this witness, Your Honor.

**THE COURT:** All right.

Any redirect?

**MS. BLANCHETTE:** I -- just very briefly, Your Honor.

**REDIRECT EXAMINATION OF MR. HILLIARD BY MS. BLANCHETTE:**

Q: Just to clear, sort of a complete record, did any comments by the Judge during the course of the entire plea proceeding raise a question to you that you may have been incorrect about the 85 percent?

A: No.

**MS. BLANCHETTE:** No further questions, Your Honor.

**THE COURT:** All right.

You may step down. Thank you.

**MR. HILLIARD:** Thank you, Your Honor.

**THE COURT:** All right. Call your next witness.

**MS. BLANCHETTE:** Your Honor, I would call the applicant, Dennis Cumbee, to the stand.

**DENNIS CUMBEE, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

**THE CLERK:** Please have a seat and state your full name for the record.

**MR. CUMBEE:** My name is Dennis Cumbee.

**DIRECT EXAMINATION OF MR. CUMBEE BY MS. BLANCHETTE:**

Q: Mr. Cumbee, where are you currently incarcerated?

A: At Broad River Correctional Institution.

Q: Okay. And we are here today because you filed a PCR application back in December of 2017; is that correct?

A: Yes, ma'am.

Q: Okay. And I've had the opportunity since I became your attorney to meet with you on a number of occasions; is that correct?

A: Yes, ma'am.

Q: And during those meetings, do you recall me explaining to you the only relief that you could ask this Court for today?

A: Yes, ma'am, which would be a new trial.

Q: Okay. And with your permission, I then amended your application to include two allegations and to acknowledge that you understood the relief you can get is a new trial.

A: Yes, ma'am.

Q: Okay. And furthermore, I've explained to you what that

word a "new trial" means. To the best of my understanding it is, if the Court sees fit, he can set aside your guilty plea, and your conviction, and your sentence. Then you would be put back in the position you were before you entered your guilty plea. It would be as if you never entered a guilty plea. You'd face your original charges all over again with no guarantee of less time. Do you understand that?

A: Yes, ma'am.

Q: And with discussing that, I may not have said it in the best way that time, but we've discussed it on a number of different occasions. You understand there's a risk involved with that?

A: Yes, ma'am. I do.

Q: And knowing that, you still want to go forward today?

A: Yes, ma'am.

Q: Okay. Now, let's first talk about how Mr. McKnight got involved in your case. Was he retained or appointed?

A: He was retained.

Q: Okay. And how did that come to be?

A: As soon as the charge came up my father and my mother, I believe, both went and retained him. And me and him actually went to go turn myself in to the county jail.

Q: Okay. And after you turned yourself in with Mr. McKnight, did you remain in the county jail or did you make bond?

A: I remained in the county jail without bond.
Q: All right. And Mr. McKnight -- you've been present in the courtroom when he testified today; is that correct?
A: Yes, ma'am. I was here.
Q: Okay. I'm going to show you what's been previously marked as applicant's number 1, which is a plea offer sheet; and applicant's number 2, which is a letter from Mr. McKnight. Can you take a second to review those?
A: Yes, ma'am.
Q: Do you recall receiving that letter and that plea offer from Mr. McKnight?
A: Yes, ma'am. I do.
Q: Okay. And what was your response when you received that letter in the mail?
A: I was displeased, and I called my father and mother and they were also displeased about it. And we asked him, you know, what can be done with this. And we just decided to go with another attorney, which was John Hilliard at the time.
Q: Okay. And at that time, were you wanting to enter a guilty plea or were you wanting to pursue a trial?
A: No, ma'am. I was wanting to pursue a trial.
Q: Okay. And did your displeasure, was that the result of the fact that you wanted to pursue a trial and he was coming to you with a plea offer?
A: Yes, ma'am.

Q: And you indicated already that then you chose to retain new counsel being Mr. Hilliard; is that correct?
A: Yes, ma'am.
Q: Okay. I want to ask you a couple of questions about that letter. You did indicate you reviewed the letter; is that correct?
A: Yes, ma'am.
Q: And based upon that letter, what was the advice that he was giving you regarding the percentage of time you'd have to serve on that 35-year offer?
A: It was an 85 percent serve on the offer.
Q: Okay. And did he ever explain that to you in person as well? Do you remember?
A: Yes, ma'am. One time and he actually told me it was 29 years and 7 months.
Q: Okay. And I'll take those exhibits back from you, so we don't get those lost.
Now, you retained Mr. Hilliard, did you discuss the possibility with him of pursuing a trial?
A: Yes, ma'am.
Q: Okay.
A: We discussed the case.
Q: Okay. And did you talk about possible defenses or strategies for a trial?
A: Yes, ma'am. We did.

Q: And, Mr. Cumbee, up until the day of the guilty plea, were you still wanting to pursue a trial?
A: Yes, ma'am.
Q: And if the Court would see fit to grant you relief, are you saying today that you would want to pursue a trial in this case as one of the options?
A: Yes, ma'am.
Q: Okay. Now, with Mr. Hilliard did you have the opportunity to go through some of your concerns that you had with Mr. McKnight's representation, such as not getting you ready for a trial?
A: Briefly I met with his paralegal and his other team and we went over the defenses that we would be using. And we were actually -- when we went to court, we actually wasn't going for a -- to enter a plea deal or, you know, talk about trial. We were actually going up for a bond, a bond hearing. And when we got there, they said that, you know, you're going to trial, you're up on the docket and that's when we came to a plea deal.
Q: Okay. So, let's just kind of break that down here. This was before your plea date obviously, you were transferred to court?
A: Yes, ma'am.
Q: Do you remember the day of the week that was?
A: It was that Friday.

Q: Okay. So, the Friday before you entered your plea you were transferred to court and your understanding is that you're going for bond court; is that correct?
A: Yes, ma'am.
Q: And once you get there, do you have the opportunity to meet with Mr. Hilliard?
A: Yes, ma'am. In the back, before we went into court he actually came back and he spoke to me and he said that the prosecutor, Ricky Todd, he said that he wants me to go to trial. He actually wanted me to start it that day, and if I didn't accept the offer by 5 o'clock that day, then the offer would be off the table and I would go to trial Monday.
Q: And so you recall that being on a Friday?
A: Yes, ma'am. That was on a Friday.
Q: And just to be clear, and I believe you stated it, it was the original offer communicated to you by Mr. McKnight that was still on the table that you were being asked to either accept or reject?
A: Yes, ma'am. It was.
Q: Okay. And your understanding from Mr. McKnight was that would be served at 85 percent.
A: Yes, ma'am.
Q: What was the advice that Mr. Hilliard gave you about the service of time?
A: It was the same, the 85 percent.

Q: And did you discuss what the calculation of that would look like, exactly how many years that would be?
A: Yes, ma'am. He actually computed it in his calculator, and it was -- it came out to 29.75, which would mean I would do 29 years and 7 months, the same exact as Cezar explained to me.
Q: Okay. And, Mr. Cumbee, was the advice that you would serve this at 85 percent a deciding factor? Did that help you make the decision to enter into the guilty plea?
A: Yes, ma'am.
Q: Can you please explain why?
A: It was the fact that, you know, I didn't have to do the whole 35 years. And the fact that it was 85 percent, I was really asking for something under that. It was, you know, it was less than 35 years or less than 30 years and I already had some time in.
Q: Okay. And was one of the things you also recall discussing with one or both of your attorneys is this possibly being a voluntary manslaughter case?
A: Yes, ma'am.
Q: Okay. And as far as the sentence for voluntary manslaughter, did that plan into your reasoning as to why this mattered that it would only be 29 years?
A: Yes, ma'am.
Q: Please explain that.

A: What it was was that murder would carry nothing under 30, so the voluntary manslaughter he said would carry zero to 30. So, when he told me it was under 29, but it was -- well, I didn't know at the time it was under 30 for the murder. But when he told me at the time that it was 29, I felt like that was better than the murder charge would be actually nothing under 30 years.

Q: All right. So, was it explained to you that that would be more in the range of a voluntary manslaughter conviction o the high end?

A: Yes, ma'am. Yes, ma'am.

Q: All right. Now, let's talk about the morning of your guilty plea. Did you have the opportunity to further discuss the guilty plea with Mr. Hilliard?

A: Yes, ma'am. I did.

Q: And was your family part of that discussion?

A: Yes, ma'am.

Q: Okay. And was the same advice rendered to you at that time, that you would serve 85 percent which was approximately 29.75 years?

A: Yes, ma'am.

Q: Now, do you have a copy of the guilty plea transcript there in front of you?

A: No, ma'am.

Q: Okay. I'll provide you my copy. Mr. Cumbee, do you

recall this on 12/2016 when you entered your guilty plea?
A: Yes, ma'am.
Q: Okay. I'm going to provide you a copy of the transcript, sir.
Specifically, I'd like to draw your attention to page 7, beginning at line 14. The Judge's comments there, did that cause you to question the advice you had been given by Mr. Hilliard?
A: No, ma'am.
Q: If you could flip over to page 8 and look at line 12. If you could look at that page 8, line 12 and let me know, the Judge's comments there, did that raise a question to you as to the advice you'd been given by Mr. Hilliard?
A: Yes, ma'am. That one actually did when he had said that.
Q: Okay. Could you please explain.
A: After -- during the time after he said it, I stopped and looked at Hilliard and he shaked his head yes. When we got -- after the plea deal, I asked Mr. Hilliard in the back if -- what did he mean by that? And Mr. Hilliard told me that he had to say that in case the laws change.
Q: And when he said he had to say that; are you referring to the Judge?
A: The Judge. The Judge had to say that. Yes, ma'am. Just in case the laws change.
Q: Okay. And when you had that discussion with him right

after your guilty plea, who was present as far as you recall?
A: My father was present at that time.
Q: Okay. And in the meetings you had with him before you entered the guilty plea, what family members were present?
A: My mother and my father, and I believe my baby sister also.
Q: Okay. So, you had that brief encounter with Mr. Hilliard and then you were ushered off to SCDC; is that correct?
A: Yes, ma'am.
Q: And did you first go to Kirkland; is that where you went for R&E?
A: Yes, ma'am. I went to Kirkland.
Q: Okay. And when you got to Kirkland did anything bring this matter to your attention?
A: Oh, yes, ma'am. It did. At Kirkland I was actually placed on (inaudible) and I went up for a job review, I had a job in the cafeteria. And then gave me my sentencing sheet and on it it said 20/50, and I was confused. And I went to ask the counselor, I said they have my time messed up in the computer and on this paper. She said, what's wrong with your time? And I told her I was supposed to be doing 85 percent, they've got me doing 100 percent. She said, okay, well give me a minute. She went in the computer and she told me, oh, yes you were charged with murder, that's 100 percent, day for day. And during that time I was -- I was baffled. I called

my mother and my father and I asked them to call Mr. Hilliard. And I actually told the lady there, I said I've got a paper that says mine is 85 percent, which is the paper that was presented to the Court by Cezar McKnight. I still had that. I said, I've got a paper that says mine is 85 percent. I was thinking that I could bring her that paper and that would clear it up in the system, it would change it to 85, but they didn't. So, after that I went and called my mother and my father. I asked them to speak with Mr. Hilliard and ask him what's going on, why is this 100 percent, I don't know nothing about that. And from then I believe that my father contacted Mr. Hilliard.

Q: And then at that point did you proceed with filing a PCR application?

A: Yes, ma'am.

Q: And it took you a good bit of the one-year statute of limitations to file your application; is that correct?

A: Yes, ma'am.

Q: You discovered your issue right away, so why did it take you so long to file your application?

A: I was working. I was really trying to obtain a lawyer so they could do it. And during the time I was working so I had less time to go to the law library. I didn't really know how to file and everything. So, between work and then coming -- going back to the cell and also doing -- working and doing, I

didn't have time. I was trying to obtain a lawyer to do it, to file it for me.

Q: Okay. And you are here today, and you filed this PCR application. I'm just going to ask you, is your reasoning because but for your attorney's advice that it was 85 percent, you wouldn't have entered the guilty plea.

A: That's correct.

Q: And would you have wanted to proceed with a trial?

A: Yes, ma'am.

**MS. BLANCHETTE:** Your Honor, if I could beg the Court's indulgence one moment.

**THE COURT:** Sure.

**BY MS. BLACHETTE:**

Q: As the second allegation on your amendment, you have alleged that your attorney was ineffective when he didn't interject or move to withdraw your guilty plea after the Court addressed the service of your sentence. If Mr. Hilliard would have said after the Judge made his comments or you raised a concern, you know what I did misadvise you, it's day for day, would you have wanted him to move to withdraw your guilty plea at that point and not have to wait to go forward with this PCR?

A: Yes, ma'am. I would not have gone forward.

**MS. BLANCHETTE:** Your Honor, I have no further questions.

**THE COURT:** All right.

Cross.

**CROSS EXAMINATION OF MR. CUMBEE BY MR. JAMES:**

Q: Mr. Cumbee.

A: Yes, sir.

Q: The Court told you that you were going to have to serve a minimum of 30 years, correct?

A: Yes, sir.

Q: But you thought that you were going to serve less than 30 years, correct?

A: Yes, sir.

Q: And that didn't set off an alarm bell in your mind?

A: No. The first time he said it, it did not.

Q: All right. Did you think you were pleading to murder or to voluntary manslaughter?

A: I knew I was pleading to murder.

Q: Okay. Now, the Court told you you would not be eligible for parole, correct?

A: Correct.

Q: And the Court told you that it would impose a 35-year sentence -- if it imposed a 35-year sentence, you would serve a 35-year sentence, correct?

A: Yes, sir. That's when it raised an eyebrow.

Q: Okay. But at that time, you told the Court you understood.

A: Yes, sir.

Q: Okay. You didn’t tell the Court you didn't understand.
A: No, sir. I looked at my lawyer after that was said and he shook his head like yeah; and that's when I asked him about it in the back about the Judge saying that.
Q: Well that's a pretty ambiguous answer. You didn't follow up with him or say hey to the Court -- no, Your Honor, I don't understand?
A: I asked -- I also asked the lawyer in the back again. And what it was is the reason why it raised the brow the second time and the reason why it didn't raise and eyebrow the first time was because I had two lawyers telling me the same thing, and I was saying okay. And then the second time I did follow up with Hilliard in the back right after court and I asked him, "He said I had to do the whole 35 years, I believe that's what he said." He said, "Oh, the Judge had to say that because -- in case the law changes."
Q: Isn't it true that you told the Court that you were pleading guilty because you were guilty of the crime?
A: Yes, sir.
Q: All right. And was that true, you were pleading guilty because you were guilty of the crime?
A: I actually was pleading guilty because my lawyer was actually -- he actually said in the trial, as you will see in the transcript, that he didn't have enough time to properly prepare for the case and being that that was better, he felt

like if we would have went to trial it would have been a life sentence. And being that he said he wasn't ready, the Judge was willing to give him I think a month to work on the case and I didn't think that was enough time to gamble with a life sentence.

Q: So, you didn't plead guilty over the 85 percent confusion, you plead guilty because you didn't think your lawyer had enough time?

A: No, sir. Well, during -- I took the plea after that but the 85 percent -- I took the 85 percent after that, that's what I was advised. I plead guilty because he didn't -- no, sir. I didn't think he had enough time to properly work on the case.

Q: Okay. So, your position is that you did not plead guilty because you were guilty of the crime?

A: No, sir.

Q: Okay. And you assert today that you are not guilty of the crime?

A: Yes, sir.

Q: All right. So, when you told the Court on page 9 of this transcript, lines 11 to 13, the Court asked you quote, "Are you pleading guilty to this crime because you committed this crime?" You said, "Yes, sir." You were lying to the Court at that time; is that correct?

A: Yes, sir.

Q: Okay. And you have a copy of the transcript up here still with you?
A: Yes, sir.
Q: All right. Now, after that the solicitor, the prosecutor, Mr. Todd, stated the facts of the case against you; is that correct?
A: Yes, sir.
Q: And afterwards the Court asked you if you understood the allegations; is that correct?
A: Yes, sir.
Q: I can see you searching through the transcript. I would direct you to page 11, lines 20 on down.
A: Yes, sir.
Q: And the Court asked you if what the solicitor said was what happened in this case, correct?
A: Yes, sir.
Q: All right. And you said that that's what happened, correct?
A: Yes, sir.
Q: And you're telling me you're not guilty, correct?
A: Yes, sir.
Q: And so, you lied when you told the Court that that's what happened?
A: Um.
Q: And you agreed with what the state said.

A: Well, that's just a -- I feel like that's a synopsis of it, um, basically a roundabout way about it. I feel like he had most of what he said correct, or some of what he said correct.
Q: Well, what part of it do you disagree with?
A: It was -- it was a lot of different things I agree with, but he had the main cause correct and it was the fact that it was an agreement and we were at a -- it wasn't a grilling, it was more of a birthday party. And me and Mr. -- me and Mr. Thomas got engaged in an argument and it led to -- it led further than that.
Q: So, you agree with part of the facts presented but disagree with some of the other facts presented?
A: Yes, sir.
Q: But at the time, you agreed with the synopsis as a whole?
A: Yes, sir.
Q: Okay. You indicated that you had an opportunity to review potential defenses and trial strategies with Mr. Hilliard's team, correct?
A: Yes, sir.
Q: And so, you had engaged in some trial preparation, correct?
A: Yes, sir.
Q: Do you recall what defenses you discussed?
A: It was self-defense or stand your ground.

Q: So, you already knew what trial strategy you were going to pursue if you did in fact take this to trial?
A: Yes, sir.
Q: And you testified that you wanted to take it to trial.
A: Yes, sir.
Q: But ultimately you plead guilty because you felt your attorney didn't have enough time to prepare that defense?
A: Yes, sir.
Q: Did Mr. Hilliard ever tell you that you had to plead guilty?
A: No, sir.
Q: Did he ever threaten you or anything?
A: No, sir.
Q: Did he ever promise you anything?
A: No, sir.

**MR. JAMES**: I have no further questions for this witness.

**THE COURT**: Redirect?

**MS. BLANCHETTE**: Briefly, Your Honor.

**REDIRECT EXAMINATION OF MR. CUMBEE BY MS. BLANCHETTE**:

Q: Mr. Cumbee, you retained an attorney to provide you with legal advice; is that correct?
A: Yes, ma'am.
Q: And did he advise you as to how you needed to respond when you were in the courtroom for your guilty plea?
A: Yes, ma'am, about the Judge saying what he says.

Q: Okay. And was it your understanding that you needed to agree with the facts in order for your guilty plea to go forward?
A: Yes, ma'am.
Q: Okay.
A: Yes, ma'am.
Q: And was it your understanding that you disagreed with anything, most likely the guilty plea would not be accepted and go forward?
A: That's exactly correct.
Q: So, you were acting under the advice of your attorney?
A: Yes, ma'am.
Q: You had mentioned in your direct about voluntary manslaughter. The state asked you on cross about some of the defenses; you mentioned self-defense, stand your ground. This wasn't a case where you were going to claim an alibi or that you weren't involved; is that correct?
A: That's correct. Yes, ma'am.
Q: Okay. And were you wanting to pursue a trial because you wanted the jury to assess your level of guilt in this case?
A: Yes, ma'am.
Q: Okay. And the state asked you a number of time if you choose to enter a guilty plea simply because your attorney wasn’t prepared and I think you agreed, but did you also choose to enter a guilty plea because your attorney advised

you that the service of time would be at 85 percent which would be 29 years?
A: Yes, ma'am. Yes, ma'am. After it was said that, you know, this is our -- this is gone be our best option and I was explained that, okay, it was 85 percent of 35, that's when I accepted it. Yes, ma'am.
Q: Okay. And that fell in line with the idea that if a jury found you guilty of voluntary manslaughter, that sentence would be close in time to a voluntary manslaughter conviction?
A: Yes, ma'am.

**MS. BLANCHETTE:** Your Honor, I have no further questions.

**THE COURT:** All right.

Anything further from the state?

**MR. JAMES:** Nothing further, Your Honor.

**THE COURT:** You may step down.

Any other witnesses?

**MS. BLANCHETTE:** Yes. I have one final witness, Denise Giles.

**DENISE GILES, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

**THE CLERK:** Please be seated and state your full name for the record, please.

**MS. GILES:** Denise L. Giles.

**DIRECT EXAMINATION OF MS. GILES BY MS. BLANCHETTE:**

Q: And, Ms. Giles, how is it that you know Dennis Cumbee

seated here to my right?
A: My son.
Q: Okay. And the fact that he's your son, you understand that you're here to tell the truth and only the truth; is that correct?
A: Correct.
Q: And you're not here today to just try to help your son?
A: Uh-uh. (Negative response.)
Q: Okay. Let me take you back to the week before your son entered his guilty plea. Were you part of discussions with him and his attorney about the guilty plea that was on the table?
A: Yes. On that Friday I was.
Q: Okay. And on that Friday, what was your understanding as to the amount of time the guilty plea would be for?
A: 35 years with 85 percent.
Q: Okay. And as far as you knew that was the understanding that your son had as well; is that correct?
A: Correct.
Q: And did you have -- did the attorney explain to you at all if the state would budge off of that or that was the best and final offer?
A: That was the best and final offer.
Q: And if he didn't take that offer, what was going to be his other option?

A: To go to trial which would have been that Monday.
Q: And was it your understanding at the beginning that he had to plead that day, or the trial was going to start?
A: The plea had to be submitted by 5P.M. on that Friday, if not the trial would have started on Monday morning.
Q: Okay. Did you have the opportunity to discuss the option of taking that plea with your son?
A: Yes. I did.
Q: Okay. And what was the advice that you gave him about taking that guilty plea?
A: It would be better to take the plea.
Q: Okay. And was it your understanding that you son, in fact, wanted a trial?
A: Yes. Yes, he did.
Q: Okay. And was a factor in the advice you gave him and your thought process, the fact that it would only be served at 85 percent?
A: Correct.
Q: At that time were you aware that that sentence would actually have to be served day for day?
A: I was not aware of that. No.
Q: Okay. Were you present at the plea when he went in front of the Court and entered his plea?
A: Yes. I was.
Q: Okay. At any time when the Judge was making any

comments, when the state was saying anything, when Mr. Hilliard was saying anything did you clue in, for lack of better words, that it would not be served at 85 percent?
A: No. I was not aware. I did not understand that at that time.
Q: Okay. When did that first come to your attention? When did you find out that your son was going to have to serve his sentence day for day?
A: I can't remember exactly the date, but he was already in prison at that time. He called and said that the time that he -- a sentence sheet or something that he was given had 100 percent time on it.
Q: Okay. And do you recall what your response to him was?
A: That we would look into it because it was supposed to be 85 percent.
Q: Okay.
A: We'd find out what happened.
Q: And you did what you could on his behalf to look into that; is that correct?
A: Correct.
Q: Okay.
**MS. BLANCHETTE:** Your Honor, if I could beg the Court's indulgence just one moment.
**THE COURT:** Sure.
**MS. BLANCHETTE:** Your Honor, I have no further questions

of this witness.

**THE COURT:** All right.

State.

**MR. JAMES:** I have no questions for this witness, Your Honor.

**THE COURT:** All right.

You may step down.

Any other witnesses?

**MS. BLANCHETTE:** No, Your Honor. I do have a memorandum of law that I have compiled, but it's not specific to this case. I don't apply the facts it's just going over the law. And then I have a couple of cases that I reference therein that I have copies of.

**THE COURT:** Okay.

**MS. BLANCHETTE:** I'm happy to present those at the appropriate time.

**THE COURT:** State, do you intent to call any witnesses?

**MR. JAMES:** If I beg a moment of the Court's indulgence.

**THE COURT:** You may.

**MR. JAMES:** Your Honor, the state is going to recall Mr. Hilliard.

**THE COURT:** All right.

**DIRECT EXAMINATION OF MR. HILLIARD BY MR. JAMES:**

Q: Mr. Hilliard, thank you. I'll remind you that you are still under oath.

A: Yes. Thank you.
Q: I will be brief. Did you feel that you had enough time to prepare for trial?
A: Yes.
Q: Did your client ever express concerns to you about how much time you had to prepare?
A: No. And let me say this, I would never let anybody plead guilty because we didn't have time for trial. I can -- anyway …

**MR. JAMES:** I have no further questions, Your Honor.

**THE COURT:** All right.

Cross?

**MS. BLANCHETTE:** Nothing, Your Honor.

**THE COURT:** All right.

You may step down.

Any other witnesses?

**MR. JAMES:** Nothing further from the state, Your Honor.

**THE COURT:** All right.

Ms. Blanchette, anything you'd like to present?

**MS. BLANCHETTE:** Your Honor, I have prepared a memorandum of law. I've provided a copy to the state. If I could mark this as applicant's number 3, just so it's clear that it's part of the record for any further proceedings.

**THE COURT:** Sure.

**(APPLICANT'S EXHIBIT NUMBER 3 IS**

**ADMITTED INTO EVIDENCE.)**

**MS. BLANCHETTE:** I have an original with my signature on it.

**MR. HILLIARD:** May I be excused at this point, Judge?

**THE COURT:** Any objections?

**MR. JAMES:** No objection from the state, Your Honor.

**MS. BLANCHETTE:** No objection, Your Honor.

**THE COURT:** You have a good day.

**MR. HILLIARD:** Thank you, Judge. Always a pleasure.

**THE COURT:** Thank you.

**MS. BLANCHETTE:** If Your Honor would like argument or would you like me to just go through these cases while I'm submitting them? I'm happy to do either.

**THE COURT:** Either way you want to do it, just briefly do it if you want.

**MS. BLANCHETTE:** Okay. Yes, Your Honor. I'll just explain why I handed up the memorandum.

This memorandum essentially goes from Boykin to what I would say present day on any cases that I thought might be pertinent to the issues here. I know Your Honor is excellent at reviewing all of the materials and typically takes things under advisement, so I just wanted to provide this. It's 7 pages instead of handing you 50 cases and arguing those in front of you, to provide you a synopsis of the case law. I do have a couple cases that I'm just going to point out and I'm

going to hand you copies of those. But this just kind of sets forth the controlling -- what I would call the controlling case law. It does go into some other issues like pedia (ph) and other things like that, but I think the reasoning in those cases is helpful in an instance like this. As I stated before, I don't go into an application of facts to the law because until we had the testimony today, I don't think we had facts to apply to the law. I would be happy to do that in a further memorandum or proposed order if the Court would like that at a later time.

I will be handing up a copy of *Alexander versus State* and I must mention I did provide the state, last week, a list of these cases that I'll be handing up. This case deals with the issue of erroneous sentencing advice like we have here. And in this case, they make it clear that the defendant's testimony alone that but for the advice he would have proceeded to trial is enough to establish prejudice. So, I'll be handing that up.

I also have a copy of *Hinson versus State*. The reason why I'm handing this up, and it's referenced in the memorandum, is there the defendant, and in that case the co-defendant's attorney, testified that the parole advice was giving was wrong and that was sufficient to establish deficiency. Here we have both Mr. McKnight, Mr. Hilliard, and Mr. Cumbee stating that the advice that was given was wrong.

So, what we have here is greater than *Hinson* I would ask the Court to find.

I'm also providing a copy of *Frazier versus State*. This deals with parole misadvise. In this case it deals with where there's differing advice and not knowing 100 percent what the testimony would be today, I just provided a copy of that as well.

The next case I'll be handling [sic] up -- handing up is *State versus Hazel*. This case goes to our second allegation where we're finding that if this -- or we're alleging that if this Court finds that the Court's comments cured a misadvise, because there's a line of cases I will concede that says that and I have cited to those cases in my memorandum out of all fairness. If this Court finds that the Court's comments cured the misadvise, we would then allege that counsel was ineffective for not moving to withdraw, or object, or bring that attention to the Court. If was cured for Mr. Cumbee it should have been cured for Mr. Hilliard, Your Honor, as the testimony today so I won't elaborate on that point. But I'm providing *Hazel* because there was a plea which on direct appeal dealing with misadvise regarding sentencing. Just to kind of play through that scenario, that alternative scenario, what Mr. Hilliard could have done if the Court's comments would have clued him in to the fact that he had misadvised Mr. Cumbee.

And then I also have a copy of *Frierson versus State*. This is a decision handed down by our Supreme Court in 2018. My opinion is they're trying to clarify the prejudice standard in guilty plea cases. I cite extensively to *Frierson* in the memorandum. I'd ask Your Honor to review that. But the point that I'd like to make is *Frierson* makes it clear that in these issues you don't need to get into guilt or innocence or overwhelming evidence as they had done in *Frierson*. The standard is would he have proceeded to trial but for this erroneous advice. It's not for this Court to go through the facts and determine the level of his guilt, and they clarify that standard very well in *Frierson*.

And as I said, I wanted to be fair and provide all of the case law, so I have a copy of *Moorehead versus State*. That is where misadvise regarding probation was cured by the Court's comments.

And I believe I have one final case for Your Honor, and that is *Wolf versus State*. That is another case where they determined that it was cured. But on this issue, I just wanted to be fair and make sure I provided all of the pertinent case law. If Your Honor would like, I have those cases that I referenced to hand up at this time.

**THE COURT:** All right. That'd be good. Thank you.

**MS. BLANCHETTE:** And again, Your Honor, I am happy to summarize all of the testimony and apply it to the law at this

point, but if you prefer that we do that at a later juncture through something written, I can do that as well.

**THE COURT:** All right.

**MS. BLANCHETTE:** So, I'll proceed as you request.

**THE COURT:** Anything the state want to add to it?

**MR. JAMES:** Your Honor, the state's position is two pronged and pretty simple. The state is relying on *Moorehead versus State* to assert that the Judge's colloquy during the plea proceeding cured any conceivable misunderstanding or error or at the very least should have brought to Mr. Cumbee's attention the fact that he was going to serve day for day 35 years. He was presented the opportunity to explain that misunderstanding to the Court, he passed on that opportunity. There's a reason why we give defendant's who are going through the plea proceeding that opportunity to express any confusion or any misunderstanding in order to make sure that we don't get to where we are here today where they say well I didn't know what I was actually pleading to. Well, the Judge told him in almost as plain a language as you could possibly imagine.

Additionally, we have testimony today that he didn't just plead guilty because of the 85 percent and his belief that he'd receive that. He also plead guilty because he believed that his attorney didn't have enough time. He plead guilty because he was not ready to go forward to trial. And when I

say he I'm referring to Mr. Cumbee not to Mr. Hilliard, whose own testimony indicated that he was very prepared to proceed to trial.

So, Your Honor, on those two approaches the state respectfully submits that Mr. Cumbee cannot meet his burden of showing prejudice. And for those reasons I respectfully request that the petition for post-conviction relief be denied.

**THE COURT:** All right.

I will take it under advisement and let you know something shortly.

**MS. BLANCHETTE:** Thank you, Your Honor.

**MR. JAMES:** Thank you, Your Honor.

**THE COURT:** Thank you.

**(COURT IS ADJOURNED.)**

# C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Dennis Cumbee versus State of South Carolina held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on March 25th, 2019.

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

Sallie Beth Todd, CVR

Official Reporter

September 21, 2020.

# State of South Carolina
# Office of the Solicitor
# Fifteenth Judicial Circuit


Scott R. Hixson
Chief Deputy Solicitor

REPLY TO ☐

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CONWAY, SC 29528
843-915-5460
FAX: 843-915-6461

Alicia A. Richardson
Deputy Solicitor

REPLY TO ☒

P.O. BOX 1688
GEORGETOWN, SC 29442
843-545-3169
FAX: 843-545-3268

JIMMY A. RICHARDSON, II
Solicitor


DATE: May 3, 2016
TO: Cezar Edward McKnight, Esquire
FROM: Richard D. Todd, Jr., Assistant Solicitor
RE: State vs. Dennis Cumbee Case # 15G00336

Pending Charge(s) Murder Warrant(s) 2015A2220200182

Upon reviewing the above referenced case(s) the State makes the following offer regarding the disposition of the charge(s):

**If the Defendant will plead guilty to: Murder**

**The State offers the following: 35 years**

The Defendant must accept the offer by August 19, 2016 or it is considered rejected and the State will not make the offer again. Should the defendant accept the offer, he or she must enter the plea before or during the August 2016 term of court. Please review the offer with your client, sign and date as indicated below, and return to me no later than August 19, 2016. Please call me at 545-3189 if I may be of service.

**DEFENDANT'S RESPONSE**

TRIAL_____ GUILTY PLEA_____

Attorney's Signature _____ Date: _____

Defendant's Signature _____ Date: _____

The mission of the Fifteenth Circuit Solicitor's Office is to uphold the public's trust in the pursuit of justice and enforcement of the law.


State of South Carolina
Office of the Solicitor
Fifteenth Judicial Circuit

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Law Office of
CEZAR E. MCKNIGHT LLC

CEZAR E. MCKNIGHT
ATTORNEY AT LAW

July 14, 2016

**VIA US. MAIL**
Mr. Dennis Cumbee
Georgetown County
2394 Browns Ferry Rd
Georgetown, SC 29440

RE: State of South Carolina vs. Dennis Cumbee
Warrant No(s): 2015A2220200182/Murder; 2015A2220200196/Weapons

Dear Mr. Cumbee:

Enclosed within, please find a copy of the offer made by the Solicitor's Office in your case. They are offering you a Guilty Plea to the charge of murder, and they are offering you a sentence of 35 years. Murder a most serious offense and it is a violent offense for the purposes of sentencing. This means that you have to do a mandatory 85% of the sentence, and that if you are convicted of 2 most serious offenses like murder during your life, you could face life in prison without probation or parole.

Please consider this offer and contact me immediately thereafter and advise me whether or not you wish to accept or reject this offer. I look forward to hearing from you soon.

With kind regards, I remain

Sincerely,
LAW OFFICE OF CEZAR E. MCKNIGHT, LLC

[dictated, but not read]

Cezar E. McKnight, Esquire

CEM/ee

| | |
|---|---|
| STATE OF SOUTH CAROLINA )<br>COUNTY OF GEORGETOWN ) | IN THE COURT OF COMMON PLEAS<br>DOCKET NO.: 2017-CP-22-02728 |
| DENNIS CUMBEE, JR., 370848, )<br>Applicant, )<br>v. )<br>)<br>STATE OF SOUTH CAROLINA, )<br>Respondent, ) | MEMORANDUM OF LAW |

It is well established that a guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.[1] See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v.

[1] The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting United States v. Wade, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. See Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)(arraignment); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); Wade, supra (postindictment lineup); Argersinger v.Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that 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, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012) (emphasis added), as follows:

> Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See Hill,supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.
>
> In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.
> In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea

> bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. **It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.** Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In South Carolina, a substantial number of cases have developed a body of case law that establish which consequences must be explained to a defendant by counsel prior to a plea. Generally speaking, a defense attorney must only inform a defendant of the direct consequences of his plea, and counsel has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (Finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate); Hinson v. State, 377 S.E.2d 338, 297 S.C. 456 (1989) (Based upon the testimony of co-defendant's counsel, the court found counsel's advice regarding parole eligibility misstated the law, and prejudiced was established from "uncontravered testimony that Hinson entered the plea in expectation of receiving the lesser period for parole eligibility.").

Direct consequences have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). If a criminal defendant does not properly understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271

S.E.2d 602 (1980).[2] A defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Additionally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

In Glover v. United States, 531 U.S. 198, 203 (2003), the Supreme Court of the United States held "any amount of [additional] jail time has Sixth Amendment significance." In Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for

[2] On this direct appeal from the lower court's denial of motion to withdraw guilty plea, the South Carolina Supreme Court held that counsel's improper advice regarding the sentence for kidnapping rendered her guilty plea involuntary.

counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation.).

Similarly, in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), counsel was found to be ineffective for erroneously advising the defendant regarding the sentence he could receive, thus inducing a guilty plea. On appeal, the State agreed that the advice given was erroneous but argued that the lack of prejudice required reversal. Ray, 303 S.C. at 376, 401 S.E.2d at 153. In addressing the difference between the sentence Ray was advised he could receive (life) versus the actual sentence he could receive (possible 75 years without parole) and the issue of prejudice the Court reasoned:

> We hold this distinction is sufficient to satisfy prong two of the Hill v. Lockhart test. Ray's steadfast maintenance of his innocence; his uncontroverted testimony that he would not have pled guilty absent the erroneous advice of counsel; and the real distinction between the penalty Ray faces and the advice given him, convince us to *REVERSE* the lower court and *REMAND* for a new trial.

Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991).

Recently, in Frierson v. State, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court addressed the prejudice analysis in a case stemming from a guilty plea. The court explained and clarified:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would have not pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Id. In affirming as modified, the Court further held:

> Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming evidence analysis in this case. See Smalls, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. In conclusion, the court emphasized the following:

> We reiterate the prejudice analysis is limited to the outcome of the plea process – whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.

Id.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); See Moorehead v. State, 496 S.E.2d 415 (1998).[3] "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

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[3] In Moorehead v. State, 496 S.E.2d 415 (1998), the South Carolina Supreme Court reversed the lower court's grant of PCR relief. At the evidentiary hearing, Moorehead testified that he entered his guilty plea because counsel advised him he would receive probation. Counsel did not agree with this assertion by Moorehead. Id. at 416. In reversing the lower court's finding that counsel misadvised Moorehead and relief was warranted, the Supreme Court reasoned that Moorehead's responses that he had not been promised anything and the plea judges statements regarding the plea negotiations did not support the granting of relief. Id. at 416-717.

Respectfully submitted,

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Attorney for Applicant

| | | |
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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF GEORGETOWN | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Dennis Cumbee, Jr.,<br>S.C.D.C. No. 370848,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No.: 2017-CP-22-01051<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an application for post-conviction relief filed by Denis Cumbee, Jr. ("Applicant") on December 11, 2017. Respondent made its return on or about February 9, 2018. The Court convened an evidentiary hearing into the matter on March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Four witnesses testified at the evidentiary hearing: Applicant's first counsel, Cezar McKnight, Esq. ("McKnight"); Applicant's second and ultimate counsel, John M. Hilliard, III, Esq. ("Hilliard") (attorneys collectively as "Counsels"); Applicant himself; and Applicant's mother Denise Giles ("Giles"). The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, the pleadings, the amendment, Applicant's memorandum of law submitted at the evidentiary hearing, and the exhibit introduced at the hearing. The Court finds as follows:

## I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2015 term of the Georgetown County Grand Jury for murder (2015-GS-22-00427).[1] Applicant was initially represented by Cezar McKnight, Esq., and ultimately represented by John M. Hilliard, III, Esq. Richard D. Todd, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On December 12, 2016, Applicant pled guilty as indicted for murder. The Honorable Benjamin H. Culbertson sentenced Applicant to imprisonment for a term of 35 years. Applicant did not appeal his plea or sentence.

### Present Application

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

1. Ineffective assistance of counsel, in that:
    a. "My counsel did not have an adequate amount of time to prepare for my case and wasn't able to look at my case thoroughly."

By and through PCR counsel Blanchette, Applicant amended his application by filing on March 1, 2019, to raise the following grounds for relief:

1. "Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea."
2. "Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence. Transcript pp. 7-8."

[1] Applicant was also indicted at the March 2014 term for discharging a firearm into a dwelling (2014-GS-22-00294), unlawful carrying of a pistol (2014-GS-22-00295), at the March 2015 term for aggravated breach of peace (2015-GS-22-00122), and at the May 2015 term for possession of a weapon during the commission of a violent crime (2015-GS-22-00428). These indictments were all dismissed *nolle prosequi* as part of the Applicant's plea.

Applicant, through his amendment, requests "a new trial or whatever relief the court deems proper." At the evidentiary hearing, Applicant proceeded forward on allegations as set forth in the March 1, 2019 amendment.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

### A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d

at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690).

Second, counsel's deficient performance must have prejudiced 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly

incredible."). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

***1. Misadvice as to Expected Term of Incarceration***

The Court finds Applicant has failed to meet his burden of showing prejudice as a result of his Counsels' misadvice that he could be eligible for some form of release after serving 85% of the sentence imposed. "A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)). "Typically, parole eligibility is considered a collateral consequence of a sentence. However, if trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on the misinformation to receive PCR." Id. (citing Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997)).

The laws governing parole eligibility and community release are labyrinthine, and the calculus for the incarceration of persons convicted of murder is governed by a smorgasbord of overlapping statutes. The crime of murder is a "no parole offense." See S.C. Code Ann. § 24-13-100 (defining a "no parole offense" to include those crimes exempt from the felony classification

system); S.C. Code Ann. § 16-1-10(D) (exempting murder from the felony classification system). Notwithstanding any other provision of law, an inmate convicted of a "no parole offense" and sentenced to the custody of the Department of Corrections, is not eligible for early release, discharge, or community supervision until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §§ 24-13-150(A). *However*, the same statute provides that "[n]othing in this section may be construed to allow an inmate convicted of murder [. . .] to be eligible for work release, early release, discharge, or community supervision." Id.; see also S.C. Code Ann. § 24-21-560(A) (same language). Additionally, the relevant portion of the murder statute provides:

> No person sentenced to a mandatory minimum term of imprisonment *for thirty years to life* pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for *thirty years to life* required by this section.

S.C. Code Ann. § 16-3-20(A).[2] Altogether, the interconnected statutes provide for the more common legal and judicial parlance that murder is a "day-for-day offense," such that those convicted of murder will remain incarcerated in SCDC for every single day the sentence imposed.

At the evidentiary hearing, both Counsels testified they instructed Applicant he could expect to serve 85% of his sentence before he would become eligible for some form of release. Applicant testified that Hilliard did the math and informed him he would be eligible for release after serving twenty-nine years and seven months of his sentence. Giles confirmed further that the attorneys had instructed her and her son that he would serve 85% of the sentence before becoming eligible for some form of release. The Court finds Applicant's Counsels affirmatively misadvised

[2] How any number greater than thirty could similarly constitute the mandatory minimum term is an unanswered question of statutory construction not ultimately before this Court.

him regarding the potential for parole or other early release, and such affirmative misadvice constituted deficient performance under Strickland and Hill.

The inquiry thus moves to the prejudice prong. Deficient advice on the part of counsel may be cured by a thorough and accurate colloquy by the plea court prior to the entry of the guilty plea. Holden v. State, 393 S.C. 565, 575, 713 S.E.2d 611, 616 (2011), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). At the plea proceeding the plea court instructed Applicant:

> THE COURT: Do you also understand that this crime carries a mandatory minimum sentence, which means the absolute minimum sentence that must be imposed is 30 years in prison. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> THE COURT: Do you also understand that this crime is classified as a violent crime, and what that means is if you're ever convicted of another violent crime then that [subsequent] violent crime conviction you would not be eligible for probation and you would not be eligible for parole. Do you understand that?
>
> MR. CUMBEE: Yes, sir.
>
> [. . .]
>
> THE COURT: You understand that for this crime you would not be eligible for parole. *So if I impose the 35-year sentence you're going to have to serve the 35-year sentence. Do you understand that?*
>
> MR. CUMBEE: *Yes, sir.*

(Tr. 7-8) (emphasis added). Applicant only thereafter pled guilty. (Tr. 8, ll. 17-25).

At the evidentiary hearing, Hilliard acknowledged the above exchanges and replied that he did not realize the statements of the plea court meant Applicant would have to serve "day-for-day" rather than 85% of the sentence. Hilliard continued by explaining that the Department of Corrections habitually utilized "different languages" such that he believed that an 85% sentence was tantamount to a day-for-day sentence. Hilliard opined that the best practice was likely to not

tell clients what percentage of their sentence they could realistically expect to serve. Hilliard additionally explained he reviewed the case with Applicant, looked for any trial defenses available to Applicant, but ultimately could not find any.

Applicant testified that his understanding that he would serve only 85% of his sentence was a decisive factor in his decision to plead guilty. When confronted with the plea court's remarks that the mandatory minimum was thirty years, Applicant answered that the plea court's question gave him no cause for concern about his Counsels' prior advice. When confronted with the plea court's remarks as to parole eligibility, Applicant testified he asked Hilliard about the question, and Hilliard replied that the plea judge had to state as much in case the law changed subsequent to the plea. Applicant testified he did not discover that murder required him to serve 100% of his sentence until he arrived at Kirkland Correctional Institute and was informed as much. On cross-examination, Applicant testified he pled guilty because he felt Hilliard had not had enough time to prepare for trial, and that he had lied to the plea court when he confirmed that he was pleading guilty because he had committed the crime. On redirect examination, Applicant testified Hilliard told him what to say during the plea proceeding. Applicant testified he knew he had to agree with the court's questions in order to get the plea. Applicant asserted he pled guilty in part because he was told he would only need to serve a minimum of 85% of the sentence before he became eligible for early release, which was in line with what he expected to receive if he took the case to trial and secured a conviction for the lesser-included offense of voluntary manslaughter.

The Court finds Applicant has failed to meet his burden of showing that but for Counsels' advice he would not have pled guilty, but would have proceeded to trial. First, the plea court's statements that Applicant was not eligible for parole and would have to serve the entire thirty-five year sentence could scarcely be clearer. Applicant expressed no confusion during the plea

proceeding, and communicated no concerns on the record to the plea court. The plea court's colloquy cured any misapprehension, and Applicant knew that he was going to serve the entirety of the negotiated thirty-five year sentence, and he proceeded with pleading guilty anyway.

Second, the Court does not find Applicant's self-serving testimony, his attorney's advice regarding parole eligibility was what induced him to plead guilty, sufficient to establish that he relied on the misinformation in pleading guilty. See Fraiser v. State, 351 S.C. 285, 389, 570 S.E.2d 172,174 (2002) (internal citation omitted). Applicant rightly notes in his memorandum of law that, *depending on the facts of the case*, an applicant's self-serving statements *may* be sufficient to establish prejudice under Hill. Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009). The present matter, however, is not an appropriate circumstance to rely upon such a statement. Applicant has now made many alternative and conflicting assertions.[3] Taking them all into consideration, the Court does not find them sufficient to establish that the Applicant, relying on the misinformation by his attorney and wholly disregarding the corrective plea colloquy, would have not pled guilty, but for counsel's misadvice. Even if the Court gave sufficient weight to Applicant's testimony that Hilliard told him what to say, or that Hilliard dismissively explained away the plea court's cure during the colloquy, a defendant cannot rely upon an attorney's dismissal of the gravity of the plea proceeding as a basis to answer untruthfully during the plea proceeding. Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997).

This Court finds Applicant accepted a generous offer to plead guilty in exchange for a negotiated sentence because he was guilty and because the State's strong case against him involved

[3] Applicant has now alternately asserted (1) he pled guilty because he was in fact guilty, (2) he pled guilty because he was told he would be eligible for early release after service of 85% of the sentence, and (3) he pled guilty because Hilliard did not have enough time to prepare the case for trial.

numerous witnesses identifying him as the aggressor and shooter from a party involving fifteen to twenty people, and forensic evidence to establish Applicant shot the victim in the back numerous times before the victim fell and was coldly executed.[4] Applicant, at the evidentiary hearing, went so far as to largely reaffirm the State's factual recitation from the plea proceeding. These facts contrast noticeably with those which required relief in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991): where Ray steadfastly maintained his innocence and provided uncontroverted testimony that he would not have pled guilty but for his attorney's uncured misadvice as to the sentence he could expect, Applicant has now repeatedly acknowledged his complicity in the killing at the heart of his murder charge and conviction, and given multiple conflicting answers as to precisely why he pled guilty. "A guilty plea is a solemn, judicial admission of truth of charges against an individual[,]" Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018), and this Court is presented no sufficient reason to set aside Applicant's admissions made under oath during that plea.

Though Applicant was no doubt misadvised prior to the plea as to his eligibility for some form of release before serving the entire thirty-five year sentence, any misconception was remedied by the plea court during the plea colloquy. Applicant knew he would serve every day of his sentenced, and pressed ahead with his plea anyway. Applicant's self-serving, inconsistent statements are inadequate to meet his burden of establishing a reasonable probability of a different outcome, and he has thus failed to establish prejudice under Hill. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

[4] Applicant firmly reminds the Court that under Frierson v. State, 423 S.C. 257, 815 S.E.2d 433 (2018), forecloses any "overwhelming evidence" analysis. This Court does not note the strength of the State's case against Applicant for the purpose of considering whether prejudice may be foreclosed, but in considering the totality of the record in determining what motivated Applicant to plead guilty in the first place.

### *2. Failure to Move to Withdraw Guilty Plea*

The Court finds no merit in Applicant's alternative argument that if the plea court's cure was sufficient, then Hilliard was ineffective for failing to interject and move to withdraw Applicant's guilty plea. When there is reason to think a rational defendant would want to withdraw his plea, or when the defendant reasonably demonstrated an interest in so withdrawing his plea, plea counsel may be constitutionally obliged to move to terminate a plea proceeding or otherwise move to withdraw his client's guilty plea. See, e.g. Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (finding counsel ineffective for failing to move to withdraw a plea after the state reneged on its plea agreement); Smith v. State, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014) (same); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (same); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009) (finding counsel ineffective for failing to move to withdraw a plea after client repeatedly asserted his innocence during the plea hearing); cf Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (comparable standard in the context of failure to appeal from a guilty plea). Where a defendant seeks to withdraw his guilty plea, whether to permit such withdrawal is within the sound discretion of the trial judge. State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982).

First, there is nothing in the record to indicate Applicant or anybody on Applicant's behalf ever asked Hilliard to move to withdraw the plea. Second, given the alternating reasons for pleading guilty offered by Applicant, it is not clear that Hilliard should have been immediately prompted to action by the plea court's clarification that Applicant would have to serve thirty-five years of the thirty-five year sentence. As noted in the previous section, the Court does not find sufficient weight to establish prejudice in Applicant's testimony that Hilliard instructed him on what to say during the plea, or that Hilliard dismissively explained away the plea court's cure.

Third, even if Hilliard had moved to withdraw the plea after the fact, this Court perceives no reasonable probability the plea court would have permitted him to do so on a basis of an issue that was explicitly addressed and clarified during the plea colloquy. For all of these reasons, the Court finds Applicant has failed to meet either prong of Strickland by way of this allegation, and his request for relief is **DENIED**.

[*Conclusion and signature page to follow*]

## III. CONCLUSION

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

This Court notifies the Applicant that he 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, 409 S.E.2d 395 (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 South Carolina Department of Corrections.

**AND IT IS SO ORDERED this** 12 **day of** Feb **, 2020.**

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

_____, South Carolina

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | IN THE COURT OF COMMON PLEAS<br>DOCKET NO.: 2017-CP-22-02728 |
| DENNIS CUMBEE, JR., 370848,<br>Applicant,<br>v.<br><br>STATE OF SOUTH CAROLINA,<br>Respondent, | ) | MOTION PURSUANT TO<br>RULE 59 (a) & (e), SCRCP |



Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 11, 2017. Respondent submitted a Return on February 9, 2018.

On March 25, 2019, an evidentiary hearing was convened at the Georgetown County Judicial Center in front of the Honorable William H. Seals, Jr. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Johnny E. James, Jr., Assistant Attorney General. At the evidentiary hearing, Applicant proceeded on the allegations set forth below, which were filed via Amendment on March 1, 2019:

> In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial and appeal. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of counsel that rendered Applicant's guilty plea involuntary due to counsel advising Applicant incorrectly about the service of his sentence prior to the entry of his guilty plea.

2. Ineffective assistance of counsel for failure to interject and/or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence. Transcript pp. 7-8.

Following the evidentiary hearing, the Court requested Respondent submit a proposed Order. Following the submission of a proposed Order, Applicant, through counsel sent the Court a letter addressing concerns with the proposed Order on November 26, 2019. An Order of Dismissal was signed on January 10, 2019 and filed on January 15, 2020.[1] A copy of this Order was received by undersigned counsel on January 22, 2020, from which this Motion timely follows.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal. Additionally, Applicant would respectfully request that the Court reconsider the standing Order and properly address the following.

A. Relevant Case Law Discussion

It is well established that a guilty plea may not be accepted unless it is voluntarily and understandingly made. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). In South Carolina, the courts have consistently held that that a defendant must have a full

[1] It must be noted that it appears that the Court took counsel's letter into consideration and this Order was a revision of Respondent's proposed Order. It further appears the date should be reflected as January 10, 2020.

understanding of the consequences of his plea and the charges against him. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997), Simpson v. State, (317 S.C. 506, 455 S.E.2d 175 (1995). Additionally, a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.[2] See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the assistance provided by counsel, "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In a PCR stemming from a guilty plea, an applicant alleging a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). Therefore, an applicant that entered a plea on the advice of counsel may only attack the voluntary nature of that 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, applicant would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985), Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). In Hill, the Supreme Court of the United States made it clear that the "voluntariness of the plea depends on whether

[2] The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (quoting United States v. Wade, 388 U.S. 218, 227-228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. See Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)(arraignment); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) (postindictment interrogation); Wade, supra (postindictment lineup); Argersinger v.Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea).

counsel's advice was within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 57, 106 S.Ct. at 369.

In Hill and Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010), the Supreme Court of the United States examined the role of advising a client about a plea offer and ensuing guilty plea as was discussed in Missouri v. Frye, 132 S. Ct. 1399, 1405-06 (2012) (emphasis added), as follows:

> Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. See Hill,supra, at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.
>
> In Hill, the decision turned on the second part of the test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. Hill, supra, at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203.
> In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at ___, 130 S. Ct. 1473, 176 L. Ed. 2d 284, 298. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In South Carolina, a substantial number of cases have addressed which consequences must be explained to a defendant by counsel prior to a plea. Generally

speaking, a defense attorney must only inform a defendant of the direct consequences of his plea, and counsel has no obligation to inform his client of the collateral consequences of his plea. See Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (Finding that a defendant need not be informed of the collateral consequences of his sentence such as parole eligibility; however if an attorney undertakes to advise a defendant of the collateral consequences of his sentences, then the advice must be accurate); Hinson v. State, 377 S.E.2d 338, 297 S.C. 456 (1989) (Based upon the testimony of co-defendant's counsel, the court found counsel's advice regarding parole eligibility misstated the law, and prejudiced was established from "uncontravered testimony that Hinson entered the plea in expectation of receiving the lesser period for parole eligibility.").

Direct consequences have a "definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Paxtuent Institution, 475 F.2d 1364, 1366 (4th Cir. 1973). If a criminal defendant does not properly understand the direct consequences of his plea, then the plea is invalid. State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980).[3] A defense counsel's failure to advise a client of the direct consequences of a guilty plea constitutes ineffective assistance counsel. Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999). Additionally, constitutionally defective performance is found when defense counsel offers erroneous advice concerning an issue that is central to the defendant's decision to plead guilty. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

[3] On this direct appeal from the lower court's denial of motion to withdraw guilty plea, the South Carolina Supreme Court held that counsel's improper advice regarding the sentence for kidnapping rendered her guilty plea involuntary.

In Glover v. United States, 531 U.S. 198, 203 (2003), the Supreme Court of the United States held "any amount of [additional] jail time has Sixth Amendment significance." In Davie v. State, 381 S.C. 601, 613, 675 S.E.2d 416, 422-23 (2009), the South Carolina Supreme Court reasoned that it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See Jackson v. State, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (Rejecting objective evidence requirement established in Judge and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), overruling Judge v. State, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry--prejudice--is shown by demonstrating through objective evidence . . . [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea. Mere statements by the PCR petitioner that he would have accepted the plea agreement but for counsel's incompetence are insufficient to show prejudice because they are self-serving and inherently unreliable.") (citation omitted); See also Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty."), Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (Holding that there was enough evidence to demonstrate that there was a reasonable probability that defendant would not have pled guilty even though defendant

did not specifically testify that he would have insisted upon going to trial if he had known the solicitor was going to make a recommendation.).

Similarly to the instant case, in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), counsel was found to be ineffective for erroneously advising the defendant regarding the sentence he could receive, thus inducing a guilty plea. On appeal, the State agreed that the advice given was erroneous but argued that the lack of prejudice required reversal. Ray, 303 S.C. at 376, 401 S.E.2d at 153. In addressing the difference between the sentence Ray was advised he could receive (life) versus the actual sentence he could receive (possible 75 years without parole) and the issue of prejudice the Court reasoned:

> We hold this distinction is sufficient to satisfy prong two of the Hill v. Lockhart test. Ray's steadfast maintenance of his innocence; his uncontroverted testimony that he would not have pled guilty absent the erroneous advice of counsel; and the real distinction between the penalty Ray faces and the advice given him, convince us to *REVERSE* the lower court and *REMAND* for a new trial.

Ray v. State, 303 S.C. 374, 376, 401 S.E.2d 151, 153 (1991).

Recently, in Frierson v. State, 815 S.E.2d 433, 436 (2018), the South Carolina Supreme Court addressed the prejudice analysis in a case stemming from a guilty plea. The court explained and clarified:

> In order to establish prejudice when challenging a guilty plea, a defendant must prove "there is a reasonable probability that, but for counsel's errors, the defendant would have not pled guilty, but would have gone to trial." Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004). The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial. Alexander v. State, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991).

Id. In affirming as modified, the Court further held:

> Because the prejudice inquiry in a case involving a guilty plea is so limited, it was error for the court of appeals to conduct an overwhelming

> evidence analysis in this case. See Smalls, 422 S.C. at ___, 810 S.E.2d at 843-47 (surveying cases that discuss overwhelming evidence - all of which involved a conviction obtained at trial).

Id. In conclusion, the court emphasized the following:

> We reiterate the prejudice analysis is limited to the outcome of the plea process – whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial.

Id.

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007); See Moorehead v. State, 496 S.E.2d 415 (1998).[4] "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000).

B. Discussion

Based upon the foregoing in conjunction with the record and testimony before the Court, Applicant would urge the Court to standby the finding of deficiency as to counsel's advice but reconsider the finding that Applicant has failed to establish prejudice. It appears the Court somewhat agrees that Applicant's testimony, in conjunction with the testimony of his mother and prior attorneys, establishes prejudice, but it appears the Court discounts the established prejudice due to "alternate" reasons for

[4] In Moorehead v. State, 496 S.E.2d 415 (1998), the South Carolina Supreme Court reversed the lower court's grant of PCR relief. At the evidentiary hearing, Moorehead testified that he entered his guilty plea because counsel advised him he would receive probation. Counsel did not agree with this assertion by Moorehead. Id. at 416. In reversing the lower court's finding that counsel misadvised Moorehead and relief was warranted, the Supreme Court reasoned that Moorehead's responses that he had not been promised anything and the plea judges statements regarding the plea negotiations did not support the granting of relief. Id. at 416-717.

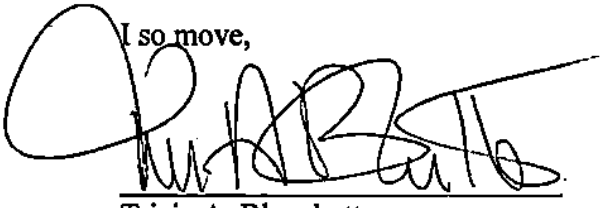
entering the guilty plea. Applicant submits this analysis is flawed and worthy of reconsideration. It would be absurd to believe that anyone that enters a guilty plea does not have multiple reasons for entering the guilty plea. The applicable precedent does not require that the errant advice be the sole reason but merely that the Applicant would not have pled and proceeded to trial but for the errant advice of counsel, which Applicant clearly established. Again, for the errant advice to be the lone factor in deciding to forego a trial would be implausible in any murder case resulting in a guilty plea. Applicant submits that his testimony has been misconstrued to find a basis on which to deny relief that extends beyond that of existing precedent and notably as clearly clarified in Frierson, as discussed above.

Additionally, Applicant submits that the finding that counsel was not deficient nor was Applicant prejudiced by counsel's failure to interject or move to withdraw when he heard the statements by the court allegedly curing the errant advice cannot be reconciled with counsel's admissions and testimony as a whole. Therefore, Applicant would ask the Court to thoroughly review the record and testimony offered and ensure that this issue is properly addressed in the standing Order and/or find that relief is warranted.

## CONCLUSION

In conclusion, Applicant would request that the Court review the full record, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

I so move,



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070

January 31, 2020

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN<br><br>Dennis Cumbee, Jr., #370848,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | IN THE COURT OF COMMON PLEAS<br>FIFTEENTH JUDICIAL CIRCUIT<br><br>Docket No.: 2017-CP-22-1051<br><br>**RETURN TO APPLICANT'S MOTION PURSUANT TO RULE 59(A) AND (E), SCRCP** |



This matter comes before the Court by way of Applicant's "Motion Pursuant to Rule 59(a) and (e), SCRCP." Respondent, making its Return to the motion, would respectfully show:

## I. PROCEDURAL HISTORY

Applicant Dennis Cumbee, Jr., is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Georgetown County Clerk of Court. During its May 2015 term, the Georgetown County Grand Jury indicted Applicant for murder (2015-GS-22-00427) and possession of a weapon during the commission of a violent crime (2015-GS-22-00428). Applicant was represented by John M. Hillard III, Esquire. Richard D. Todd, Esquire, of the Fifteenth Circuit Solicitor's Office prosecuted the case. On December 12, 2016, Applicant appeared before the Honorable Benjamin H, Culbertson, circuit court judge, and pled guilty as indicted to murder. Judge Culbertson sentenced Applicant to thirty-five years' imprisonment. Applicant did not pursue a direct appeal.

Applicant filed an application for post-conviction relief on December 11, 2017, where he alleged his Sixth and Fourteenth Amendment rights were violated because counsel was ineffective, did not have an adequate amount of time to prepare for the case, and could not look at his case thoroughly. Respondent submitted a Return on February 9, 2018, showing that

Applicant had not met his burden of proof in demonstrating ineffective assistance of counsel, but still requested an evidentiary hearing to fully resolve the issue. Applicant's application was amended, by PCR Counsel, on March 1, 2019. In this amended application, Applicant, through PCR Counsel, requested a new trial or "whatever relief the court deems proper." Additionally, Applicant alleges that he received ineffective assistance of counsel, rendering the plea involuntary because counsel incorrectly advised him about the service of his sentence prior to entering the plea and failure to interject or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence.

An evidentiary hearing into the matter was convened March 25, 2019, at the Georgetown County Judicial Center. Applicant was present at the hearing and was represented by counsel, Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Johnny E. James, Jr., of the South Carolina Attorney General's Office.

By written Order signed on January 10, 2019, and filed January 15, 2020, this Court denied and dismissed Applicant's post-conviction relief action with prejudice, finding that any misinformation regarding the sentence was remedied through the plea colloquy and that Applicant did not meet his burden of proof the plea would be withdrawn, but for ineffective assistance of counsel. Thereafter, on February 4, Applicant, through counsel, filed a motion to reconsider, alter, or amend pursuant to Rule 59(a) & (e), SCRCP. Applicant made a Rule 59(e) motion that was filed by the clerk's office on February 4, 2020.

## II. MOTION BEFORE THE COURT

In the Court's order of dismissal, while the Court found Counsel was deficient for erroneously advising Applicant that he would be eligible for some type of early release from incarceration after serving approximately eighty-five percent of his sentence, the Court expressly

found Applicant could not establish any resulting prejudice from this erroneous advice. Accordingly, the Court denied relief.

In his "motion pursuant to Rule 59(a) & (e), SCRCP", Applicant requests specific findings of fact and conclusions of law are entered on each issue raised and the record before the Court and testimony of each witness is properly addressed on the Order of Dismissal, as required under *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). Additionally, Applicant askes this Court to reconsider its ruling, alleging Applicant was prejudiced by Counsel's deficient performance when Counsel incorrectly advised Applicant about the service of his sentence prior to taking the plea. Applicant, through Counsel, argues that the Court's finding that Applicant pled out for alternate reasons, other than the misinformation, is deserving of reconsideration, citing contradictory precedent on this issue and arguing that "for the errant advice to be the lone factor in deciding to forego a trial would be implausible in any murder case resulting in a guilty plea." Further, Counsel allegedly prejudiced Applicant when he failed to interject or move to withdraw Applicant's guilty plea after the court addressed the service of Applicant's sentence.

In response, Respondent submits this Court properly ruled on all issues presented at the post-conviction relief hearing and Applicant's motion should be denied. In finding Applicant could not establish the requisite prejudice necessary for relief, this Court found plea court's statements made clear he would not be eligible for parole and Applicant acknowledged he knew he would have to serve his time day-by-day at the hearing. The Court did not find Applicant relied on Counsel's advice regarding parole eligibility when taking the plea instead of proceeding to trial. Further, the Court found the weight of the evidence against Applicant was so great and the sentence imposed generous compared to what it would be if he proceeded to trial that it was unlikely he would have gone to trial. Finally, the Court found Applicant used multiple

conflicting answers regarding the question why he took the plea, which the Court used to substantiate the finding that Applicant failed to meet his burden of proof in establishing he would not have taken the plea but for the misinformation. Respondent contends through this Order, the Court properly made findings of facts and conclusions of law and, as such, relief through reconsideration is inappropriate.

Accordingly, the Court properly ruled on all issues before it, and Applicant's motion should be denied.

## III. CONCLUSION

WHEREFORE, having made its Return to the motion, Respondent requests this Court summarily dismiss this motion and affirm its prior order of dismissal.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

for CHELSEY F. MARTO
Assistant Attorney General

By: [signature]
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

March 19, 2020

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | IN THE COURT OF COMMON PLEAS<br>IN THE FIFTEENTH JUDICIAL CIRCUIT |
| Dennis Cumbee, Jr., #370848,<br>Applicant,<br><br>v.<br><br>State of South Carolina,<br>Respondent. | Case No.: 2017-CP-22-1051<br><br>**ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION** |



The matter before this Court by way of an Application for post-conviction relief (hereafter "PCR") filed December 11, 2017. This Court convened an evidentiary hearing into the matter on March 25, 2019, at the Georgetown County Judicial Center. Applicant was present at the hearing and represented by Tricia A. Blanchette. Respondent was represented by Jacob Isenburg, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by written Order dated January 10, 2019. On February 4, 2020, Applicant, through Counsel, filed a Motion for Reconsideration. Respondent's attorney, Chelsey F. Marto, Esquire, submitted its return on March 13, 2020, which was perfected on March 19, 2020.

After careful consideration of the arguments of Counsel and review of the record, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded, and further finds no error of law or fact not appropriately considered. The Order of Dismissal issued by this Court contains the appropriate findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code of Laws and Rule 52(a) of the South Carolina Rules of Civil procedure. Accordingly, Applicant's Motion for Reconsideration is **DENIED.**

**IT IS THEREFORE ORDERED** that Applicant's motion is hereby **DENIED AND DISMISSED.**

AND IT IS SO ORDERED this 29 day of May, 2020.

The Honorable William H. Seals, Jr.
Circuit Court Judge
Fifteenth Judicial Circuit

Florence, South Carolina

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| STATE OF SOUTH CAROLINA<br>COUNTY OF GEORGETOWN | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Dennis Cumbee, #370848<br><br>Applicant, | ) | Case No.: 2017-CP-22-1051 |
| v. | ) | Certificate of Service |
| State of South Carolina<br><br>Respondent, | ) | |

1. Undersigned is counsel of record for the Respondent in the above-captioned action.

2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."

3. Undersigned has served a copy of the **Order Denying Applicant's Motion for Reconsideration** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

**Tricia A. Blanchette, Esquire**
**blanchettelaw@gmail.com**

DATED this 9th Day of June, 2020.

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ChelseyMarto@scag.gov

**WITNESSES**

Georgetown Police Department

**ARREST WARRANT NUMBER**

2015A2220200182
CDR: 0116 §16-03-0010, 0020
DOI: 4/7/2015

**ACTION OF GRAND JURY**

TRUE BILL

Janet Langley
*Foreperson of Grand Jury*
*Date:* 5-27-15

**VERDICT**

*Foreperson of Petit Jury*
*Date:*

**DOCKET NO.** 2015-GS22-00427 ✓

# The State of South Carolina

## County of Georgetown

Erin Bailey 15G00336

**COURT OF GENERAL SESSIONS**

**MAY, 2015 TERM**

**THE STATE**

**vs.**

**DENNIS CUMBEE**
[redacted]
**GEORGETOWN, SC 29440-2237**
**DOB:** [redacted]
[redacted]
**B / M**

**ATTORNEY: Cezar Edward McKnight**

**Indictment for**

**MURDER**

**Jimmy A. Richardson, II, Solicitor**

STATE OF SOUTH CAROLINA )
)
COUNTY OF GEORGETOWN )

INDICTMENT

At a Court of General Sessions, convened on May 27, 2015, the Grand Jurors of Georgetown County present upon their oath:

MURDER

CDR: 0116 16-03-0010, 0020

That Dennis Cumbee did in Georgetown County, on or about April 7, 2015, willfully, feloniously, and intentionally kill the victim, Tory Thomas (Deceased), with malice aforethought, either express or implied, by means of by shooting the victim, and the victim did die as a proximate result thereof on or about April 7, 2015 in Georgetown County, in violation of Section 16-03-0020, S. C. Code of Laws, 1976, as amended.

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

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

**WITNESSES**

Georgetown Police Department

**ARREST WARRANT NUMBER**

2015A2220200196
CDR: 0549 §16-23-0490
DOI: 4/7/2015

**ACTION OF GRAND JURY**

TRUE BILL

Janet Ramsey
*Foreperson of Grand Jury*
*Date:* 5-27-15

**VERDICT**

*Foreperson of Petit Jury*
*Date:*

**DOCKET NO.** 2015-GS22-00428 ✓

# The State of South Carolina

## County of Georgetown

Erin Bailey 15G00336

**COURT OF GENERAL SESSIONS**

**MAY, 2015 TERM**

**THE STATE**

**vs.**

**DENNIS CUMBEE**
[redacted]
**GEORGETOWN, SC 29440-2237**
**DOB:** [redacted]
**SSN:** [redacted]
**B / M**

**ATTORNEY: Cezar Edward McKnight**

Indictment for

**POSSESSION OF A WEAPON DURING THE COMMMISSION OF A VIOLENT CRIME**

**Jimmy A. Richardson, II, Solicitor**

WP
TRDS
12-12-2016

STATE OF SOUTH CAROLINA )
)
COUNTY OF GEORGETOWN )

INDICTMENT

At a Court of General Sessions, convened on May 27, 2015, the Grand Jurors of Georgetown County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

CDR: 0549 16-23-0490

That Dennis Cumbee did in Georgetown County, on or about April 7, 2015, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

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

JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR