THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Circuit Court Judge

Case No. 2011-CP-42-0516

Michael Shane Johnson, S.C.D.C. #315435, ... Petitioner

v.

State of South Carolina, ...Respondent

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Was the petitioner denied the Constitutional right of allocution at sentencing?**

II. **Did the petitioner voluntarily, knowingly, and intelligently waive a conflict of interest between his attorney and the sentencing judge?**

III. **Was counsel ineffective for failing to aid in the petitioner's cooperation with the State, thereby prejudicing the petitioner?**

IV. **Was counsel ineffective for failing to adequately explore plea negotiations, thereby prejudicing the petitioner?**

STATEMENT OF THE CASE

This case stems from the petitioner's February 27, 2008 guilty plea to three counts of First Degree Burglary, one count of Second Degree Burglary, three counts of Grand Larceny more than $5,000, one count of Grand Larceny more than $1,000, and one count of receiving stolen goods (Appx 92). The petitioner was originally offered a sentence of 15 years (violent) for these charges through his court-appointed attorney, James Cheeks (Appx 94, 107). His mother then met with Kenneth Sowell, Esq. upon Sowell's representation that he could secure a much more favorable resolution (Appx 94-97) Sowell testified that he was aware of the State's 15-year offer (Appx 40) After Sowell was retained, the petitioner was sentenced to 35 years imprisonment, which was reduced to 30 years imprisonment at a motion for reconsideration. (Appx 92)

All the burglaries occurred in unoccupied homes during the day (Appx. 110-11) The investigating officer promised the petitioner at the outset that if he cooperated, the officer would speak favorably about him to the sentencing judge, telling him that the petitioner fully cooperated. (Appx 111-12). The petitioner was not arrested until after

he cooperated with law enforcement, pointed out the homes he and a co-defendant had burglarized, gave a confession, and helped recover stolen property (Appx. 109-11).

The petitioner plead guilty and was sentenced before the Honorable Wyatt Saunders (Appx. 179). During the petitioner's sentencing hearing, the investigating officer was present and was asked if he had anything to say. (Appx. 230-31) Despite his promise that he would tell the court that the petitioner fully cooperated, the officer declined to say anything (Appx. 230-31)

The petitioner was prepared to allocute at his sentencing hearing, addressing the court and the victims (Appx. 118-19) The petitioner had a written statement prepared for this purpose. (Appx 119, 259) Nevertheless, he was never given the opportunity to allocute, and Sowell did not object (Appx 118, *see also* Appx. 180-236,) There is nothing in the record establishing the petitioner's voluntary, knowing, and intelligent waiver of his right to allocute (*See* Appx. 180-236) Judge Saunders initially sentenced the petitioner to a total of thirty-five years in prison, classified as violent. (Appx. 92).

The petitioner's co-defendant, Tracey Richards, also plead guilty to three counts of First Degree Burglary. (See Case Nos. 2007-GS-42-03541; 2007-GS-42-03542, 2007-GS-42-03543) Richards received a 15-year imprisonment sentence, suspended upon service of 18 months imprisonment and five years of probation (*See* Appx 109; Case Nos. 2007-GS-42-03541, 2007-GS-42-03542, 2007-GS-42-03543). Despite the petitioner and Richards' joint actions, Sowell admitted that he "knew nothing at all" about Richard's case and made no argument concerning the disparity of sentences (Appx. 144)

Sowell filed a motion to reconsider the petitioner's sentence, which was also heard before Judge Saunders (Appx. 238) At the petitioner's reconsideration hearing, the victims asked why the petitioner had not apologized at his sentencing hearing. (Appx 259). Sowell admitted that it was his fault, and acknowledged that the petitioner had written out an apology (Appx 259) The petitioner was permitted to allocute at the reconsideration hearing. (Appx 262-63). Nevertheless, Sowell made no substantive arguments as to why the petitioner should receive a reduced sentence. (*See* Appx 238-69). If he pointed out, for example, the petitioner's ability to pay restitution he would have likely received a lesser sentence (*See* Appx. 97-98). Further, if Sowell pointed out that the officer had failed to testify regarding the petitioner's substantial cooperation, he would have likely received a lesser sentence (*See* Appx 111-12, 118). Instead, Sowell merely asked the court to reconsider the original sentence without offering any further evidence or substantive arguments (*See* Appx 238-69). Judge Saunders amended the petitioner's sentence to 30 years imprisonment (Appx. 92).

Prior to the petitioner's plea and sentencing hearing, Judge Saunders had held Sowell in Criminal Contempt of Court (Appx. 132-34, 156). In 2002, Sowell represented defendant Bobby Lewis in a drug case before Judge Saunders. State v. Sowell, 370 S C 330, 333, 635 S E 2d 81, 82 (2006). Sowell hired a used car salesman, Gene Gore, to be a private investigator on the case. Sowell, 370 S C at 333. He gave Gore the Grand Jury file information that was forwarded to him from the Attorney General's office Sowell, 370 S C at 333 Judge Saunders found Sowell in criminal contempt and sentenced him to 90 days imprisonment, suspended upon payment of a $5,000.00 fine (Appx. 134) Sowell filed a Motion to Reconsider, and Judge Saunders

amended Sowell's sentence to 90 days imprisonment, suspended upon payment of a $2,500.00 fine. State v. Sowell, Opinion No. 2005-UP-122 (S C. Ct. App filed Feb 17, 2005) This sentence was affirmed by the Court of Appeals but reversed by the South Carolina Supreme Court. Sowell, 370 S.C at 333

Sowell told the petitioner that he could enter a guilty plea before Judge Hayes or Judge Saunders (Appx. 117-18). Sowell convinced the petitioner to plead before Judge Saunders because of Sowell's relationship with the Judge. (Appx 117-18; 131) On the back of a manila folder, Sowell had the petitioner sign the following statement "I agree to plead before Judge Saunders understanding his contempt ruling against my attorney." (Appx 118, 171) There is nothing on the record, either at the guilty plea, sentencing hearing, or reconsideration hearing, establishing this alleged waiver (Appx 179-269) While Judge Saunders' impartiality is without question, Sowell felt that a conflict existed as he had the petitioner sign a waiver, yet the issue was never discussed on the record at any stage

On direct appeal, the petitioner was represented by Appellate Defender Wanda H. Carter (Appx 43). Attorney Carter filed an Anders brief, and on February 11, 2010, the Court of Appeals dismissed the petitioner's direct appeal State v. Johnson, Opinion No. 2010-UP-126 (S C Ct App Filed February 11, 2010); (Appx. 43-49). On February 2, 2011, the petitioner filed his Application for Post Conviction Relief. (Appx 29-33).

On January 31, 2012, the petitioner's Application for Post Conviction Relief was heard before Judge Frank R. Addy, Jr (Appx 90). On May 2, 2012, Judge Addy entered an Order dismissing the petitioner's Application, finding that (1) any denial of the petitioner's right to allocution was cured at the reconsideration hearing, and even if it was

not cured, the petitioner was not prejudiced (Appx. 8-9), (2) Sowell explained the conflict of interest between himself and Judge Saunders to the petitioner, and the petitioner signed a waiver, therefore the petitioner voluntarily, knowingly, and intelligently waived the conflict (Appx 7-8), (3) Sowell was not ineffective for failing to aid in the petitioner's attempts to cooperate with the government because the majority of the petitioner's cooperation came prior to Sowell's involvement in the case and Sowell spent a great deal of effort in attempting to provide information on the petitioner's behalf to the State (Appx. 5); and (4) Sowell was not ineffective for failing to adequately explore plea negotiations because he "testified that he was never aware of any fifteen year offer, nor was he told by the [petitioner] or his mother of any offer when he was retained on the case " (Appx. 6).

The petitioner filed a Motion to Alter/Amend or Reconsider Judge Addy's Order (Appx. 15-18) The State thereafter filed a Return to the petitioner's Motion to Alter/Amend or Reconsider (Appx 19-22) On June 5, 2012, the petitioner filed a Reply to the State's Return. (Appx. 23-25) Judge Addy denied the petitioner's Motion to Alter/Amend or Reconsider by an Order entered on June 5, 2012 (Appx 12) The petitioner's counsel received written notice of this Order on June 8, 2012, and filed a Notice of Appeal the same day (Appx 26)

Although the May 2, 2012 Order lists numerous grounds for relief that were alleged in the petitioner's application, it fails to acknowledge that the petitioner also stated an additional ground. "other such issues that may be determined through the discovery process." (Appx 31). In fact, the discovery process and transcript revealed other issues, including that the petitioner was denied his constitutional right to allocute at

sentencing. In South Carolina, an applicant can raise claims of constitutional violations in post conviction relief. S C. Code Ann § 17-27-20(a) (2011) ("Any person who has been convicted of, or sentenced for, a crime and who claims . [t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State . may institute . a proceeding under this chapter to secure relief"). This issue was litigated at the post conviction relief hearing, and no objection was made by the State Doe v. S.B.M., 327 S C 352, 356, 488 S E 2d 878, 880-81 (Ct App 1997) (citing Wilson v Clary, 212 S C 250, 47 S E 2d 618 (1948) ("Objections not raised in the trial court cannot be relied on in the appellate court"); Parks v. Morris Home Corp., 245 S.C. 461, 141 S E 2d 129 (1965) ("The duty is on the litigant to make a timely objection in order to preserve the right of review"); State v Hoffman, 312 S.C. 386, 440 S E.2d 869 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review"); Cogdill v. Watson, 289 S C. 531, 347 S E 2d 126 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object")) Moreover, this issue was properly brought before the post conviction court because Sowell did not object to the denial of the constitutional right to allocute at the petitioner's sentencing hearing *See* Id., *see also* Wilson v Ozmint, 357 F 3d 461, 467 (4th Cir 2004) ("Under South Carolina law, the failure to object to proceedings below waives the presentation of those issues on appeal, or in post-conviction absent an allegation of ineffective assistance of counsel") In the petitioner's application for post conviction relief, and at the post conviction relief hearing, he specifically alleged that counsel was ineffective. (Appx. 31, Appx 93, *see also* Appx. 94-103, 106-19, 127-50, 160-61)

ARGUMENT

I. Was the petitioner denied the Constitutional right of allocution at sentencing?

"As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." Green v. United States, 365 U S 301, 304, 81 S.Ct 653, 655, 5 L.Ed 2d 670 (1961) (citing Anonymous, 3 Mod 265, 87 Eng.Rep. 175 (K B.)); *see also* Groppi v Leslie, 404 U S 496, 501, 92 S.Ct. 582, 586, 30 L Ed 2d 632 (1972) (recognizing "the traditional right of a criminal defendant to allocution prior to the imposition of sentence"); Penn v Thomas, 553 A 2d 918, 919 (Sup. Ct Pa 1989) ("The right to personally address the court prior to sentencing is of ancient origin. Often referred to as the 'ancient inquiry,' the practice originated in the English common law where, as early as 1689, any failure to permit a defendant to plead for mercy required reversal. . [M]odern cases have expressly rejected the notion that allocution is an anachronism in modern criminal practice"). As recognized by the United States Supreme Court, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself" Green, 365 U S at 304, 81 S Ct. at 655 Here, the petitioner was not afforded his right to allocute at his sentencing hearing. The record is completely devoid of any allocution by the petitioner and there is no inquiry by counsel or the court, nor any mention of a waiver of the right to allocute The post-conviction relief court incorrectly held that this failure was remedied at the petitioner's motion to reconsider (Appx. 8-9)

The right to allocute is constitutionally based and must be afforded at all stages of sentencing *See* United States v Jackson, 923 F.2d 1494, 1496 (11th Cir 1991) (at sentencing "this right to be present and speak is constitutionally based"), United States v.

Luepke, 495 F.3d 443, 451-52 (7th Cir 2007) ("the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process") (citing United States v. Muhammad, 478 F.3d 247, 251 (4th Cir 2007)), Muhammad, 478 F.3d at 250 ("even though Muhammad had addressed the court at the original sentencing hearing, he had a renewed right to allocute at resentencing"), United States v. Moree, 928 F 2d 654, 655-56 (5th Cir. 1991) ("we have consistently held that a defendant's rights to be present and to allocute at sentencing, which are of constitutional dimension, extend to resentencing proceedings"); Presbury v Wyoming, 226 P 3d 886, 888 (Sup. Ct. Wyo. 2010) (recognizing that the right to allocution is "constitutionally protected"), Schutter v Soong, 873 F.2d 66, 87 (Sup. Ct Hawaii 1994) ("Once a defendant is denied the opportunity to be heard, this denial of due process cannot be corrected later at a motion for reconsideration")

South Carolina law is clear A defendant's waiver of constitutional rights must be established by a complete record. Narciso v. State, 397 S.C 24, 33, 723 S E 2d 369, 374 (2012) ("A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both"); Brannon v State, 345 S C 437, 439, 548 S E.2d 866, 867 (2001), Whitehead v. State, 310 S C. 532, 426 S.E.2d 315 (1992) Here, there was nothing on the record establishing the petitioner's alleged voluntary, knowing, and intelligent of his right to allocute. Despite a plea hearing and two sentencing hearings, there was no colloquy between the Court and the petitioner, or between the Court and Sowell In fact, the record is void of any mention of any possible waiver. Attorney Sowell testified that he had an off the

record communication with the petitioner during sentencing when the petitioner shook his head "No" (Appx. 8) Were this true, it is not on the record and is therefore fatally defective It is, in fact, not true, as Sowell stated at the motion to reconsider that "You asked why he hadn't apologized. I guess that was my fault. He has previously written out an apology to you and to the crowd " (Appx 259). Sowell said nothing at the motion to reconsider to suggest that the petitioner waived his right to allocute at the sentencing (Appx 238-69)

In Narciso the petitioner signed a Consent Order granting a belated direct appeal and purportedly waiving his right to raise any other PCR allegations Narciso, 397 S.C at 33, 723 S E 2d at 373. Despite the straightforward Consent Order, "the colloquy between the court and the defendant . [did] not clearly establish that [p]etitioner knowingly and voluntarily waived his right to raise any other PCR allegations" Narciso, 397 S C at 35, 723 S.E 2d at 374 The Court contrasted Spoone v State, 379 S.C 138, 665 S.E 2d 605 (2008), wherein the plea colloquy showed that the Court "specifically asked petitioner about the wavier both in the language of the plea agreement, and in 'plain language.'" Narciso, 397 S C. at 34, 723 S.E.2d at 374 (citing Spoone, 379 S C. at 143-44). Like in Narciso, here the record did not establish that the applicant voluntarily, knowingly, and intelligently waived his rights

The post conviction court incorrectly held that the denial of the petitioner's right to allocution was cured at the motion for reconsideration when the petitioner's statement was read into the record (Appx 8) The violation of this constitutional right cannot be corrected at a motion for reconsideration Schutter, 873 P 2d at 87 ("Once a defendant is denied the opportunity to be heard, this denial of due process cannot be corrected later at

a motion for reconsideration"); Washington v. Crider, 899 P 2d 24, 29-30 (Ct App. Wash. 1995) ("we agree with Mr. Crider that an opportunity to speak extended for the first time after sentence has been imposed is a totally empty gesture. Even when the court stands ready and willing to alter the sentence when presented with new information from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position"), Hawaii v. Carvalho, 978 P.2d 718, 724 (Sup. Ct Hawaii 1999) ("A defendant's right of allocution is designed to provide an opportunity to affect the totality of the trial court's sentencing determination The right of presentence allocution would become illusory if judges were permitted to construct a sentence one brick at a time, only permitting the defendant to speak before the last piece of the wall was about to be mortared in place")

The petitioner need not show prejudice in light of this constitutional defect. Thomas, 553 A.2d at 919 ("we reject the Commonwealth's argument that one who stands convicted of a crime and who is denied an opportunity to address the sentencing court must somehow demonstrate prejudice thereby. What effect the exercise of the right of allocution might have on the subjective process of sentencing can never be known with such certainty that a reviewing court can conclude there was no prejudice in its absence"); Presbury, 226 P 3d at 887-88 ("Federal courts have recognized that in the absence of an opportunity to allocute being given, it is almost impossible to ascertain what the effect of the opportunity would have been had the error not occurred") (citing United States v Luepke, 495 F 3d 443, 451 (7th Cir. 2007) (when there has been a violation of the right to allocute, a reviewing court should presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district

court heard from him before imposing the sentence); United States v. Prouty, 303 F 3d 1249, 1252 (11th Cir. 2002) ("prejudice must be found if a defendant has not been given the opportunity to speak to the court when the possibility of a lower sentence existed"); United States v. Jarvi, 537 F.3d 1256, 1262 (10th Cir 2008) ("The government concedes that a denial of allocution is per se prejudicial and requires a remand without an investigation of prejudice")

Nevertheless, if the petitioner had been given the opportunity to allocute, there is a reasonable probability that the outcome of his sentencing proceedings would have been different. As the Fourth Circuit stated:

> When a defendant was unable to address the court before being sentenced and the possibility remains that an exercise of the right of allocution could have led to a sentence less than that received, we are of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute were we to allow the sentence to stand

United States v. Cole, 27 F 3d 996, 999 (4th Cir 1994). The Supreme Court has also addressed the importance of the right of allocution: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green, 365 U S at 304, *see also* Hawaii v Schaefer, 184 P 3d 805, 813 (Ct. App Hawaii 2008) ("[w]e also expressed doubt that the denial of presentence allocution can ever be harmless error"), United States v. Rucker, 395 Fed Appx 970, 974, 2010 WL 3623553 (unpublished) (4th Cir 2010) (case remanded for resentencing because the possibility remained that Rucker "could have received a lower sentence if he had the right of allocution") A guilty plea and sentencing must clearly establish a waiver of all constitutional rights Failure to waive allocution on the record is a denial of due process and the plea and sentencing are therefore fatally defective Should any record fail to

establish that the defendant knowingly and voluntarily waived his right to remain silent and right to a jury trial, the plea and sentence would be set aside. Moore v. State, -- S.C --, -- S E.2d --, 2012 WL 4464551, *3 (September 26, 2012) (ineffective assistance of counsel where there was no on-the-record colloquy between the court and the petitioner's trial counsel, or the court and the petitioner, regarding an alleged jury trial waiver); Pittman v State, 337 S C 597, 600, 524 S E 2d 623, 624-25 (1999) (the Court granted the petitioner a new trial because he did not waive his constitutional rights on the record, therefore his guilty plea was not knowingly and voluntarily made) The failure to waive the right to allocute on the record at sentencing is no different.

II. Did the petitioner voluntarily, knowingly, and intelligently waive a conflict of interest between his attorney and the sentencing judge?

Sowell had the petitioner sign the back of a manila folder indicating that the petitioner knew that Judge Saunders had previously held Sowell in contempt. (Appx 171) Sowell perceived this as a conflict of interest. This issue was never put on the record. For a waiver of a conflict of interest to be valid, "it must not only be voluntary, it must be done knowingly and intelligently." Thomas v. State, 346 S C 140, 144, 551 S E 2d 254, 256 (2001) (citing United States v Swartz, 975 F.2d 1042, 1048-49 (4th Cir. 1992); Hoffman v Leeke, 903 F.2d 280, 289 (4th Cir 1990)) The petitioner had a right to be sentenced before a judge with whom his attorney did not have a conflict of interest. *See* United States v. Godwin, 272 F 3d 659, 682 (4th Cir 2001) ("This right to an impartial judge cannot be trampled, not even by overwhelming evidence of guilt"); Gray v. Mississippi, 481 U S. 648, 668, 107 S.Ct. 2045, 2057, 95 L.Ed 2d 662 (1987) ("We have recognized that some constitutional rights are so basic to a fair trial that their

infraction can never be treated as harmless error. . . . The right to an impartial adjudicator, be it judge or jury, is such a right").

In South Carolina, "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both." Narciso, 397 S C at 33, 723 S E 2d at 374. Here, the petitioner signed the back of a manila folder, on which the following was written. "I agree to plead before Judge Saunders, understanding his contempt ruling against my attorney." (Appx. 171). If nothing else, this demonstrates that Sowell perceived a conflict of interest with the sentencing Judge, yet this was never addressed on the record. The court found that the petitioner's waiver was voluntary, knowing, and intelligent because Sowell "explained his prior interactions with Judge Saunders" to the petitioner. (Appx 8) "However, this argument exhibits a fundamental misunderstanding of what this Court's waiver jurisprudence commands The validity of a defendant's waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver " Moore v. State, -- S.C --, -- S.E.2d --, 2012 WL 4464551, *3 (September 26, 2012). Sowell did not put the waiver on the record, either at the plea hearing, sentencing hearing, or hearing on the motion to reconsider . The petitioner did not voluntarily, knowingly, and intelligently waive any conflict of interest He was sentenced ultimately to 30 years imprisonment after turning down a 15-year plea His co-defendant received a 15-year imprisonment sentence, suspended upon service of 18 months imprisonment and five years of probation. (*See* Appx. 109, Case Nos 2007-GS-42-03541, 2007-GS-42-03542, 2007-GS-42-03543). While Judge Saunders was

universally recognized as being fair and impartial, this conflict, as memorialized in a written waiver by Sowell, was never addressed on the record.

III. Was counsel ineffective for failing to aid in the petitioner's cooperation with the State, thereby prejudicing the petitioner?

The government promised the petitioner that if he cooperated, the investigating officer would speak at the petitioner's sentencing hearing about his cooperation (Appx. 111-12) The petitioner fully cooperated by pointing out houses that he broke into, giving a statement, and helping recover property (Appx. 109-111). The petitioner cooperated with law enforcement for a number of days prior to his actual arrest without an attorney However, when the officer was asked if he had anything to say at the sentencing hearing, he declined (Appx. 230-31) Sowell did not object to the officer's silence, nor did he put the agreement on the record (Appx 179-237). The post conviction court held that if Sowell "was aware of an officer who was willing to testify on the [petitioner's] behalf in court, he would have subpoenaed that officer and had him present to speak on [the petitioner's] behalf," therefore the petitioner had not met his burden (Appx. 5). The issue is not whether the officer was present to speak on the petitioner's behalf In fact, the officer was present in the courtroom and specifically asked by the Assistant Solicitor if he had anything to say (Appx. 230-31)

"Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding. . . For example, a defendant who provides beneficial information to law enforcement can be said to have relied to his detriment." Custodio v. State, 373 S.C. 4, 11, 644 S.E 2d 36 (2007) (citing Reed v Becka, 333 S C. 676, 689, 511 S E.2d 369 (Ct. App. 1999)) This is exactly what happened here. The State promised the petitioner

that if he would cooperate, the officer would testify favorably to the judge about the petitioner's cooperation. The petitioner relied on this promise by providing extensive beneficial information to law enforcement to his detriment. "Certainly, helping law enforcement solve several burglary crimes and assisting in the return of stolen property is beneficial information." Custodio, 373 S.C at 12. Like in Custodio, "[b]ecause petitioner could have enforced the plea agreement under the detrimental reliance exception and counsel failed to take this action, counsel failed to render reasonably effective assistance." Custodio, 373 S C. at 12-13.

Moreover, Sowell was ineffective in failing to aid in the petitioner's cooperation with the government to secure restitution payments The victims in the petitioner's case were very vocal about restitution, yet Sowell did not make an attempt to have the petitioner pay restitution (Appx 98, 144) Sowell knew that the petitioner's mother lived in a nice house, however never mentioned restitution to her (Appx. 98, 145) The petitioner's grandmother had an account with over $630,000 00, which she was willing to lend the petitioner to pay the victims (Appx 97). The grandmother actually paid Sowell's attorneys fees. (Appx. 97) Yet, Sowell did nothing with this information This also greatly prejudiced the petitioner Had he paid restitution, he likely would have received a lesser sentence (*See* Appx. 219-221, 228).

IV. Was counsel ineffective for failing to adequately explore plea negotiations, thereby prejudicing the petitioner?

The Assistant Solicitor offered the petitioner a 15-year sentence if he were to plead guilty (Appx. 94, 107). The petitioner's mother, Pinckie Dardar, contacted Attorney Sowell and met with him at a Waffle House to discuss the petitioner's case. (Appx. 95) Sowell told Ms. Dardar that 15 years imprisonment was too much time, and

that the petitioner did not do anything that was considered violent. (Appx. 97). However, the petitioner's burglary charges are considered violent offenses. S C Code Ann. § 16-1-60 (2008) Moreover, 15 years imprisonment is the statutory minimum sentence for First Degree Burglary. S C Code Ann. § 16-11-311 (2008).

Sowell acknowledged that the petitioner told him that the petitioner had received the 15-year offer (Appx. 129) ("I remember he - - Mr. Johnson had told me he received a plea offer"). Sowell testified that he and the prosecutor never went to talk to the Judge about a fifteen year sentence because he thought doing so would have been improper. (Appx. 132). Despite Sowell's testimony that he knew of the 15-year offer, the post conviction court erroneously held that Sowell "was never aware of any fifteen year offer, nor was he told by the [petitioner] or his mother of any offer when he was retained on the case." (Appx 6).

"[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer " United States v Day, 969 F 2d 39, 43 (3rd Cir 1992) (citing Hill v Lockhart, 474 U S 52, 56-57, 106 S Ct 366, 369, 88 L.Ed.2d 203 (1985) (voluntariness of guilty plea depends on adequacy of counsel's advice), Von Moltke v. Gillies, 332 U.S 708, 721, 68 S.Ct. 316, 322, 92 L Ed. 309 (1948) (Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered). Sowell convinced the petitioner to reject the 15-year offer and hire him instead of proceeding with Attorney Cheeks. (Appx. 96-97). The petitioner was ultimately sentenced to 30 years imprisonment before Judge Saunders. The petitioner's co-defendant received only 15 years imprisonment suspended upon service of 18 months

imprisonment and five years of probation. (*See* Appx 109; Case Nos 2007-GS-42-03541; 2007-GS-42-03542, 2007-GS-42-03543; PCR 20)

CONCLUSION

For the reasons demonstrated above, the petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and permit full briefing on the questions presented.

Respectfully submitted,

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October 26, 2012
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHEROKEE COUNTY
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The Honorable Frank R. Addy, Jr , Circuit Court Judge

Case No.: 2011-CP-42-0516

Michael Shane Johnson,
Appellant,

v

State of South Carolina,
Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Petition for Writ of Certiorari and accompanying Appendix on the following by depositing a copy of it in the United States Mail, postage prepaid, on October 26, 2012·

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Dated this 26th day of October, 2012
Greenville, South Carolina