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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Diane S. Goodstein, Circuit Court Judge

Case No. 2006-CP-38-00273
Appellate Case No. 2013-00637

Levi Bing, Jr.,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG

2003-GS-38-2411

2003-GS-38-2412

2003-GS-38-2413

THE STATE OF SOUTH CAROLINA

-VS-

LEVI BING, JR.

:
:
:
:
:

TRANSCRIPT OF RECORD

MARCH 14, 2005

ORANGEBURG, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE.

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

DAVID M. PASCOE, JR., ESQUIRE
DONALD N. SORENSON, ESQUIRE
ATTORNEYS FOR THE STATE

MICHAEL R. CULLER, JR., ESQUIRE
JOHN DELGADO, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: YOU ALL MAY BE SEATED. IS THE STATE
2 READY TO PROCEED?

3 MR. PASCOE: YES, YOUR HONOR. GOOD MORNING.

4 THE COURT: GOOD MORNING. IS THE DEFENSE READY TO
5 PROCEED?

6 MR. CULLER: YES, YOUR HONOR.

7 MR. PASCOE: MAY IT PLEASE THE COURT?

8 THE COURT: YES, SIR.

9 MR. PASCOE: YOUR HONOR, WE'RE HERE FOR THE PURPOSE
10 OF A PLEA OF THE DEFENDANT, LEVI BING. THE DEFENDANT IS
11 GOING TO PLEAD GUILTY TO ONE COUNT OF MURDER WHICH IS
12 03-GS-2411, ONE COUNT OF GRAND LARCENY, 03-GS-2412, AND ONE
13 COUNT OF POSSESSION OF A WEAPON DURING THE COMMISSION OF A
14 VIOLENT CRIME, 03-GS-2413. I HAVE COPIES OF THE INDICTMENTS,
15 YOUR HONOR, AND THE SENTENCING SHEETS, IF I COULD APPROACH
16 AND PASS THEM UP.

17 THE COURT: YES, SIR. AND YOU SAID THE MURDER WAS
18 2411; CORRECT?

19 MR. PASCOE: YES, MA'AM, I BELIEVE SO. IT SHOULD BE
20 ON THERE. THIS IS GOING TO BE A NEGOTIATED PLEA WITH REGARDS
21 TO THE SENTENCE, YOUR HONOR. THE DEFENDANT IS TO RECEIVE A
22 SENTENCE OF 40 YEARS ON THE MURDER CHARGE.

23 THE COURT: UH-HUH.

24 MR. PASCOE: AND WHATEVER YOU GIVE HIM ON THE OTHER
25 CHARGES TO RUN CONCURRENT WITH THAT 40-YEAR SENTENCE ON THE

1 MURDER.

2 THE COURT: NOW, AS I UNDERSTAND IT, THE GRAND
3 LARCENY IS MORE THAN \$5,000?

4 MR. PASCOE: YES, MA'AM.

5 THE COURT: SO THAT IS ZERO TO TEN; CORRECT?

6 MR. PASCOE: YES, YOUR HONOR.

7 THE COURT: AND THE POSSESSION OF A FIREARM DURING
8 THE COMMISSION OF A VIOLENT CRIME IS ZERO TO FIVE.

9 MR. PASCOE: YES, YOUR HONOR.

10 THE COURT: MR. DELGADO AND MR. CULLER, YOU BOTH
11 REPRESENT MR. BING; IS THAT CORRECT?

12 MR. DELGADO: YES, MA'AM.

13 MR. CULLER: YES, YOUR HONOR.

14 THE COURT: OKAY. AND HAVE YOU EXPLAINED TO YOUR
15 CLIENT THE CHARGES CONTAINED IN THE INDICTMENTS, THE POSSIBLE
16 PUNISHMENT, AND HIS CONSTITUTIONAL RIGHTS?

17 MR. DELGADO: YES, MA'AM.

18 MR. CULLER: YES, YOUR HONOR.

19 THE COURT: DO YOU BELIEVE HE UNDERSTANDS THE
20 CHARGE, THE PUNISHMENT, AND HIS RIGHTS?

21 MR. DELGADO: YES, MA'AM.

22 MR. CULLER: YES, YOUR HONOR.

23 THE COURT: DOES YOUR CLIENT WISH TO PLEAD GUILTY OR
24 NOT GUILTY?

25 MR. DELGADO: WISHES TO PLEAD GUILTY.

1 MR. CULLER: GUILTY, YOUR HONOR.

2 THE COURT: AND DO YOU AGREE WITH THAT DECISION?

3 MR. DELGADO: YES, MA'AM.

4 MR. CULLER: YES, YOUR HONOR.

5 THE COURT: TO YOUR KNOWLEDGE, HAS YOUR CLIENT EVER
6 HAD TO BE EVALUATED TO DETERMINE HIS COMPETENCY?

7 MR. DELGADO: NO, MA'AM.

8 MR. CULLER: NO, YOUR HONOR.

9 THE COURT: OKAY. AND IS IT CORRECT THAT YOU'VE
10 REACHED A NEGOTIATED PLEA ON THE MURDER CHARGE OF 40 YEARS?

11 MR. DELGADO: YES, MA'AM.

12 MR. CULLER: THAT'S CORRECT.

13 THE COURT: AND ON THE OTHER CHARGES THAT THEY RUN
14 CONCURRENT WITH THE MURDER CHARGE; IS THAT CORRECT?

15 MR. DELGADO: YES, MA'AM.

16 MR. CULLER: YES, YOUR HONOR.

17 THE COURT: SIR, IF YOU WOULD STAND FOR ME AND RAISE
18 YOUR RIGHT HAND TO BE SWORN.

19 LEVI BING, JR., AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 EXAMINATION BY THE COURT

22 Q. SIR, I'M GOING TO EXPLAIN TO YOU CERTAIN OF YOUR
23 RIGHTS TO MAKE SURE THAT YOU GIVE A KNOWING AND VOLUNTARY AND
24 INTELLIGENT GUILTY PLEA IN THIS MATTER. DO YOU UNDERSTAND?

25 A. YES, MA'AM.

1 Q. IF THERE'S ANYTHING THAT I ASK OF YOU OR A QUESTION
2 THAT YOU DO NOT UNDERSTAND OR YOU NEED SOMETHING REPEATED,
3 PLEASE LET ME KNOW. DO YOU UNDERSTAND?

4 A. YES, MA'AM.

5 Q. SIR, STATE YOUR FULL NAME FOR THE RECORD.

6 A. LEVI BING, JR., MA'AM.

7 Q. AND, SIR, HOW OLD ARE YOU?

8 A. TWENTY-THREE IN AGE, MA'AM.

9 Q. HOW FAR HAVE YOU GONE IN SCHOOL?

10 A. TWELVE YEARS, MA'AM.

11 Q. DID YOU GRADUATE?

12 A. YES, MA'AM.

13 Q. WHERE DID YOU GO TO HIGH SCHOOL?

14 A. STRATFORD HIGH SCHOOL IN GOOSE CREEK, SOUTH
15 CAROLINA.

16 Q. WHAT TYPE WORK DID YOU DO BEFORE YOU WERE
17 INCARCERATED?

18 A. ELECTRICIAN, MA'AM.

19 Q. AND HOW LONG WERE YOU EMPLOYED IN THAT OCCUPATION?

20 A. FOUR MONTHS, MA'AM.

21 Q. ARE YOU MARRIED?

22 A. NO, MA'AM.

23 Q. DO YOU HAVE ANY CHILDREN?

24 A. NO, MA'AM.

25 Q. SIR, ARE YOU CURRENTLY ON PROBATION OR PAROLE?

1 A. NO, MA'AM, I'M NOT.

2 Q. HAVE YOU EVER BEEN TREATED FOR THE ABUSE OF ALCOHOL,
3 DRUGS, OR MENTAL ILLNESS?

4 A. NO, MA'AM.

5 Q. HAVE YOU HAD ANY DRUGS, ALCOHOL, OR MEDICATION IN
6 THE LAST 72 HOURS?

7 A. NO, MA'AM, I HAVE NOT.

8 Q. ARE YOU AWARE OF ANY PHYSICAL, EMOTIONAL, OR NERVOUS
9 PROBLEM THAT WOULD KEEP YOU FROM UNDERSTANDING WHERE YOU ARE
10 RIGHT NOW OR WHAT YOU ARE DOING?

11 A. NO, MA'AM.

12 Q. HAVE YOUR LAWYERS EXPLAINED TO YOU THE CHARGES
13 CONTAINED IN THE INDICTMENTS, THE POSSIBLE PUNISHMENT, AND
14 YOUR CONSTITUTIONAL RIGHTS?

15 A. YES, MA'AM, THEY HAVE.

16 Q. SIR, YOU ARE CHARGED WITH MURDER. HOW DO YOU PLEAD?

17 A. I PLEAD GUILTY, MA'AM.

18 Q. SIR, DO YOU UNDERSTAND THAT THAT CHARGE CARRIES A
19 MINIMUM PENALTY OF 30 YEARS AND A MAXIMUM PENALTY OF LIFE?

20 A. YES, MA'AM, I DO.

21 Q. AND ON THE CHARGE OF GRAND LARCENY MORE THAN \$5,000,
22 HOW DO YOU PLEAD?

23 A. GUILTY.

24 Q. DO YOU UNDERSTAND THAT THAT CHARGE CARRIES A MAXIMUM
25 PENALTY OF TEN YEARS?

1 A. YES, MA'AM.

2 Q. AND ON THE CHARGE OF POSSESSION OF A FIREARM DURING
3 THE COMMISSION OF A VIOLENT CRIME, DO YOU UNDERSTAND THAT
4 THAT CARRIES A MAXIMUM PENALTY OF FIVE YEARS?

5 A. YES, MA'AM.

6 Q. AND, SIR, HOW DO YOU PLEAD TO THAT CHARGE?

7 A. GUILTY, MA'AM.

8 Q. SIR, DO YOU UNDERSTAND THAT THE MURDER CHARGE IS
9 CLASSIFIED AS BOTH VIOLENT AND MOST SERIOUS?

10 A. MA'AM?

11 Q. UNDER SOUTH CAROLINA LAW THERE ARE CLASSIFICATIONS
12 OF OFFENSES, AND THE MURDER -- A MURDER CHARGE IS CLASSIFIED
13 AS WHAT WE CALL VIOLENT AND SERIOUS.

14 A. YES, MA'AM.

15 Q. HAS THAT BEEN EXPLAINED TO YOU?

16 A. YES, MA'AM.

17 Q. SIR, DO YOU UNDERSTAND THAT UNDER THE THREE-STRIKES
18 LAW THAT YOU NOW HAVE -- THE TWO OR THREE-STRIKES LAW THAT
19 YOU NOW HAVE ONE STRIKE?

20 A. YES, MA'AM.

21 Q. DO YOU UNDERSTAND THAT IF YOU WERE TO GET ANOTHER
22 MOST SERIOUS OFFENSE THAT YOU COULD BE SUBJECTED TO THE
23 POSSIBILITY OF LIFE WITHOUT PAROLE?

24 A. YES, MA'AM.

25 Q. DO YOU ALSO UNDERSTAND THAT SINCE IT IS CLASSIFIED

1 AS VIOLENT AND MOST SERIOUS THAT THAT WILL AFFECT THE WAY YOU
2 SERVE YOUR TIME?

3 A. YES, MA'AM.

4 Q. OKAY. DO YOU UNDERSTAND THAT THE COURT MAKES NO
5 REPRESENTATIONS ABOUT THAT?

6 A. YES, MA'AM.

7 Q. AND DO YOU UNDERSTAND THAT HOW YOUR SENTENCE IS
8 CALCULATED WILL BE CALCULATED BY THE DEPARTMENT OF
9 CORRECTIONS?

10 A. YES, MA'AM.

11 Q. SIR, I WANT TO EXPLAIN TO YOU THAT YOU MAY HAVE
12 DISCUSSED PAROLE OR PAROLE ELIGIBILITY WITH YOUR LAWYER OR
13 WITH OTHER PEOPLE, BUT UNTIL YOU'RE SENTENCED, NO ONE CAN
14 TELL YOU WHEN, IF EVER, YOU WILL BE ELIGIBLE FOR PAROLE OR
15 UNDER WHAT CONDITIONS. YOU SHOULD ASSUME THAT YOU WILL SERVE
16 THE ENTIRE TIME IN JAIL THAT YOU'RE SENTENCED TO. DO YOU
17 UNDERSTAND THAT?

18 A. YES, MA'AM.

19 Q. SIR, IS IT CORRECT THAT YOU HAVE REACHED -- YOUR
20 LAWYERS HAVE REACHED A NEGOTIATED PLEA OF 40 YEARS WITH THE
21 SOLICITOR?

22 A. YES, MA'AM.

23 Q. AND THAT WHATEVER TIME YOU RECEIVE ON THE OTHER
24 CHARGES THAT THAT WILL RUN CONCURRENTLY.

25 A. YES, MA'AM.

1 Q. SIR, I WILL ADVISE YOU THAT IF I CANNOT ACCEPT THE
2 NEGOTIATED PLEA I WILL ALLOW YOU TO WITHDRAW YOUR PLEA. DO
3 YOU UNDERSTAND?

4 A. YES, MA'AM.

5 Q. I WANT YOU TO LISTEN VERY CAREFULLY TO THE FACTS.
6 MR. SOLICITOR?

7 MR. PASCOE: MY DEPUTY SOLICITOR, DON SORENSON, WILL
8 COVER THE FACTS.

9 THE COURT: MR. SORENSON?

10 MR. SORENSON: MAY IT PLEASE THE COURT, YOUR HONOR?

11 THE COURT: YES, SIR.

12 MR. SORENSON: ON THE EVENING OF NOVEMBER 10TH,
13 2003, ABOUT 8:45 IN THE EVENING, THE BODY OF MR. RANDY BILLS
14 WAS FOUND OUT IN THE ROADWAY BY SOME PASSING MOTORISTS AND
15 ALSO SOME RESIDENTS OUT IN THAT AREA AT THE INTERSECTION --
16 NEAR THE INTERSECTION OF BOYER ROAD AND OLD STATE ROAD WHICH
17 IS IN HOLLY HILL, SOUTH CAROLINA, HERE IN ORANGEBURG COUNTY.
18 UPON LAW ENFORCEMENT AND THE SHERIFF'S DEPARTMENT AND HIGHWAY
19 PATROL RESPONDING OUT THERE THAT NIGHT, IT WAS DETERMINED
20 THAT MR. BILLS HAD BEEN SHOT THREE TIMES. THERE WAS ALSO
21 FIVE NINE MILLIMETER SHELL CASINGS FOUND -- LOCATED BY THE
22 SHERIFF'S DEPARTMENT AROUND MR. BILLS' BODY.

23 AN AUTOPSY LATER ON THAT DAY DETERMINED THAT HE HAD
24 BEEN SHOT THREE TIMES: ONE TIME IN THE RIGHT ARM NEAR THE
25 ELBOW AREA WHICH EXITED AROUND HIS RIGHT SHOULDER AND ENDED

1 UP STRIKING HIM IN THE RIGHT FACE AND TWO ADDITIONAL SHOTS,
2 BOTH IN THE LEFT BACK AREA, ALL THREE OF WHICH, ACCORDING TO
3 THE PATHOLOGIST, WOULD HAVE BEEN FATAL. AT THAT POINT IN
4 TIME THE SHERIFF'S DEPARTMENT BEGAN INVESTIGATING THAT
5 EVENING. THEY LEARNED THAT THE VICTIM HAD GONE EARLIER THAT
6 EVENING TO COLUMBIA FOR THE PURPOSE OF SELLING A CORVETTE
7 THAT HE OWNED TO A YOUNG MAN WHO I BELIEVE ALL THEY KNEW AT
8 THAT POINT IN TIME WAS HE WAS USING THE NAME CHRIS.

9 THE INVESTIGATION CONTINUED. THE NEXT DAY THAT
10 CHRIS SUBJECT ACTUALLY CALLED SEVERAL TIMES. AN INVESTIGATOR
11 WITH THE SHERIFF'S DEPARTMENT ACTUALLY TALKED TO THAT CHRIS
12 SUBJECT WHEN HE WAS CALLING THE VICTIM'S HOME, ESSENTIALLY
13 LOOKING FOR AT THAT POINT IN TIME MR. BILLS, INDICATING HE
14 HAD NEVER SHOWED UP THE NIGHT BEFORE TO DO THE DEAL OVER THE
15 CORVETTE.

16 THE FOLLOWING DAY ON NOVEMBER 12TH OF 2003 - SO THIS
17 IS NOW A DAY AND A HALF AFTER MR. BILLS' BODY WAS FOUND -
18 THIS DEFENDANT, LEVI BING, JR., CALLED FROM HIS JOB HERE IN
19 COLUMBIA INDICATING AT THAT POINT IN TIME THAT HE HAD THE
20 VICTIM'S CORVETTE AND HAD SEEN IT OR A COWORKER HAD SEEN IT
21 ON THE NEWS. HE'D GONE OUT AND CHECKED THE V.I.N. NUMBER AND
22 REALIZED IT WAS THE CORVETTE THAT THE SHERIFF'S DEPARTMENT
23 WAS LOOKING FOR AND WAS CALLING AT THAT POINT IN TIME TO
24 BASICALLY INDICATE THAT HE HAD THE VEHICLE.

25 THIS INVESTIGATOR WITH THE SHERIFF'S DEPARTMENT THAT

1 UP STRIKING HIM IN THE RIGHT FACE AND TWO ADDITIONAL SHOTS,
2 BOTH IN THE LEFT BACK AREA, ALL THREE OF WHICH, ACCORDING TO
3 THE PATHOLOGIST, WOULD HAVE BEEN FATAL. AT THAT POINT IN
4 TIME THE SHERIFF'S DEPARTMENT BEGAN INVESTIGATING THAT
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22 REALIZED IT WAS THE CORVETTE THAT THE SHERIFF'S DEPARTMENT
23 WAS LOOKING FOR AND WAS CALLING AT THAT POINT IN TIME TO
24 BASICALLY INDICATE THAT HE HAD THE VEHICLE.

25 THIS INVESTIGATOR WITH THE SHERIFF'S DEPARTMENT THAT

1 SPOKE TO MR. BING ON THE TELEPHONE AT THAT POINT IN TIME WAS
2 THE SAME INVESTIGATOR THAT HAD TALKED TO THIS CHRIS SUBJECT
3 THE DAY BEFORE AND RECOGNIZED THE VOICE AS BEING THE SAME
4 PERSON. AT THAT POINT IN TIME THE SHERIFF'S DEPARTMENT
5 RESPONDED TO COLUMBIA WHERE MR. BING TURNED OVER THE VEHICLE
6 AND ALSO AGREED TO GO BACK TO THE SHERIFF'S DEPARTMENT HERE
7 IN ORANGEBURG AND TALK AT THAT POINT IN TIME.

8 A SEARCH OF -- A CONSENSUAL SEARCH OF HIS BOOK BAG
9 AT THAT POINT IN TIME FOUND SEVERAL NINE MILLIMETER BULLETS
10 CONSISTENT WITH THE SHELL CASINGS THAT WERE FOUND OUT AT THE
11 SCENE. AT THAT POINT IN TIME THE STORIES THAT MR. BING ENDED
12 UP GIVING OVER THE NEXT SEVERAL DAYS BEGAN. IT WENT FROM
13 ESSENTIALLY HIM GETTING THE CAR FROM A COUSIN OF HIS WHO IS A
14 CAR DEALER AND HAD BOUGHT THE CAR AT AN AUCTION TO HIM BEING
15 -- HE AND THE VICTIM BEING CARJACKED THAT NIGHT AND THE
16 VICTIM BEING SHOT BY SOME UNKNOWN MAN TO A FRIEND OF HIS WHO
17 WAS COMING TO ASSIST IN THE DEAL PULLING OUT A GUN AND
18 SHOOTING THE VICTIM.

19 THE ULTIMATE LIE, I BELIEVE, WAS ONE OF THE LAST
20 STATEMENTS HE GAVE WAS THAT HE HAD A NINE MILLIMETER GUN ON
21 HIM FOR PROTECTION AND THAT THE VICTIM HAD GOTTEN A HOLD OF
22 THE GUN AND PULLED IT ON HIM. A STRUGGLE ENSUED, WHEREIN HE
23 GOT THE GUN FROM THE VICTIM AND ENDED UP SHOOTING HIM.

24 DURING THE COURSE OF THESE STATEMENTS, HE DID GIVE
25 SHERIFF'S DEPARTMENT INVESTIGATORS INFORMATION AS TO WHERE

1 THAT GUN COULD BE LOCATED. I BELIEVE IT WAS AT A RELATIVE OF
2 HIS'S (SIC) HOUSE. THEY DID LOCATE THAT GUN. IT WAS SENT
3 OUT TO THE STATE LAW ENFORCEMENT DIVISION WHERE THEY DID
4 MATCH IT UP TO THE SHELL CASINGS FOUND OUT AT THE SCENE ALONG
5 WITH THE THREE PROJECTILES THAT WERE RECOVERED FROM MR. BILLS
6 AT THE AUTOPSY.

7 AT THAT POINT IN TIME THE SHERIFF'S DEPARTMENT STILL
8 CONTINUED TO FOLLOW UP IN THEIR INVESTIGATION, ULTIMATELY
9 BEING ABLE TO FIND A VIDEO AT A CONVENIENCE STORE IN SANTEE
10 NEAR -- CLOSER TO WHERE THE VICTIM'S BODY WAS FOUND THAT
11 SHOWED THE TWO OF THEM TOGETHER PRIOR TO THE BODY BEING FOUND
12 INSIDE -- THE VICTIM AND THE DEFENDANT INSIDE THAT
13 CONVENIENCE STORE AND THEN ALSO IN WEST COLUMBIA A SHORT TIME
14 AFTER THE BODY WAS FOUND SHOWING JUST THE DEFENDANT ALONG
15 WITH THE VEHICLE. THAT WOULD BE IT, I BELIEVE, AS FAR AS THE
16 FACTUAL PRESENTATION, YOUR HONOR.

17 THE COURT: OKAY.

18 MR. SORENSON: THE ONLY OTHER THING AS FAR AS IF YOU
19 WANT TO HEAR AT THIS TIME, YOUR HONOR, IS THE PRIOR RECORD.
20 MR. BING DOES NOT HAVE ANY ADULT -- ADULT CONVICTIONS.

21 BY THE COURT:

22 Q. OKAY. SIR, DO YOU AGREE OR DISAGREE WITH THE FACTS?

23 A. I AGREE, MA'AM.

24 Q. DO YOU FEEL ANYTHING NEEDS TO BE CHANGED OR ADDED TO
25 THE FACTS?

1 A. NO, MA'AM.

2 Q. SIR, ARE YOU PLEADING GUILTY BECAUSE YOU'RE GUILTY?

3 A. YES, MA'AM.

4 Q. AND, SIR, DO YOU AGREE OR DISAGREE THAT YOU HAVE NO
5 ADULT CRIMINAL RECORD?

6 A. I AGREE, MA'AM.

7 Q. SIR, WHEN YOU PLEAD GUILTY YOU GIVE UP CERTAIN
8 IMPORTANT CONSTITUTIONAL RIGHTS. I WANT YOU TO LISTEN VERY
9 CAREFULLY. YOU HAVE THE RIGHT TO A JURY TRIAL. AT A JURY
10 TRIAL THE STATE WOULD HAVE THE BURDEN OF PROVING YOUR GUILT
11 BEYOND A REASONABLE DOUBT. YOU'RE ALSO ENTITLED TO A
12 PRESUMPTION THAT YOU'RE INNOCENT. YOU WOULD HAVE THE RIGHT
13 TO CONFRONT AND CROSS-EXAMINE THE STATE'S WITNESSES AND CALL
14 WITNESSES IN YOUR OWN DEFENSE. YOU WOULD ALSO HAVE THE RIGHT
15 TO REMAIN SILENT, AND IF YOU EXERCISED THAT RIGHT, YOUR
16 SILENCE COULD NOT BE USED AGAINST YOU. YOU WOULD HAVE THE
17 RIGHT TO PRESENT ANY DEFENSES THAT YOU MAY HAVE. AND IF
18 YOU'VE MADE ANY CONFESSIONS OR OTHER INCRIMINATING
19 STATEMENTS, YOU WOULD HAVE THE RIGHT TO CHALLENGE THOSE
20 STATEMENTS. DO YOU UNDERSTAND EACH AND EVERY ONE OF YOUR
21 RIGHTS AS I'VE JUST EXPLAINED THEM TO YOU?

22 A. YES, MA'AM, I DO.

23 Q. DO YOU UNDERSTAND THAT YOU'RE GIVING UP EACH AND
24 EVERY ONE OF THOSE RIGHTS?

25 A. YES, MA'AM.

1 Q. OTHER THAN WHAT HAS BEEN STATED FOR THE RECORD, HAVE
2 THERE BEEN ANY OTHER PLEA NEGOTIATIONS MADE ON YOUR BEHALF?

3 A. YES, MA'AM.

4 Q. OTHER THAN THE NEGOTIATED PLEA, IS THERE ANYTHING
5 ELSE MORE TO IT?

6 A. NO, MA'AM.

7 Q. HAS THE SOLICITOR FULLY AND COMPLETELY STATED WHAT
8 YOU UNDERSTAND THE NEGOTIATED PLEA TO BE?

9 A. YES, MA'AM.

10 Q. SIR, HAVE YOU BEEN SATISFIED WITH YOUR LAWYERS'
11 SERVICES?

12 A. YES, MA'AM, I HAVE.

13 Q. HAVE THEY ANSWERED ALL OF YOUR QUESTIONS?

14 A. YES, MA'AM, THEY HAVE.

15 Q. HAVE THEY DONE EVERYTHING YOU ASKED OR EXPECTED IN
16 REPRESENTING YOU?

17 A. YES, MA'AM, THEY HAVE.

18 Q. HAVE YOU SPOKEN WITH THEM FOR AS LONG AND AS OFTEN
19 AS YOU HAVE FELT IS NECESSARY TO REPRESENT YOU?

20 A. YES, MA'AM, I HAVE.

21 Q. DO YOU NEED TO SPEAK WITH THEM ANY FURTHER AT THIS
22 TIME?

23 A. NO, MA'AM.

24 Q. HAVE THEY DONE EVERYTHING THAT YOU'VE ASKED OR
25 EXPECTED?

1 A. YES, MA'AM.

2 Q. IS THERE ANYTHING MORE YOU WOULD HAVE THEM DO TODAY
3 THAT THEY HAVE NOT ALREADY DONE?

4 A. NO, MA'AM.

5 Q. AND DO YOU HAVE ANY COMPLAINTS ABOUT THEIR SERVICES?

6 A. NO, MA'AM.

7 Q. HAS ANYONE PROMISED YOU ANYTHING OR HELD OUT ANY
8 HOPE OF A REWARD TO CAUSE YOU TO PLEAD GUILTY?

9 A. NO, MA'AM.

10 Q. HAS ANYONE USED THREATS, COERCION, FORCE, PRESSURE,
11 OR INTIMIDATION TO CAUSE YOU TO PLEAD GUILTY?

12 A. NO, MA'AM.

13 Q. ARE YOU PLEADING GUILTY FREELY AND VOLUNTARILY AND
14 OF YOUR OWN WILL?

15 A. YES, MA'AM.

16 Q. DO YOU BELIEVE YOU'VE HAD ENOUGH TIME TO MAKE UP
17 YOUR MIND ABOUT PLEADING GUILTY?

18 A. YES, MA'AM.

19 Q. HAVE YOU UNDERSTOOD MY QUESTIONS?

20 A. YES, MA'AM, I HAVE.

21 Q. DO YOU NEED TO ASK ME ABOUT ANYTHING THAT WE'VE BEEN
22 OVER?

23 A. NO, MA'AM, I DON'T.

24 Q. HAS ANYONE SUGGESTED TO YOU HOW TO ANSWER MY
25 QUESTIONS?

1 A. NO, MA'AM.

2 Q. HAVE YOU BEEN ABSOLUTELY TRUTHFUL IN EACH AND EVERY
3 ANSWER THAT YOU'VE GIVEN TO THE COURT?

4 A. YES, MA'AM.

5 Q. DO YOU UNDERSTAND THAT YOU HAVE THE RIGHT TO APPEAL
6 THIS GUILTY PLEA AND SENTENCE OF THE COURT BUT THAT YOU MUST
7 DO SO IN WRITING WITHIN TEN DAYS OF TODAY?

8 A. YES, MA'AM.

9 Q. DO YOU UNDERSTAND THAT IF YOU CANNOT AFFORD AN
10 ATTORNEY FOR THIS PROCESS THAT ONE WILL BE APPOINTED TO YOU
11 AT NO COST?

12 A. YES, MA'AM.

13 THE COURT: IS THERE ANYTHING FURTHER FROM THE
14 STATE?

15 MR. PASCOE: ONLY AFTER THE PLEA IS COMPLETED, YOUR
16 HONOR, I WAS GOING TO INTRODUCE SOME OF THE FAMILY MEMBERS.

17 THE COURT: OKAY. I FIND THERE'S A SUBSTANTIAL
18 FACTUAL BASIS FOR THIS PLEA, THAT THE DEFENDANT HAS ENTERED
19 THIS PLEA FREELY, VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY,
20 THAT HE HAS HAD THE ADVICE AND ASSISTANCE OF COUNSEL WITH
21 WHOM HE'S INDICATED TO THE COURT HE IS SATISFIED, AND I WILL
22 ACCEPT THE NEGOTIATED PLEA.

23 MR. PASCOE: THANK YOU, YOUR HONOR.

24 THE COURT: YOU'RE WELCOME.

25 MR. PASCOE: PRESENT IN THE COURTROOM, YOUR HONOR,

1 ARE A NUMBER OF RANDY BILLS' FAMILY MEMBERS: HIS WIFE,
2 MISSY, HIS SON, PAUL, AND HIS DAUGHTER, EMILY. ANOTHER VERY
3 IMPORTANT MEMBER OF THE FAMILY OBVIOUSLY COULDN'T BE HERE AND
4 THAT'S HIS OTHER DAUGHTER, ALLY. SHE'S ONLY SEVEN YEARS OLD.
5 THERE ARE A NUMBER OF OTHER FAMILY MEMBERS HERE: HIS
6 IN-LAWS, JERRY AND PATSY BUTTS, AND AS YOU CAN SEE, A NUMBER
7 OF OTHER FRIENDS AND FAMILY MEMBERS. I HAVE SPOKEN WITH
8 THEM. BEG THE COURT'S INDULGENCE.

9 THE COURT: YES.

10 MR. PASCOE: THEY DON'T WANT TO -- THEY'RE ACTUALLY
11 JUST TOO HURT OBVIOUSLY TO SAY ANYTHING, YOUR HONOR. I WOULD
12 LIKE TO SAY JUST THREE BRIEF THINGS. I -- OBVIOUSLY I DIDN'T
13 KNOW RANDY BILLS, BUT I CAN TELL YOU THIS: AFTER MEETING
14 WITH HIS FAMILY FOR LESS THAN FIVE MINUTES, YOU CAN TELL THAT
15 RANDY WAS A VERY SPECIAL PERSON.

16 THE COURT: UH-HUH.

17 MR. PASCOE: HE'S GOT A SPECIAL WIFE, VERY SPECIAL
18 IN-LAWS, JERRY AND PATSY, AND HIS CHILDREN. I FINALLY GOT TO
19 MEET WITH THEM YESTERDAY. THEY CAME DOWN HERE FROM INDIANA.
20 I MET WITH THEM, AND JUST MEETING WITH THEM I KNEW WHAT A
21 GOOD PERSON RANDY WAS. THE SECOND POINT I WANT TO MAKE IS I
22 WANT TO COMMEND THE ORANGEBURG SHERIFF'S OFFICE FOR THEIR
23 INVESTIGATION INTO THIS CASE. ANOTHER PERSON THAT'S HERE
24 TODAY IS SHERIFF LARRY WILLIAMS. I SAW HIM RIGHT THERE, AND
25 I WANT TO COMMEND THE SHERIFF'S OFFICE IN THIS CASE. THEY

1 DID AN UNBELIEVABLE JOB IN THIS INVESTIGATION.

2 WE PLED THIS CASE TODAY NOT OUT OF MERCY FOR THE
3 DEFENDANT, AND WE CERTAINLY DIDN'T PLEAD IT BECAUSE IT WASN'T
4 A GOOD CASE. I CAN SAY WITHOUT HESITATION: HAD THIS CASE
5 GONE TO TRIAL, WE WOULD HAVE WON BECAUSE OF THE JOB THE
6 SHERIFF'S DEPARTMENT DID. AND THE REASON WE PLED THIS CASE
7 WAS SO THE VICTIMS, AFTER MEETING WITH THEM FOR THE LAST
8 COUPLE OF WEEKS -- IS SO WE COULD GET SOME CLOSURE, AND
9 THAT'S THE FINAL POINT I WANT TO BRING TO THIS COURT. I WANT
10 TO THANK YOUR HONOR FOR TAKING TIME AWAY FROM HER SCHEDULE
11 BECAUSE YOU WEREN'T EVEN SUPPOSED TO BE HERE TODAY BUT TO
12 COME HERE AND ALLOW THIS FAMILY AND ALLOW US TO GET SOME
13 CLOSURE IN THIS CASE, AND I WANT TO THANK THE COURT FOR
14 TAKING TIME TO COME.

15 THE COURT: YOU'RE WELCOME.

16 MR. PASCOE: THANK YOU, YOUR HONOR.

17 THE COURT: MR. DELGADO OR MR. CULLER, WHO WOULD
18 LIKE TO PROCEED?

19 MR. DELGADO: YOUR HONOR, WE'LL BE VERY BRIEF. THE
20 DEFENDANT WOULD LIKE TO BE ABLE TO ADDRESS THE COURT IN JUST
21 A MOMENT.

22 THE COURT: CERTAINLY.

23 MR. DELGADO: WE, TOO, AS THE SOLICITOR HAS SAID,
24 WANTED TO SEEK CLOSURE FOR THIS FAMILY. THEY DESERVE THAT,
25 AND WE CAN SAY NOTHING TO THEM THAT WOULD IN ANY WAY HELP

1 CURE THE ACTIONS OF OUR CLIENT. WE ARE JUST GOING TO STAND
2 MUTE BECAUSE THEIR GRIEF IS JUST -- YOU CAN'T EVEN BEGIN TO
3 FATHOM THAT.

4 THE COURT: UH-HUH.

5 MR. DELGADO: YOUR HONOR, SOME THINGS ABOUT LEVI
6 THAT I THINK WOULD BE HELPFUL FOR THE COURT. OVER IN THE
7 JURY BOX ARE MEMBERS OF HIS FAMILY AS WELL: MR. AND MRS.
8 LEVI BING, HIS SISTER, AND A BROTHER-IN-LAW WHO ALL HAVE COME
9 TO SUPPORT LEVI. THEY, TOO, LIKE THE BILLS, ARE AN
10 EXTRAORDINARY FAMILY AS WELL.

11 THE COURT: UH-HUH.

12 MR. DELGADO: AND HAVE SUPPORTED AND LOVED OUR
13 CLIENT AND WILL CONTINUE TO DO THAT NOW AS HE SERVES THIS
14 SENTENCE. WE ASK THE COURT TO FOLLOW THE RECOMMENDATION THAT
15 THE SOLICITOR HAS PUT FORTH.

16 THE COURT: MR. CULLER?

17 MR. CULLER: I WOULD HAVE NOTHING TO ADD TO WHAT MR.
18 DELGADO HAS SAID, YOUR HONOR.

19 THE COURT: OKAY. MR. BING, IS THERE ANYTHING YOU'D
20 LIKE TO STATE FOR THE RECORD BEFORE THE COURT PRONOUNCES
21 SENTENCE?

22 MR. BING: YES, MA'AM.

23 THE COURT: I'LL BE GLAD TO HEAR FROM YOU.

24 MR. BING: I WANT TO APOLOGIZE FOR WHAT I DID TO MR.
25 RANDY BILLS. I'M VERY SORRY. IF THERE'S ANYTHING I COULD DO

1 TO BRING HIM BACK, I WOULD. AND I JUST ASK FOR Y'ALL'S
2 FORGIVENESS AND I'LL KEEP Y'ALL IN MY PRAYERS. MAY GOD BLESS
3 YOU AND YOUR FAMILY. THANK YOU. THANK YOU, YOUR HONOR.

4 THE COURT: THANK YOU VERY MUCH, MR. BING. ONE OF
5 THE MOST UNIQUE THINGS ABOUT SOUTH CAROLINA'S CIRCUIT COURT
6 SYSTEM IS THAT A CIRCUIT COURT JUDGE GETS TO PRESIDE OVER
7 BOTH CRIMINAL CASES AND CIVIL CASES. IN MOST STATES THEY DO
8 ONE OR THE OTHER, AND I THINK IT'S VERY UNIQUE THAT OUR
9 SYSTEM ALLOWS US TO DO THAT. IT IS FUNNY TO ME SOMETIMES -
10 AND I DON'T MEAN FUNNY HA-HA - BUT I MEAN IT'S FUNNY TO ME
11 SOMETIMES BECAUSE I THINK THE PUBLIC THINKS THAT THE MOST
12 GLAMOROUS PART OF OUR JOB IS CRIMINAL CASES AND THE
13 SENTENCING OF DEFENDANTS AND PRESIDING OVER CRIMINAL CASES.
14 AND IT'S PECULIAR, I GUESS MORE ON FUNNY, IS THE WORD THAT I
15 WAS SEARCHING FOR BECAUSE I DON'T THINK THAT THEY REALLY
16 TRULY GRASP HOW DIFFICULT IT IS AND THAT THERE'S NOTHING
17 GLAMOROUS ABOUT IT, NOTHING EXCITING ABOUT IT.

18 AND WHEN I LOOK AT BOTH OF THESE FAMILIES AND I
19 UNDERSTAND THE PROFUNDITY OF THE LOSS THAT THEY'RE BOTH
20 SUFFERING, BOTH THE VICTIM'S FAMILY WHO HAVE LOST WHAT I'M
21 CERTAIN WAS A UNIQUE PERSON AS IS EVIDENCED BY THE NUMBER OF
22 PEOPLE WHO ARE HERE IN SUPPORT OF HIM AND THE COMMENTS MADE
23 BY THE SOLICITOR WHO DID NOT KNOW HIM BUT CERTAINLY
24 VICARIOUSLY THROUGH HAVING GOTTEN TO KNOW HIS FAMILY NOW HAS
25 GOTTEN TO KNOW THE NATURE OF THE PERSON WHO WAS LOST AS A

1 RESULT OF THIS HORRIBLE TRAGEDY, AND THEN I'M FACED WITH THE
2 PROFUNDITY OF THE LOSS OF BOTH THE BING FAMILY AS I LOOK AT A
3 YOUNG MAN WHO BY ALL OUTWARD APPEARANCE SHOULD NEVER HAVE
4 FOUND HIMSELF IN THIS SITUATION, WHO WAS EDUCATED, WHO IS
5 VERY WELL SPOKEN, AND WHO BY ALL OBSERVATION IN THIS LIMITED
6 AMOUNT THAT I HAVE HAD TO SEE HIM TODAY IS FAIRLY HUMBLE.

7 I DON'T SEE A LOT OF REMORSE IN DEFENDANTS, AND I
8 SEE THAT IN HIM. AND I'LL TELL YOU MY MENTOR, JUDGE FIELDS,
9 WHO'S RETIRED NOW FROM THE CIRCUIT COURT -- I WAS HIS LAW
10 CLERK BEFORE I WENT INTO PRIVATE PRACTICE, AND I USED TO HEAR
11 HIM SAY MANY THINGS THAT REALLY STUCK WITH ME, ONE OF WHICH
12 WAS: BUT FOR THE GRACE OF GOD THERE GO I, WHICH HELPS YOU TO
13 UNDERSTAND THAT THERE ARE MANY CIRCUMSTANCES IN LIFE THAT CAN
14 TAKE A GOOD LIFE AND TURN IT INTO A VERY TRAGIC SET OF
15 CIRCUMSTANCES. AND THEN THE OTHER WAS REALLY LEARNING HOW TO
16 DISCERN BETWEEN PEOPLE WHO ARE REALLY EVIL AND UNREPENTANT
17 AND THOSE WHO HAVE JUST MADE HORRIBLE MISTAKES FOR WHATEVER
18 REASON. AND, AGAIN, I GUESS I JUST MAKE THAT OBSERVATION
19 REGARDING MR. BING TO HELP BOTH THE STATE AND THE DEFENSE
20 UNDERSTAND WHY I WOULD ACCEPT THE NEGOTIATED PLEA BASED ON MY
21 OBSERVATIONS OF HIM IN THIS COURTROOM TODAY.

22 WE'VE HAD A LOT OF PRETRIAL DISCUSSIONS REGARDING
23 THIS CASE AND TRYING TO SCHEDULE IT AND THE MAGNITUDE OF
24 SCHEDULING IT AND, OF COURSE, YOU ALL, HOWEVER, GET TO KNOW A
25 WHOLE LOT MORE ABOUT YOUR CASE. YOU GET TO KNOW A WHOLE LOT

1 MORE ABOUT THE DEFENDANT THAN I DO. SO TO SOME EXTENT I
2 LEARN THROUGH YOU ALL, BUT THEN WHEN I GET TO COURT I THEN
3 GET THE OPPORTUNITY TO ACTUALLY OBSERVE THE ENTIRE
4 CIRCUMSTANCE. AND SO I HAVE NO TREPIDATION IN ACCEPTING THE
5 PLEA. I'VE ALREADY ACCEPTED IT, AND I THINK IT IS
6 APPROPRIATE. I THINK IT IS AN APPROPRIATE NEGOTIATED PLEA,
7 AND I CERTAINLY THINK IT IS AN APPROPRIATE RESOLUTION OF THIS
8 CASE, CERTAINLY FOR THE FAMILY. I AGREE WITH YOU CLOSURE IS
9 IMPORTANT, AND I COMMEND YOU ALL. YOU ALL THANKED ME, BUT I
10 COMMEND YOU FOR THE HARD WORK THAT YOU ALL HAVE DONE IN
11 GETTING THIS CASE RESOLVED.

12 BASED ON WHAT HAS BEEN PRESENTED TO THE COURT -- MR.
13 BING, IF YOU WOULD STAND FOR SENTENCING. SIR, ON THE CHARGE
14 OF MURDER, PURSUANT TO THE NEGOTIATED PLEA, YOU ARE SENTENCED
15 TO STATE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 40 YEARS.
16 ON THE CHARGE OF POSSESSION OF A FIREARM DURING THE
17 COMMISSION OF A VIOLENT CRIME, YOU'RE SENTENCED TO FIVE
18 YEARS, AND ON THE CHARGE OF GRAND LARCENY YOU ARE SENTENCED
19 TO TEN YEARS. ALL SENTENCES TO RUN CONCURRENTLY CONSISTENT
20 WITH THE NEGOTIATED PLEA. IS THERE -- DOES HE -- HOW MUCH
21 TIME HAS HE ALREADY SERVED IN THE DEPARTMENT OF CORRECTIONS?

22 MR. CULLER: HE'S BEEN IN ORANGEBURG FOR ABOUT A
23 YEAR AND A HALF. I DON'T KNOW THE EXACT...

24 MR. PASCOE: NOVEMBER THE 12TH?

25 MR. BING: SIXTEEN MONTHS TO BE EXACT, MA'AM.

1 THE COURT: OKAY. AND I WILL ORDER THAT THE
2 DEPARTMENT OF CORRECTIONS, PURSUANT TO 24-13-40, CALCULATE
3 ANY TIME THAT HE IS TO BE GIVEN CREDIT PURSUANT TO STATUTE.
4 IS THERE ANYTHING FURTHER FOR THE RECORD FROM THE STATE?

5 MR. PASCOE: NO, YOUR HONOR.

6 THE COURT: FROM THE DEFENSE?

7 MR. DELGADO: NO, MA'AM.

8 MR. CULLER: NO, YOUR HONOR.

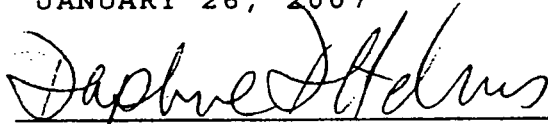
9 THE COURT: THANK YOU ALL VERY MUCH.

10 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE
11 WERE NO EXHIBITS INTRODUCED.)
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I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE 14TH DAY OF MARCH, 2005.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JANUARY 26, 2007

A handwritten signature in cursive script, reading "Daphne D. Helms", written over a horizontal line.

DAPHNE D. HELMS, COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

Levi Bing, Jr. #308051)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2006-CP-38-273

APPLICATION FOR

POST-CONVICTION RELIEF

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 Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010
2. Name and location of Court which imposed sentence Orangenburg County General Sessions, 190 Gibson Street, Orangeburg, SC 29115
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2003-GS-38-2411 Murder
 - (b) 2003-GS-38-2412 Grand Larceny
 - (c) 2003-GS-38-2413 Possession of a Weapon During the Commission of a Violent Crime

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 14, 2005 - 40 years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Involuntary Guilty Plea
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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

No

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

(a) which grounds have been presented:

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

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

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

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

(a) _____

- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? X
 - (b) your trial, if any? _____
 - (c) your sentencing? X
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. John Delgado, PO Box 1359, Columbia, SC 29202
 - ii. Michael R. Culler, Jr., Orangeburg County Public Defender, PO Box 1112, Orangeburg, SC 29115
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Plea & Sentencing
 - ii. Plea & Sentencing
 - iii. _____
19. State clearly the relief you seek in filing this application:
New trial
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

County of Lee

VERIFICATION

I, Levi Bing, Jr., #308051, 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.

Levi Bing Jr.

SWORN to and subscribed before me this 10
day of March, 2014.

Debra Jones (L.S.)
Notary Public

My Commission Expires: 11-4-2015

11-4-2015

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

I, Levi Bing, Jr., #308051, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Levi Bing Jr.
Applicant

SWORN or affirmed to and subscribed before me this
6 day of MARCH, 2004.

Debra Jones
Notary Public

My Commission Expires: 11-7-2015

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

2006-CP-38-273

Levi Bing, Jr., #308051,)

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

Respondent, making its Return to the application for post conviction relief (PCR) filed March 7, 2006, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for Murder (03-GS-38-2411); Grand Larceny (03-GS-38-2412); and Possession of a Weapon during the Commission of a Violent Crime (03-GS-38-2413). The Applicant was represented by John Delgado, Esquire and Michael R. Culler, Jr., Esquire. On March 14, 2005, Applicant pled guilty to the charges. He was sentenced by the Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any of the above not so attached will be forwarded upon receipt.

II.

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

1. Ineffective assistance of counsel; and
2. Involuntary guilty plea.

III.

In a post-conviction relief action, Applicant bears the burden of proving the allegations in their 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced 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 pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

In his second allegation the Applicant alleges that he did not plead guilty freely and voluntarily. The State submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered

with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The State submits the Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Respondent submits that the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of

material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

LANCE S. BOOZER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

3/29, 2007.

I N D E X

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2					
3	Post Conviction				
4	Relief Hearing	3			
5	Levi Bing, Jr.	5	25	34	
6	John Delgado	39	55	62	65
7	Michael Culler	65	102	108	
8	Levi Bing, Sr.	110			
9	Levi Bing, Jr.	120			
10	Certificate of Transcription	127			
11					
12					
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1 THE COURT: All right. We are on the
2 record in the State of South Carolina v. Levi Bing,
3 Jr. And, Mr. Bing, you are Levi Bing, Jr.?

4 THE DEFENDANT: Yes, ma'am. I am.

5 THE COURT: Very well. And Mr. Bing, of
6 course, is represented by Ms. Belinda Davis-Branch
7 and he is present.

8 And you doing okay today?

9 THE DEFENDANT: Yes, ma'am. I am.

10 THE COURT: Very well. Thank you. Thank
11 you, Mr. Bing.

12 And I have briefly reviewed the application
13 for post-conviction relief and the return, and I
14 just, if I may, I would note that Mr. Bing's position
15 is that in his plea he had ineffective assistance of
16 counsel which yielded then an involuntary guilty plea
17 and I just notice that eleven doesn't set forth
18 anything with any specificity.

19 In No. 11 -- but Mr. Boozer are you
20 prepared to go forward?

21 MR. BOOZER: Yes, ma'am. We are.

22 THE COURT: Okay. Very well then. All
23 right. Are there any preliminary matters first of
24 all from the applicant?

25 MS. DAVIS-BRANCH: No, Your Honor.

1 THE COURT: From the -- and then from the
2 State?

3 MR. BOOZER: None from the State, Your
4 Honor.

5 THE COURT: Very well. If you would call
6 your first witness, please, ma'am.

7 MS. DAVIS-BRANCH: Yes, Your Honor. I'd
8 like to call Mr. Bing.

9 THE COURT: All right.

10 (Levi Bing, called as a witness,
11 having first been duly sworn, is
12 examined and testified as follows:)

13 THE COURT: Mr. Bing, would you please
14 state your name for the record.

15 THE DEFENDANT: Yes, I'm Levi Bing, Jr.

16 THE COURT: And your last name is spelled
17 B-i-n-g?

18 THE DEFENDANT: Yes, ma'am, B-i-n-g.

19 THE COURT: Very well. Now, Mr. Bing, do
20 you need to see any documents through this
21 proceeding? Ms. Davis-Branch, I know it's difficult
22 for you so if you need to see a document just let us
23 know that. Okay?

24 THE DEFENDANT: Yes, ma'am.

25 THE COURT: And we'll try to help in you

1 that regard.

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: Okay. Your witness.

4 DIRECT EXAMINATION

5 BY MS. DAVIS-BRANCH:

6 Q. Mr. Bing.

7 A. Yes, ma'am.

8 Q. How are you doing?

9 A. All right. How are you doing
10 today?

11 Q. Good. Good. Mr. Bing, you are
12 presently incarcerated, aren't you?

13 A. Yes, ma'am. At Lee Correctional
14 Institution.

15 Q. And what did you do -- what are you
16 incarcerated for?

17 A. I'm incarcerated for murder,
18 grand larceny, and of possession of a weapon in
19 a violent crime.

20 Q. Did you have a trial or did you plead
21 at the time of the -- you were being charged did you
22 have a trial or did you plea?

23 A. I took a plea hearing, ma'am.

24 Q. Okay. When did you take that plea
25 hearing?

1 A. It was March 14, 2005.

2 Q Can you speak up a little, I'm having
3 trouble hearing you, maybe Her Honor can hear you I'm
4 having trouble hearing you over here.

5 A. It was March 14th, 2005, ma'am.

6 Q. Okay. And did you have an attorney to
7 represent you?

8 A. Yes, ma'am.

9 Q Who were your attorneys or did you
10 have one attorney or two attorneys.

11 A It was two, it was John Delgado
12 and Michael Culler?

13 Q Is Mr. Delgado here today?

14 A. Yes, ma'am.

15 Q. Is Mr. Culler here today?

16 A. Yes, ma'am.

17 Q. Okay. Did you have two attorneys or
18 you had a lead attorney and an assistant attorney?
19 What was the relationship between Mr. Delgado and
20 Mr. Culler?

21 A. John Delgado was pretty much the
22 lead attorney. He was the one I hired before
23 Mr. Michael culler came in on the case, ma'am.

24 Q. Did you pay Mr. Delgado?

25 A. Yes, ma'am. Family has the

1 records on that, ma'am. I can't recall how
2 much.

3 Q. And we're here today for a what kind
4 of hearing? Do you know what kind of hearing we're
5 here for today?

6 A. Yes, ma'am.

7 Q. Have you filed an application?

8 A. Yes, ma'am; it's a PCR.

9 Q. Okay. What is your understanding of a
10 PCR?

11 A. Post-conviction relief.

12 Q. And what grounds have you asserted for
13 post-conviction relief?

14 A. It was ineffective assistance of
15 counsel and involuntary plea, ma'am.

16 Q. Ineffective assistance of counsel?

17 A. Yes, ma'am.

18 Q. Would that be both of your counsel or
19 just one or neither one? Which counsel are you
20 dissatisfied with?

21 A. I would say both, ma'am.

22 Q. Both of them. That would be
23 Mr. Culler and Mr. Delgado?

24 A. Yes, ma'am.

25 Q. Why were you dissatisfied or are you

1 dissatisfied?

2 A. Ma'am, before I went to the plea
3 I was asking for assistance with the attorneys,
4 I was asking for a bond hearing which they were
5 denying, ignoring.

6 Q. You asked for a bond hearing?

7 A. Yes, ma'am. For my second bond
8 hearing because I never went in front of a bond
9 hearing with them.

10 Q. You had a first bond hearing?

11 A. Yes, ma'am, it was denied
12 because it was still under investigation,
13 ma'am. And that was Larue Hensley.

14 Q. Okay. And so you asked your
15 attorney -- you asked both of them?

16 A. Yes, ma'am.

17 Q. Okay.

18 A. Both were together.

19 Q. Both together, okay. At all times did
20 you see your attorneys together or did you see one at
21 one time and one at another time?

22 A. Sometimes both, sometimes one at
23 one time and the other at the other, yes,
24 ma'am.

25 Q. Okay. And so you are dissatisfied

1 because you did not have a bond hearing, a second
2 bond hearing?

3 A. It was a second bond hearing. I
4 was also asking about indictments.

5 Q. Okay.

6 A. And I wanted to know about the
7 indictments and I didn't receive any
8 indictments until I was in prison in November
9 of 2005 after I had pled.

10 Q. When did you plea again?

11 A. March 14th, 2005.

12 Q. And when did you receive your
13 indictment?

14 A. November the 7th, sometime 2005,
15 ma'am.

16 Q. Did you ask for the indictments before
17 the plea?

18 A. Yes, ma'am.

19 Q. Who did you ask for them?

20 A. Michael Culler and John Delgado.

21 Q. And what was their response?

22 A. I really can't recall on that,
23 ma'am, it was nothing.

24 Q. But did you not receive them?

25 A. No, ma'am.

1 Q. Okay. Do you have a copy of the
2 indictments now?

3 A. Yes, ma'am. I do.

4 Q. Okay.

5 MS. DAVIS-BRANCH: One moment, Your Honor.

6 THE COURT: Okay.

7 (Pause in proceedings.)

8 BY MS. DAVIS-BRANCH:

9 Q. Were you indicted for murder,
10 Mr. Levi.

11 A. Yes, ma'am.

12 MS. DAVIS-BRANCH: This is part of the
13 Court's records already, so I don't intend to submit
14 them, Your Honor. I think they're part of the
15 Court's records already.

16 THE COURT: Yes, they are.

17 MS. DAVIS-BRANCH: I'm not quite sure what
18 the number is.

19 BY MS. DAVIS-BRANCH:

20 Q. I just want to show this to you.

21 A. Yes, ma'am.

22 Q. You were indicted for what?

23 A. Murder, ma'am.

24 Q. You were also indicted for?

25 A. Grand larceny.

1 Q. Okay. Did you read those indictments?

2 A. Yes, ma'am. I have.

3 Q. Do you have issues with those
4 indictments?

5 A. Yes, ma'am.

6 Q. What are your issues with those
7 indictments, Mr. Bing?

8 A. On the murder it's not showing
9 the precise time of assault of the deceased.
10 It's just showing the date and the county of
11 which the person was deceased. I'm raising
12 jurisdiction of -- lack of jurisdiction because
13 it just doesn't reply that.

14 On the grand larceny the car description
15 that they're accusing me for having is not the right
16 description.

17 Q. Your testimony is that you never
18 received these indictments; am I correct?

19 A. Correct, ma'am.

20 Q. Okay. When you talked to Mr. Culler
21 and Mr. Delgado about not having received them and
22 what you were being charged with, what -- did you
23 complained about that?

24 A. Yes, ma'am. I had a few
25 complaints with them.

1 Q. What were your complaints?

2 A. The complaints were I didn't
3 have all the discovery, I had partial discovery
4 before my plea. If I had everything like when
5 I received my discovery in 2005 from Michael
6 Culler it was new findings that I found in
7 there I never seen before.

8 Q. Did you appeal your conviction,
9 Mr. Bing?

10 A. I didn't even know anything
11 about it, ma'am.

12 Q. No one ever discussed it with you?

13 A. No, ma'am.

14 Q. Did you ever have a conversation with
15 your family about it?

16 A. Yes, ma'am. I spoke with them a
17 few times about it.

18 Q. Okay. And what was that discussion
19 about?

20 A. They were saying that I would
21 have a parole something. It was a parole date
22 somewhere into it and I didn't.

23 Q. Okay. I'm sorry?

24 A. I didn't get anything on that,
25 ma'am.

1 Q. Okay.

2 A. The transcript says -- well, my
3 sentencing sheet says one thing different.

4 Q. Okay. Let's talk about -- a little
5 bit about what you were charged with.

6 A. Yes, ma'am.

7 Q Do you recall the gentleman's name
8 whose murder you were charged -- who you were charged
9 with murdering, his name.

10 A Mr. Randy Beals.

11 Q. Yes.

12 A. Yes, ma'am.

13 Q. Mr. Randy Beals, that's correct. On
14 the day that Mr. Beals was killed, did you spend some
15 time with Mr. Beals?

16 A. Yes, ma'am.

17 Q. Okay. What did you do with him on
18 that day?

19 A. We went into a gas station on
20 that day, I went to use the restroom; I believe
21 he did the same thing if I'm not mistaken, it
22 was on an Oak Ridge, I'm not sure.

23 Q. Okay.

24 A. Oak Ridge gas station off of 176
25 and 301 I believe, ma'am. There was a witness

1 in that gas station stating that I had spoke
2 with her.

3 Q. Do you recall her name?

4 A. I believe it's Tameka Lewis if
5 I'm not mistaken.

6 Q. I want to show you, which is also part
7 of the State's record, a statement from -- is the
8 lady you're talking about?

9 A. Yes, ma'am.

10 Q. Okay. And where was she employed?

11 MR. BOOZER: Your Honor, I haven't seen
12 this statement.

13 MS. DAVIS-BRANCH: Oh, I'm sorry.

14 MR. BOOZER: I'm not sure what she's
15 talking about.

16 MS. DAVIS-BRANCH: I'm sorry, Your Honor.

17 THE COURT: That's okay.

18 MR. BOOZER: I'm just going to ask that
19 this be limited to the issue of ineffective
20 assistance of counsel.

21 THE COURT: Sure.

22 MR. BOOZER: We're not here to try this
23 case.

24 MS. DAVIS-BRANCH: Absolutely, Your Honor.

25 THE COURT: Yes.

1 MS. DAVIS-BRANCH: Absolutely.

2 BY MS. DAVIS-BRANCH:

3 Q. What did Ms. Lewis say in accordance
4 with her statement to the police department in
5 Orangeburg.

6 A. Yes, ma'am. She said that I had
7 spoke with her that night saying that I -- I'm
8 not recalling. I can't really remember what
9 the exact words that she said that I said, but
10 I know for a fact I didn't speak with her. I
11 was telling John Delgado and Michael Culler
12 should go into investigation on the videotape
13 of that. He have seen videotapes of both of
14 the gas station stores --

15 Q. Just a moment. Just a moment.

16 A. Yes, ma'am.

17 Q. All right. Was there videotape that
18 recorded your presence in the store, Mr. Bing?

19 A. Yes, ma'am. There were.

20 Q. Okay. And is it your testimony that
21 you did not speak to Ms. Lewis?

22 A. Yes, ma'am. That's my
23 testimony.

24 Q. And is it your -- would the videotape
25 would have been able to confirm?

1 A. Yes.

2 Q. Or -- it would have?

3 A. Yes, ma'am.

4 Q. Okay. And so what did you ask

5 Mr. Delgado and Mr. Culler to do?

6 A. To investigate the tape.

7 Q. Did they do that?

8 A. I'm not sure, ma'am.

9 Q. Okay.

10 A. I asked them to see the tape

11 myself. They never --

12 Q. You asked them to see the tape

13 yourself?

14 A. Yes, ma'am.

15 Q. And you weren't provided the tape?

16 A. No, ma'am.

17 Q. In your opinion, Mr. Bing, had that

18 information been brought forth to a jury --

19 A. Yes, ma'am.

20 Q. -- or you have had the opportunity to

21 bring that information forth to a jury --

22 A. Yes, ma'am.

23 Q. -- would they have made the outcome

24 different for you?

25 A. Yes, ma'am. I believe it would

1 have caused a reasonable doubt.

2 Q. Why do you think that?

3 A. It would have been a credibility
4 of just showing that the witness is not telling
5 the truth, ma'am.

6 Q. Okay. And you did not have that
7 opportunity?

8 A. No, ma'am. It was also another
9 videotape that Mr. Delgado said that it
10 wouldn't show at all.

11 Q. Okay. What was this other videotape?

12 A. This was at the Kangaroo Gas
13 station in Dixiana exit. I believe that would
14 be in Columbia, South Carolina, ma'am.

15 Q. Okay. Mr. Bing.

16 A. Yes, ma'am.

17 Q. You had a chance to review all the
18 information that the State has in their file, haven't
19 you?

20 A. I believe so, ma'am.

21 Q. Okay. Do you recall anyone ever
22 saying that there was another vehicle at the scene of
23 the accident or scene of the crime?

24 A. Yes, ma'am.

25 Q. Okay. Do you know who said that?

1 A. I want to say -- I'm not sure of
2 the first name. I want to say Ms. Brunch or
3 Ms. Branch. I know the initials is L. B. on
4 that, ma'am. It's an elderly woman and a
5 younger woman.

6 Q. Perhaps this witness affidavit will
7 refresh your recollection.

8 A. Yes, ma'am.

9 Q. What is the name there?

10 A. It would be Lurlynn Bunch.

11 Q. Okay. Thank you. You are read her
12 statement, didn't you?

13 A. Yes, ma'am.

14 Q. Okay. Did she say anything in that
15 statement that you believe would have benefited you,
16 Mr. Bing?

17 A. Yes, ma'am. It was another
18 vehicle, a full-sized truck that was in the
19 statement, ma'am, that she saw.

20 Q. Okay. Let's talk a little bit more
21 detail about it. Ms. Burch I believe her name is.

22 A. Yes, ma'am.

23 Q. She was a witness on behalf of who,
24 Mr. Bing?

25 A. I believe that would be behalf

1 of my side.

2 Q. Okay.

3 A. Behalf of me.

4 Q. What did she say in her statement?

5 A. In her statement that she seen a
6 light-colored full-sized truck that wouldn't
7 stop.

8 Q. Okay. Did you ask your counsels to
9 investigate that matter?

10 A. Yes, ma'am.

11 Q. And what was the result of their
12 investigation?

13 A. I'm not sure, ma'am.

14 Q. Had it been investigated, Mr. Bing,
15 what would you think would be the result?

16 A. It would have showed that it was
17 more than just a Corvette at the crime of the
18 scene, ma'am.

19 Q. But you didn't have that opportunity,
20 did you?

21 A. No, ma'am.

22 Q. Because why?

23 A. It was no -- nothing
24 investigated, ma'am.

25 Q. Do you feel that you have been harmed

1 by this lack of investigation on your trial counsel's
2 part?

3 A. Yes, ma'am. It's just when I
4 got arrested this was the first case ever
5 happened to me, period in life.

6 Q. You ever been in trouble before?

7 A. No, ma'am.

8 Q. You never been arrested before?

9 A. No, ma'am.

10 Q. Okay.

11 A. I was ignorant to the law, I put
12 all my trust into them two guys there, in
13 Mr. Culler and Mr. Delgado, to represent me to
14 the full capacity. At one point they was
15 telling me that they didn't feel comfortable
16 representing me in trial, which I didn't know
17 what to do then.

18 They had seeked the death penalty on me,
19 seeked notice of the death penalty and my family they
20 were shook and scared and we didn't know what to do.

21 Q. Did you ever fire your attorneys?

22 A. One time we was in a conference
23 meeting in Orangeburg County General Sessions.
24 It wasn't no court or nothing going on. We
25 just went up there to meet up, talk and meet.

1 And I had spoke with Mr. John Delgado and
2 Michael Culler and I asked them to bring me up
3 for another bond hearing because it was another
4 solicitor, a new solicitor in town. It was
5 Mr. David Pascoe. The last time I went up for
6 a bond hearing was with Robert Robbins, Robbie
7 Robbins and that was with a whole different
8 attorney, which was LaRue Henley.

9 A So I wanted to go for another
10 bond hearing which I had the right to do with a
11 new solicitor and new lawyer representing me.
12 And he told me that he wouldn't do it. I asked
13 him numerous of times, Mr. Culler and everybody
14 and they wouldn't do it. So I told them right
15 then to get the H off my case.

16 Q. Do you understand or did they give you
17 an explanation as to why they were refusing to do
18 something that you asked them to do?

19 A. No, ma'am.

20 Q. Okay. So you said you told them to
21 get the H off your case?

22 A. Yes, ma'am.

23 Q. In your opinion was that a dismissal?

24 A. Yes, ma'am. To me.

25 Q. Okay. And did they continue to work

1 despite your dismissal of them?

2 A. Yes, ma'am.

3 Q. Okay.

4 A. They also gave me a piece of
5 paper to sign which was telling me something
6 about the trial, that they wouldn't be
7 responsible for the outcome of the trial and so
8 on and I also told them again that they can
9 dismiss off my case.

10 Q. Okay. Did you discuss that with your
11 parents?

12 A. Yes.

13 Q. And what was their response?

14 MR. BOOZER: Your Honor, I'm going to
15 object to hearsay. I'm not sure he can testify to
16 what his parents said.

17 MS. DAVIS-BRANCH: I'll rephrase, Your
18 Honor.

19 THE COURT: All right.

20 MS. DAVIS-BRANCH: Okay.

21 BY MS. DAVIS-BRANCH:

22 Q. Did you discuss it with your parents?

23 A. Yes, ma'am.

24 Q. Was there any different outcome as a
25 result of your discussion with your parents?

25 Q. You didn't believe them or you did

1 believe them?

2 A. Yes, I did believe them.

3 Q. Okay.

4 A. But I just don't feel good about
5 it.

6 Q. Were you afraid?

7 A. Yes, ma'am. I was really
8 afraid.

9 Q. What were you afraid of, Mr. Bing?

10 A. They were saying they were going
11 to kill me or life sentence.

12 Q. Okay. Had you been served with the
13 death notice?

14 A. Yes, ma'am.

15 Q. Okay.

16 MS. DAVIS-BRANCH: Just a moment, Your
17 Honor.

18 THE COURT: All right.

19 MS. DAVIS-BRANCH:

20 Q Answer any questions that Mr. Boozer
21 may have, okay?

22 A. Yes, ma'am.

23 THE COURT: Cross-examination.

24 MR. BOOZER: Court's indulgence, Your
25 Honor?

1 THE COURT: Sure.

2 MR. BOOZER: If it please Court, Your
3 Honor.

4 THE COURT: Yes, sir.

5 CROSS-EXAMINATION

6 BY MR. BOOZER:

7 Q Mr. Bing, do you have a copy of the
8 transcript in front of you today?

9 A No, sir, I don't.

10 MR. BOOZER: Your Honor, may I approach
11 the witness?

12 THE COURT: I've got one. You tell me what
13 page I'll pass it to him.

14 MR. BOOZER: Might have you working a
15 little bit.

16 THE COURT: That's okay.

17 BY MR. BOOZER:

18 Q Page 6 of the transcript, please.

19 MR. BOOZER: And if you prefer I can stand
20 up and do this as well, Your Honor.

21 THE COURT: That's okay. Can you see that?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Just pass it back. It's going
24 to be difficult for you to do you can pass it up here
25 I'll change the pages.

1 THE DEFENDANT: Okay.

2 BY MR. BOOZER:

3 Q. Mr. Bing, on page 6 of the transcript
4 you tell the Court that you haven't been treated for
5 abuse of alcohol drugs or any mental illness,
6 correct?

7 A. Correct, sir.

8 Q. Then you tell the Court that you don't
9 have any conditions that are going to keep from you
10 understanding what you're doing there that day at the
11 plea; is that correct?

12 A. Correct, sir.

13 Q. Now, further down on page 6 you told
14 the Court that the lawyers had explained the charges
15 punishments and all your rights to you is that
16 correct?

17 A. Yes, sir.

18 Q. You told the Court that you were
19 pleading guilty to murder and you understood that the
20 minimum was 30 and the max was life; is that correct?

21 A. Yes, sir.

22 Q. You go on you tell the Court that
23 you're pleading guilty to grand larceny and
24 possession of a weapon; is that correct?

25 A. Yes, sir.

1 Q. Now, on page 8 of the transcript, if
2 you could turn to that for me.

3 A. (The witness complies.) Yes,
4 sir.

5 Q. You tell the Court that you understand
6 that there's a negotiated plea of 40 years and you
7 say yes; is that correct?

8 A. Yes, sir.

9 Q. Now, going over to page 12 of the
10 transcript, if you would flip to that for me.

11 A. (The witness complies.) Yes,
12 sir.

13 Q. And I'm not going to read what the
14 solicitor said, but the solicitor goes over a set of
15 facts --

16 A. Yes, sir.

17 Q. -- about what happened. And on page
18 12 you tell the Court that you agreed with the
19 solicitor's facts what he said that day you agreed
20 with. You said that's what happened; is that
21 correct?

22 A. Yes, sir.

23 Q. All right. You said nothing needed to
24 be changed; is that correct?

25 A. Yes, sir.

1 Q. Nothing needed to be changed or added;
2 is that correct?

3 A. Yes, sir.

4 Q. Now, going over to 13.

5 A. Go ahead, sir.

6 Q. Going over to 13, you tell the Court
7 that you understood what rights you were giving up
8 and again you tell the Court that your lawyers have
9 even explained the indictments to you; is that
10 correct?

11 A. Yes, sir. They explained the
12 indictments, but I never viewed the
13 indictments.

14 Q. But you told the Court that they had
15 explained them to you; is that correct?

16 A. Yes, sir.

17 Q. Okay. Did you know at the time of the
18 plea what you were there pleading to? You knew what
19 you were there pleading to, didn't you?

20 A. Correct, sir.

21 Q. So you knew that you were there for
22 murder?

23 A. Yes, sir.

24 Q. Grand larceny and possession of a
25 weapon?

1 A. That's correct, sir.

2 Q. Now, if you'll look at page 14 of the
3 transcript.

4 A. (The witness complies.) Go
5 ahead, sir.

6 Q. Thank you, Mr. Bing.

7 A. Yes, sir.

8 Q. You tell Court that you're satisfied
9 with your lawyers. Did you tell him that?

10 A. Which number, sir?

11 Q. Page 14 of the transcript. Line 10
12 the Court says, Sir have you been satisfied with your
13 lawyer's services? You say, Yes, ma'am, I have. Did
14 you say that?

15 A. Yes, sir.

16 Q. All right. You say they've answered
17 all your questions, they did everything they could
18 and you didn't need any more time with them. Is that
19 what you said?

20 A. Yes, sir.

21 Q. If you'll flip to page 15 of the
22 transcript.

23 A. (The witness complies.) Yes,
24 sir.

25 Q. All right. You say you've got no

1 complaints about your attorneys' services; is that
2 correct?

3 A. Yes, sir.

4 Q. You say that no one's threatened you,
5 no one's promised you, no one's made you plead
6 guilty. Is that what you said?

7 A. I had made a pause in that, yes,
8 sir.

9 Q. I don't see it in here. Did you say
10 no?

11 A. Yes, sir.

12 Q. You said no one's forced you, no one's
13 pressured you, no one's intimidated you to make you
14 plead guilty; is that correct?

15 A. Yes, sir.

16 Q. You told the Court that this was
17 voluntarily and freely entered, didn't you?

18 A. Yes, sir.

19 Q. You told the Court you understood all
20 Court's questions, didn't you?

21 A. Yes, sir.

22 Q. Bottom of 15, top of 16, the Court
23 asks you if anyone suggested to you how to answer
24 those questions; and you said no they hadn't; is that
25 correct?

1 THE COURT: He's got to go to 16. Did you
2 read 15?

3 THE DEFENDANT: Yes, ma'am.

4 THE COURT: Okay. Let's go to 16. There
5 you go. There's 16.

6 THE DEFENDANT: Yes, sir.

7 BY MR. BOOZER:

8 Q. Then going through 16 you even go and
9 you tell the Court that you've been absolutely
10 truthful in all your answers; is that correct?

11 A. Yes, sir.

12 Q. Are you being truthful here today?

13 A. Yes, sir. I am.

14 Q. Well, were you being truthful that
15 day?

16 A. Yes, sir.

17 Q. Well, you just told me that at the
18 plea you were pressured and you answered all these
19 questions that you weren't pressured, that you
20 weren't intimidated --

21 A. Yes, sir.

22 Q. Yet you're saying you are being
23 truthful today and you were pressured and
24 intimidated.

25 A. Yes, sir.

1 Q So which one is it? Were you being
2 pressured then or not being pressured then?

3 A. Okay. Like the indictments, I
4 never got view of them until November 2005
5 after I had the plea March 14th, sir. If I had
6 got view of the indictments, if I had got view
7 of the indictments I would have never plead,
8 sir, beforehand.

9 Q. As I stated earlier, you told the
10 Court that the attorneys had been over all the
11 indictments with you; is that what you said?

12 A. They told me about the
13 indictments I never viewed them, sir. Never
14 viewed them.

15 Q. All right. Now, also on 16 you told
16 the Court that you understood you had a right to
17 appeal; is that correct?

18 A. Yes, sir.

19 Q. You understood that then, right?

20 A. Yes, sir. They said I have a
21 right to appeal, but I didn't know what -- what
22 to do, sir.

23 Q. Well, the Court says, You have the
24 right to appeal the guilty plea, but you must do it
25 in writing within ten days; and you said you

1 understood that. Is that correct?

2 A. Yes. But to who?

3 Q. Why didn't you ask that then?

4 A. That's a question, sir.

5 Q. All right. On page 19 if you'd flip
6 to that for me.

7 A. (The witness complies.) Yes,
8 sir.

9 Q. If you'll look at the very bottom of
10 page 19.

11 A. Uh-huh.

12 Q I know this is in the record, but I
13 just want you to read this for us here today. I was
14 you to read starting at 24, line 24, what you told
15 the Court.

16 A. I said I want to apologize for
17 what I did to --

18 Q. Can you speak up a little bit so the
19 court reporter can hear you?

20 A. I want to apologize for what I
21 did to Mr. Randy Beals. I'm very sorry. If
22 there's anything I could do to bring him back I
23 would; and I just ask for y'all's forgiveness
24 and I'll keep y'all in my prayers. May God
25 bless you and your family. Thank you. Thank

25

1 BY MS. DAVIS-BRANCH:

2 Q. Mr. Bing.

3 A. Yes, ma'am.

4 Q. Your transcript, when Her Honor -- I
5 believe it was Judge Jefferson?

6 THE COURT: Jefferson.

7 BY MS. DAVIS-BRANCH:

8 Q. She asked you a lot of questions
9 didn't she?

10 A. Yes, ma'am.

11 Q. She asked you about your attorney,
12 were you happy. Did you say yes?

13 A. Yes, ma'am.

14 Q. You did?

15 A. No. No, ma'am. I didn't say
16 yes, like...

17 Q. What did you say?

18 A. She asked me if the attorneys
19 had promised me anything and --

20 MR. BOOZER: Your Honor, I would object. I
21 think the record reflects what he said. I don't
22 think we can go and interpret what the force of his
23 yes or no was, I think we just need to go off what
24 was in the record of what he said.

25 MS. DAVIS-BRANCH: Your Honor, I'm to the

1 refuting what's in the record. What I'm merely
2 trying to solicit from him is the fact that --

3 THE COURT: You can proceed. You can
4 proceed.

5 MS. DAVIS-BRANCH: Thank you, Your Honor.

6 THE COURT: The record does speak for
7 itself, but if you're going for...

8 MS. DAVIS-BRANCH: Yes, ma'am I'm not
9 refuting that.

10 THE COURT: I'm going to let you ask him
11 these questions.

12 MS. DAVIS-BRANCH: Thank you, Your Honor.

13 MS. DAVIS-BRANCH:

14 Q. Did you hesitate at any time in
15 regards to your questions that were being asked to
16 you by the judge?

17 A. Yes, ma'am. I have witnesses of
18 that, ma'am.

19 Q. Who were those witnesses?

20 A. Andrea Green, my sister, Levi
21 Bing, Sr. my father, Janie Bing, my mother and
22 Stanley Davis.

23 Q. What question did you hesitate on?
24 Because it's not in the transcript.

25 A. I hesitated on if the attorneys

1 had promised me anything, yes, ma'am. I was
2 being forced to plea.

3 Q. How were you being forced, Mr. Bing,
4 to plea?

5 A. Because I didn't -- I felt I had
6 nothing else to do, ma'am.

7 Q. What do you think would have happened
8 if you said, Yes, Your Honor, I'm being promised
9 something?

10 A. That it would have went
11 downhill. I'm not sure, ma'am.

12 Q. The Court -- would the Court have
13 accepted your plea?

14 A. Yes, ma'am. Because they said
15 it was negotiated.

16 Q. Okay.

17 A. They said the judge didn't have
18 anything to do with that, with the negotiation.

19 Q. Again, Mr. Bing --

20 A. Yes, ma'am.

21 Q. -- was your plea voluntarily made?

22 A. No, ma'am.

23 Q. Were you scared?

24 A. Yes, ma'am.

25 Q. If you had to do all over again today,

1 what do you do, Mr. Bing?

2 A. Went to trial, ma'am.

3 Q. You think the evidence at the time
4 that Mr. Delgado and Mr. Culler reviewed your case,
5 you think they could have done something differently?

6 A. Yes, ma'am.

7 Q. What could they have done differently?

8 A. I'm not sure on their expertise,
9 ma'am.

10 Q. Okay.

11 MS. DAVIS-BRANCH: No further questions,
12 Your Honor.

13 THE COURT: Very well. Additional
14 cross-examination?

15 MR. BOOZER: Nothing from the State, Your
16 Honor.

17 THE COURT: Very well. You can come back
18 down. Take your time. Take your time.

19 (Whereupon, the witness steps down from the
20 Witness stand.)

21 THE COURT: Ms. Davis-Branch, if you would
22 call your next witness.

23 MS. DAVIS-BRANCH: Yes, Your Honor, I would
24 like to call Mr. Delgado, please.

25 THE COURT: All right. If you would come

PAGE INTENTIONALLY
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1 along, please.

2 (John Delgado, called as a witness,
3 having first been duly sworn, is
4 examined and testified as follows:)

5 THE COURT: Very well. If you would please
6 be seated. When you are seated, if you would state
7 your full name for the record.

8 THE WITNESS: My name is John Dennis
9 Delgado. I'm an attorney and I practice in Columbia.

10 THE COURT: All right. Your witness.

11 MS. DAVIS-BRANCH: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 Q. Mr. Delgado, your practice primarily
14 consists of what types of cases?

15 A. Criminal defense, ma'am.

16 Q. I'm sorry?

17 A. Criminal defense. I'm sorry.

18 Q. Criminal defense. Does that mean you
19 do exclusive criminal defense?

20 A. In the vast majority, yes,
21 ma'am.

22 Q. Okay. And did you have the occasion
23 to represent my client?

24 A. Yes, ma'am.

25 Q. Okay. There's been a lot of

1 discussion about you, so I want to make sure that you
2 agree.

3 A. Yes, ma'am. Yes, ma'am.

4 Q. Okay. How did you come to represent
5 him?

6 A. I was initially retained prior
7 to the time that this case became a capital
8 matter. After it became a capital matter I
9 asked to be relieved, but then also informed
10 the solicitor that I -- because I had spent a
11 lot of time on the case that I would consent to
12 being appointed now that this matter was a
13 capital offense.

14 Q. Okay. What was then the problem with
15 you being on the case since it became a capital
16 matter?

17 A. I didn't have any money to be --

18 Q. I'm sorry could you speak up a little
19 bit.

20 A. Yes, ma'am. They did not have
21 sufficient funds for what would have
22 necessarily been an extraordinarily overbearing
23 financial case for this family. Not only my
24 fee, but the fee of all the experts that we
25 eventually did retain and consult with.

1 Q. Okay.

2 A. There was a private
3 investigator, a forensic psychiatrist, a
4 forensic expert and others.

5 Q. Were you able to eventually bring
6 those people in or those additional resources?

7 A. Yes, ma'am.

8 Q. And how were you able to do that?

9 A. Through the office of indigent
10 defense as a result of funding request
11 presented to Judge Johnson.

12 Q. Okay. And do you recall how much
13 funding you received?

14 A. No, ma'am, I'm sorry, I don't.

15 Q. That's okay. When you were hired,
16 Mr. Delgado, what's your normal routine as to how you
17 get started with a criminal defense? What do you
18 normally do? I assume a gentleman of your stature,
19 you have been practicing a long time, you have,
20 basically, a routine. What is that routine?

21 A. Probably the first thing, ma'am,
22 is to meet with the client, which I did, over
23 the course of representation, I met with him
24 either independently or with Mr. Culler on
25 dozens of occasions. Then I obtained what

1 discovery was available. There was another
2 attorney who had preceded me a Ms. Larue
3 Hensley, maybe is the name from down towards
4 Charleston, maybe Summerville, who had been
5 initially retained. She sent me her file, I
6 reviewed that. I went over those matters with
7 the client. I believe, I believe that I even
8 asked the family to retain a private
9 investigator, Mr. Amos Jones, to assist me in
10 taking statements, all of which was prior to
11 the time that this matter became a capital
12 offense.

13 Q. Did you request that Mr. Culler join
14 you?

15 A. Well, after it became a capital
16 offense, under the statute, if the defendant is
17 indigent, the public defender for the county as
18 well as another independent counsel can be
19 appointed; so Mr. Culler did not become
20 involved with this matter until it went
21 capital.

22 Q. Okay. Who would have been considered
23 the lead attorney, Mr. Delgado?

24 A. Absolutely, ma'am, we worked on
25 all this side-by-side.

1 Q Simultaneously?

2 A. Yes, ma'am. We are co-lead
3 counsel.

4 Q Did you talk to him every day?

5 A. Mr. Culler?

6 Q. Yes.

7 A. No, not every day, but several
8 times. As we got closer to trial time, three
9 and four and five times a day, certainly.

10 Q. What was you -- do you recall what
11 your strategy was in preparing a defense for
12 Mr. Bing?

13 A. Ma'am, the strategy was that
14 Levi had given so many inculpatory statements
15 prior to the time of any counsel being involved
16 in this matter, there was so much evidence
17 against Levi, Ms. Davis. He is seen on a
18 videotape in the presence of Mr. Beals, the
19 victim, probably within half an hour prior to
20 the shooting; he buys the gun a month before
21 the shooting that is forensically linked to the
22 killing, this man -- the car winds up -- the
23 Corvette winds up in his possession, back in
24 Columbia; he makes a statement, initially,
25 ma'am, saying that it was a self-defense case.

1 I think you've seen the discovery where he
2 says he and Mr. Beals struggled over the gun and then
3 he took the gun and shot Mr. Beals. There's other
4 statements where he says he wasn't even present when
5 Mr. Beals was shot, that the car was bought at a auto
6 auction in Aiken that same night.

7 He says at another time that two other
8 fellows, while he's in the presence of Mr. Beals,
9 when they're down on this road Boyer Road in Holly
10 Hill, stop the car and take his, that is Levi's gun
11 and shoot Mr. Beals and then he gets the gun back and
12 comes back to Columbia.

13 He says someone named Jason Gibbs shot Mr.
14 Beals; he then --

15 Q. Let me ask you this, I appreciate your
16 generous response.

17 A Yes. The problem with it, to
18 answer your question, ma'am, is there were so
19 many stories, none of which, when you take them
20 into context, this man was shot in the back two
21 of the three times, and at one time the man's
22 body probably had to be turned over to liberate
23 the wallet that was taken from him that may
24 have contained the \$20,000. That wallet's
25 found on the highway, on the eastbound,

1 westbound side of the road going back towards
2 Columbia.

3 Q. Is it your testimony, Mr. Delgado, you
4 had a lot of negative information about your client?

5 A. Yes, ma'am. Absolutely, ma'am.

6 Q. Did you have any positive information?

7 A. Well, we had -- he comes from an
8 extraordinarily wonderful family. His parents
9 are absolutely just tremendous individuals.
10 His family support and outside of this incident
11 he had a sterling life. He worked, he went to
12 school, he had been gainfully employed, came
13 from a great family. But that, I'm sorry to
14 say, would have made sense only in the context
15 of the mitigational stage of the case that we
16 hoped to avoid.

17 Q. Let me ask you this, Mr. Delgado. You
18 heard direct testimony given by Mr. Bing about a --
19 Ms. Earlene Burch; you recall that direct testimony?

20 A. Yes, ma'am.

21 Q. Okay. And you recall I assume her
22 statement?

23 A. Yes, ma'am.

24 Q. Do I need to show it to you?

25 A. No, ma'am.

1 Q. Okay. In that statement I believe the
2 woman states very clearly that there was another car
3 seen at the accident or at the incident.

4 A. Yes, ma'am.

5 Q. Am I correct?

6 A. Yes, ma'am.

7 Q. Okay. Would that have been something
8 favorable to Mr. Bing?

9 A. Possibly favorable. We did
10 attempt to try to find out who that may have
11 been, Ms. Davis. We could not find the
12 individual who may have been driving that
13 truck. Mr. Bing gave us some information that
14 his cousin, Clay -- the last story we got was
15 that his cousin, Clay, was at the scene and his
16 cousin, Clay, was driving the truck. But we
17 went to interview Clay. He absolutely,
18 adamantly denied he'd ever been to Holly Hill
19 much less that he knew anything about this
20 matter.

21 Q. I understand what you're saying, and
22 my question is that, is the statement by the proposed
23 witness, Ms. Burch --

24 A. Yes, ma'am.

25 Q. -- relative to the other person that

1 she saw, am I correct?

2 A. Yes, ma'am.

3 Q. The fact that she made the statement
4 that she did see someone, wasn't that sufficient in
5 and of itself, even though she -- you could not have
6 located the person that she was talking about,
7 wouldn't that have been sufficient to put some doubt
8 in the jury's mind, Mr. Delgado? You understand my
9 question?

10 A. I understand exactly your
11 question. In my estimation, Ms. Davis, no,
12 ma'am that would not have.

13 Q. Okay.

14 A. It would not have caused a
15 reasonable doubt because, Ms. Davis, he says
16 innumerable times --

17 Q. Yes, sir.

18 A. -- just something about, where
19 he says he admits shooting Mr. Beals. I fired
20 the -- gun fired and fired one shot and I
21 finally got the gun from him and shot him.
22 That's his written statement. I mean that's
23 just one of the statements that he makes. I
24 mean, he admitted to police officers shooting
25 Mr. Beals.

1 Q. Was there any effort on your part to
2 have those statements -- was that a confession?

3 A. Yes, ma'am.

4 Q. Was there any effort on your part or
5 Mr. Culler's part to have it stricken from the
6 record?

7 A. No, ma'am. Because we were,
8 thank goodness, we thought that that -- that
9 those statements would be found voluntary by
10 the trial court and that they would be
11 introduced into evidence against him to show
12 him to be pathologically, possibly unfit, as
13 relates to testimony.

14 Q. Okay. Did you or Mr. Culler ever any
15 time sit down with Mr. Bing and say, Mr. Bing, we
16 don't have much to go on here?

17 A. Ms. Davis, you cannot imagine
18 the number of times, ma'am, that we did that.
19 After one occasion, ma'am, after Mr. Culler and
20 I just absolutely were just so distraught about
21 what we were going to say in the merits portion
22 of a death case, he finally said to us, all
23 right, all right, I'll tell you the truth. I
24 tell you what happened, he came up with this
25 last story, that his cousin, Clay had shot him

1 and then, ma'am, this was maybe half an hour's
2 worth of detailed description and then he asked
3 in the room at the Orangeburg County Detention
4 Center, Mr. Culler myself, our investigator,
5 Mr. Jones and Levi, he then asked to speak to
6 Amos by himself. And Michael and I went
7 outside in the hallway and were just talking to
8 each other maybe now we have something. Maybe
9 now we finally found the truth.

10 20 minutes later Amos came back out, I want
11 to tell you, everything he just told you is not the
12 truth. He just continued to not tell the truth. And
13 we over and over -- ma'am, we had meetings at --

14 Q. Is there anything, Mr. Delgado, that
15 you could have done differently as far as your
16 defense was for Mr. Bing? I've heard a lot about how
17 bad his case was and how negative it was.

18 A. Yes, ma'am.

19 Q. Is there anything you feel that you
20 could have done differently?

21 A. I think we hired the forensic
22 individuals that we would have needed to have
23 been able to help defend the case or at least
24 give us assistance in defending the case. We
25 hired mitigational witnesses that would have

1 given an overview or at least gave us
2 assistance and an overview of Levi's profile.
3 I cannot for the life of me, ma'am, think of
4 one thing, one other thing we could have done.
5 We searched every lead, we met with the client,
6 went -- we did everything we could do,
7 Ms. Davis, everything.

8 Q. At what point did you conclude that it
9 was better for him to plea, Mr. Delgado? Was it in
10 the beginning?

11 A. No, ma'am. I mean, after we get
12 the discovery and you see the major
13 inconsistencies with the testimony and show the
14 pathological quality of his stories, you begin
15 to get a feel that a jury's not going to
16 appreciate the fabrication and what our case
17 would have been, I think we would have had to
18 acknowledge had we gone to trial that the
19 merits portion of the case was going to go
20 against us and our hopeful theory of the
21 defense would be to try to save his life in the
22 mitigational portion of the death case.

23 Q. Did you discuss that with his family?

24 A. Yes, ma'am.

25 Q. Okay. So he took the plea; am I

1 correct?

2 A. Yes, ma'am.

3 Q. You were there, right?

4 A. Yes, ma'am.

5 Q. Did you observe any hesitancy on
6 Mr. Bing's part at the time of the plea? You didn't
7 see anything?

8 A. No, ma'am. I did not.

9 Q. Okay. Was Mr. Culler standing there
10 with you?

11 A. Yes, ma'am. Right there.

12 Q. One final question, I just want to go
13 back a little bit, Mr. Delgado. The statement by the
14 female worker in the gas station.

15 A. Yes, ma'am.

16 Q. You know who I mean?

17 A. Yes, ma'am.

18 Q. You know exactly who I'm talking
19 about?

20 A. I do. I do.

21 Q. Okay. Mr. Bing complains that he
22 never had a conversation with her. Did you view the
23 video?

24 A. Yes, ma'am.

25 Q. Okay. And what did the video reveal?

1 A. The video reveals the Corvette.
2 It only shows the outside of the store. It
3 shows the Corvette, the red Corvette, drives up
4 to the convenience store and two individuals
5 get out, an individual later identified as
6 Mr. Beals and Levi. They both come in the
7 store and after a period of time they leave the
8 store.

9 Now, when they leave the store, Levi gets
10 in the driver's side and drives the car away with
11 Mr. Bing (sic) as a passenger. It does not show the
12 interior of the store is -- you know what, ma'am, I
13 may be -- I may be incorrect about that. It may show
14 the interior of the store. I can't recall that it
15 showed any lengthy conversation. I know Levi was
16 using some language to flirt with the -- at least
17 that's what she says -- flirt with the attendant, the
18 woman who gives the statement. There was no audio on
19 it, so I can't recall if that's reported; but I do
20 know that it shows the two of them driving up and the
21 two of them driving away and Mr. Beals is dead within
22 an hour, so....

23 Q. Do you recall whether or not Mr. Bing
24 asked you for an opportunity to review the video?

25 A. Ma'am, I can't recall. I know

1 we told him about that and explained that to
2 him.

3 Q. In his direct testimony, he indicated
4 that he asked for the opportunity.

5 A. He may have asked for it,
6 ma'am --

7 Q. If a client asks you to do something,
8 is it -- it's possible that you would say no, based
9 on your discretion; am I correct?

10 A. Oh, no, I would never say no.

11 Q. You would never say no?

12 A. No, ma'am. It may have just
13 been maybe not the highest priority to try to
14 get a video screen into the Orangeburg County
15 Detention Center so he could see it; but we had
16 lots of -- he admitted exactly what was on the
17 video. I mean he admits driving up to the
18 store, the two of them getting out and then
19 leaving. We thought that was more important,
20 whether or not the woman says the things she
21 says. We thought that may have been more
22 important to a jury.

23 Q. Did you have an -- I'm sure you had an
24 opportunity to look at the indictments, didn't you?

25 A. Yes, ma'am.

1 Q. Okay. Mr. Levi testified on direct
2 that he never saw a copy of them until after he was
3 sentenced. Is that unusual?

4 A. Ma'am, I don't know if it's
5 unusual, but I mean the notice of the -- what
6 is contained in the indictments, the specifics,
7 the aggravation, all the types of things that
8 he had, I mean he saw all of that. We went over
9 it innumerable times at the Orangeburg County
10 Detention Center. So I mean he may not have
11 seen the actual indictment, he certainly knew
12 what was contained in the substantive pieces of
13 the investigative file that would support the
14 allegations in the indictment.

15 Q. You were comfortable with the
16 indictment as defense counsel?

17 A. Yes, ma'am.

18 Q. You saw no avenue to challenge the
19 indictment?

20 A. No, ma'am.

21 Q. Okay.

22 MS. DAVIS-BRANCH: No further questions,
23 Your Honor.

24 THE COURT: All right. Very well.
25 Cross-examination.

1 MR. BOOZER: Thank you, Your Honor.

2 THE COURT: Yes.

3 CROSS-EXAMINATION

4 BY MR. BOOZER:

5 Q. Mr. Delgado, with regard to these
6 meetings, these numerous meetings that you and
7 Mr. Culler had with the applicant, do you recall
8 discussing the basics, the elements of the case, the
9 charges that he was facing, the possible penalties
10 that he was facing?

11 A. Absolutely, yes, sir.

12 Q. And did you discuss the possible --
13 the defenses that he could put forth?

14 A. Well, you know the defenses
15 would shift depending on what story was the
16 most current one. I mean, self-defense was the
17 first story. Until you get -- you find out two
18 of the shots were to the back of this
19 gentleman's body. And then the story changed
20 its wasn't self-defense, somebody else shot
21 him. So it all depended on what was being
22 presented to us.

23 There was one time, Mr. Boozer, when we
24 said something to him about how story number four,
25 story number five wouldn't -- wouldn't float in our

1 estimation and he specifically said to us well, let's
2 go back to story number one. I mean it was almost
3 impossible to decide how to help defend him when the
4 defense kept shifting.

5 Q. Now, during these meetings and up
6 until the plea, was there ever a time that Mr. Bing
7 indicated to you or Mr. Culler that he didn't
8 understand what was going on?

9 A. Levi's a very intelligent
10 individual. We spent inordinate amount of time
11 with him. He knew exactly what was going on.
12 He didn't like what we had to share with him,
13 that's for certain; but he knew specifically
14 everything that went on as soon as we knew it.

15 Q. Now, going back to your investigation
16 of the case, could you expand a little bit on the
17 investigation as far as, I think you may have
18 testified to this already and I apologize for going
19 back to it. What -- the experts you were looking
20 into and some of the witnesses that you were --

21 A. Well, first and initially we had
22 hired and retained Mr. Amos Jones, a private
23 investigator from Columbia, to search out
24 witnesses. He did that to the very best of his
25 ability as the stories as I've said changed.

1 We hired a forensic psychiatrist Dr. Daphne
2 -- Deprue Debrear (phonetic), I believe is her last
3 name, from North Carolina, Chapel Hill I believe.
4 She did an extensive evaluation of Mr. Bing.

5 We hired a former SLED agent to help us
6 evaluate trajectories and distance from the body when
7 the shots were taken. Each of those individuals or
8 at least the forensic expert met with us and the
9 family and Levi's extended family on one occasion at
10 the Orangeburg County Courthouse to explain where we
11 were and how the results were not favorable for Levi.

12 Q. Now, going to the evidence in the
13 case, were you provided with access and given access
14 to the State's evidence?

15 A. Yes, sir.

16 Q. And did you review this evidence with
17 Mr. Bing?

18 A. Absolutely, except for possibly
19 that videotape, yes, sir.

20 Q. Now, I think that there was another
21 tape that Mr. Bing raised here earlier with regards
22 to the Dixianna Gas Station. Did you review that
23 tape?

24 A. My recollection is when -- you
25 see that's revealed to us late in this case,

1 when this cousin by the name of Clay, who is
2 the shooter, that was story five, maybe story
3 six. My recollection of it is when we tried to
4 get that tape through Mr. Jones that store had
5 taped over that portion of what was consistent
6 maybe a year and a half, two years before. So
7 we weren't able to review what was not
8 available for us to review.

9 Q. And the witnesses, did you investigate
10 the statements that were given?

11 A. Yes, sir. Every one of them.
12 Every one of them.

13 Q. Did you or Mr. Culler ever tell the
14 applicant that you didn't feel comfortable proceeding
15 to trial on this case?

16 A. No, sir. What we did say is
17 that we had a very difficult row to hoe,
18 absolutely.

19 Q. Mr. Delgado, how long have you been
20 practicing law?

21 A. This year will be 32 years, sir.

22 Q. Do you have any recollection of any
23 estimate of how many cases you've tried?

24 A. No, sir. I'm sorry.

25 Q. Now, did the -- Applicant alleges that

1 you were telling the family things differently than
2 you were telling him. Did you ever tell the family
3 things different than what you would tell the
4 applicant?

5 A. Absolutely not sir. There's no
6 reason to do that that's -- we would tell
7 the -- now, we've couched it differently
8 because of our affection for this poor mother
9 and father, but -- and I wouldn't have used the
10 guttural terms I may have used with Levi at the
11 Orangeburg County Detention Center that's for
12 certain. Mr. Bing and I talked by phone
13 innumerable times. We met with them at their
14 house at least two different times. We met
15 with them at the Orangeburg County courthouse
16 at least twice. I met with Levi's sister and
17 brother-in-law on several occasions in the
18 office. We would never have told them anything
19 differently.

20 I may have tried to be more sensitive to
21 Mr. and Mrs. Bing, the parents, that's about the only
22 thing I would have changed.

23 Q. Do you recall any discussion about a
24 second bond hearing with the applicant?

25 A. Vaguely, early, early, early.

1 And Mr. Robbins was opposed to that because I
2 think he was of the opinion there were no
3 material change in circumstances that would
4 merit another bond hearing.

5 Q. Had he requested a second bond hearing
6 from either you or Mr. Culler specifically you would
7 have --

8 A. I think he may have, sir, and I
9 believe I discussed that with Mr. Robbins and
10 asked if that would be possible; but seeing
11 that Mr. Robbins was going to oppose it, I just
12 felt fairly clearly that the chances of that
13 were absolutely zero.

14 Q. Now going back did you go over the --
15 review the indictments with Mr. Bing?

16 A. Sir, I'm not certain that I
17 specifically went line by line of the
18 indictment, but everything substantiated the
19 indictment was gone over on a number of
20 occasions.

21 Q. Were you aware of what Mr. Bing was
22 charged with?

23 A. Certainly, yes, sir.

24 Q. Did Applicant ever ask you to file an
25 appeal on this matter?

1 A. Sir, an appeal would have put
2 him back in the same position as he had been
3 before this matter was resolved. We thought a
4 sentence of 40 years as opposed to life in
5 prison was an extraordinary victory under all
6 the circumstances. We fought hard to get that
7 40 years as opposed to life in prison. He will
8 be eligible for parole one day and will walk
9 out of jail one day with that sentence. I
10 thought it would be contrary to his best
11 interest to have appealed.

12 Q. Had he asked you to file an appeal
13 would you have filed one?

14 A. Oh, yes, sir, of course I would
15 have.

16 Q. Was there overwhelming evidence in
17 this case to convict Mr. Bing had he gone to trial?

18 A. Mr. Boozer, this is such an
19 extraordinarily overwhelming case, Mr. Culler
20 and I were just beside ourselves about trying
21 to get Levi to understand the seriousness of
22 this situation. Yes, is the very short answer
23 to that.

24 Q. Whose decision was it to plead guilty
25 in this case?

1 A. It was Levi's decision to plead.

2 Q. Thank you, Mr. Delgado.

3 MR. BOOZER: No further questions, Your
4 Honor.

5 THE COURT: All right. Redirect?

6 MS. DAVIS-BRANCH: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. DAVIS-BRANCH:

9 Q. Mr. Delgado, I believe you testified
10 on your direct that your decision -- 40 years was a
11 gift; am I correct? Is that a fair way to
12 characterize that?

13 A. I don't know if it was a gift,
14 but it was a very, very reasonable resolution
15 to this case, yes, ma'am.

16 Q. Okay. Are you aware of the fact that
17 he's not eligible for parole?

18 A. No, ma'am.

19 Q. I'm sorry?

20 A. I thought 40 years he is
21 eligible for parole, ma'am. Is he not?

22 Q. Mr. Bing doesn't think that he's
23 eligible for parole?

24 A. I think he is eligible for
25 parole if you get a numerical sentence, ma'am,

1 85 percent of that 40 years, he is eligible for
2 parole.

3 Q. Okay. I want to go back to the
4 opportunity for him to appeal even though you felt
5 that 40 years given the circumstances was something
6 that was in his favor. What would have been the
7 reason not to appeal?

8 A. Because it was a --

9 Q. Or at least give him opportunity to
10 appeal.

11 A. Certainly. Well, I don't know
12 whether a notice of intent to appeal belies or
13 underscores that you feel that there is a
14 meritorious basis for that. I don't know
15 whether statutorily or ethically there is a
16 requirement for counsel if you find that, but
17 there was nothing to appeal from, ma'am, in my
18 estimation.

19 Q. Do you normally appeal your verdicts?

20 A. No, ma'am. I do not.

21 Q. Do you refer it to maybe appellate
22 counsel office?

23 A. No, ma'am. The vast majority of
24 the clients that I represent do not appeal
25 their cases because I think the cases are

1 fairly reasonable in their disposition.

2 Q. Isn't that something you think that
3 Mr. Bing should have had a decision, input on?

4 A. Oh, certainly, exactly. That's
5 exactly what the judge told him he had a right
6 to do. Levi is aware of what he wants to do.
7 Levi's a very astute individual; he's no fool.
8 He knows exactly what to do and how to do it.
9 He is using this as another grounds for an
10 appeal or for some sort of --

11 Q. But he didn't have the opportunity,
12 did he?

13 A. He did have opportunity, ma'am,
14 the judge told him that --

15 Q. Who would have been the most likely
16 person to file the notice of appeal Mr. Delgado?

17 A. That would have been me. If he
18 had asked know do that, ma'am, I would have
19 been glad to do that I would have done that.

20 Q. The time has passed now, hasn't it?

21 A. Yes, ma'am.

22 MS. DAVIS-BRANCH: No further questions I
23 would like to call Mr. Culler, please.

24 THE COURT: Yes. Recross.

25 MR. BOOZER: Yes, ma'am.

RE CROSS-EXAMINATION

BY MR. BOOZER:

Q. Mr. Delgado, do you normally appeal guilty pleas?

A. No. I do not.

THE COURT: Very well. All right. We are going to take our lunch break and we will begin at -- we can take an hour that will be fine we'll start at 2:15 and proceed at that time.

MR. BOOZER: Thank you, Your Honor.

MS. DAVIS-BRANCH: Thank you, Your Honor.

THE COURT: Thank you.

(A lunch recess was observed.)

THE COURT: All right. Ms. David-Branch, if you would call your next witness.

MS. DAVIS-BRANCH: Thank you, Your Honor.
Call Mr. Mike Culler, please.

(MICHAEL CULLER, called as a witness,
having first been duly sworn, is
examined and testified as follows:)

THE COURT: Your witness.

MS. DAVIS-BRANCH: Thank you, Your Honor.

DIRECT EXAMINATION

MS. DAVIS-BRANCH: Hello Mr. Michael.

THE DEFENDANT: Hello.

1 BY MS. DAVIS-BRANCH:

2 Q. Mr. Culler, you are with the public
3 defender's office; are you not?

4 A. I am.

5 Q. Orangeburg County?

6 A. Yes.

7 Q. And how long have you been there?

8 A. About 16 years.

9 Q. Sixteen years. And you obviously you
10 primarily do --

11 A. Criminal work, yeah.

12 Q. Criminal work. You had the
13 opportunity to represent my client Mr. Levi Bing?

14 A. I did have that opportunity,
15 yes.

16 Q. And how were you brought in on the
17 defense team?

18 A. I was appointed.

19 Q. Okay. You were appointed by?

20 A. By the clerk of court.

21 Q. And what criteria sets up an
22 appointment?

23 A. Well, the client applies
24 typically from the jail and if they're indigent
25 then you know a public defender gets assigned

1 it's done on a rotating basis. I think in this
2 case though the death notice had been served
3 and since I'm the only one in the office now to
4 be certified to do that so I got him along with
5 Mr. Delgado.

6 Q Did Mr. Delgado initiate the
7 appointment or did you initiate the appointment.

8 A I think Mr. Bing initiated the
9 appointment. Or I think on his behalf it was
10 done.

11 Q. Okay. And as a criminal defense
12 attorney what are your normal routine duties as to
13 how you get started with a case.

14 A. Well, I would echo what
15 Mr. Delgado said earlier. Clearly you meet
16 with the client, you get the discovery, examine
17 that, try to talk to witnesses which we did in
18 this case. In this particular case I got
19 probably seven or eight experts on board
20 because we anticipated that we could
21 potentially go to trial. We got orders signed
22 for funds for those experts. Each case is
23 different; but typically, obviously, you meet
24 the client through the discovery.

25 Q. When did you meet with Mr. Levi

1 A. Oh, I'm sure it was time in I
2 think October maybe. I think he was arrested
3 in October and I think I met with him shortly
4 after that.

5 Q. Okay. You were here for his direct
6 testimony, correct?

7 A. I was.

8 Q. Did you hear him testify that he did
9 not have opportunity to view his indictments?

10 A. I did.

11 Q. And do you have a response to that?

12 A. Well, I find it remarkable, but
13 certainly, you know the practice would be and
14 what I do is the indictment and the plea sheet
15 typically goes together and we review those.
16 Certainly, however if, in fact, he didn't
17 physically see it he did know what he was
18 charged with which I think he said on direct.

19 We had been working with him for probably a
20 year at that point, 9 months to 12 months, so it
21 wasn't, I don't think, a great surprise to him that
22 he was charged with murder along with the other two
23 charges.

24 Q. But you had the opportunity to review
25 the indictment?

1 A. I'm sure that I did.

2 Q. I'll show you two of them.

3 A. Okay.

4 MS. DAVIS-BRANCH: They're -- all right --
5 I'm sorry. Okay. Indictments.

6 THE DEFENDANT: Right, the indictments.

7 BY MS. DAVIS-BRANCH:

8 Q. Are you comfortable with those
9 indictments? Do you think they actually capture the
10 charge, Mr. Culler?

11 A. Let me read it. Did with malice
12 aforethought kill one Randy Beals by means of
13 shooting the victim. I think that probably
14 covers that. And then the grand larceny, did
15 take and carry away a 2000 Chevrolet Corvette,
16 silver and gray in color, with the intent to
17 permanently deprive the owner. I think that
18 covers that. I'm fairly comfortable with that.

19 Q. Okay. What would be the consequences
20 of the indictments failure to allege time and place
21 of death in your opinion?

22 A. I would say, it would not have
23 any great relevance.

24 Q. Okay. Why not?

25 A. Well, I think that's a matter of

1 evidence that would be something that goes to
2 the ultimate charge. The purpose of the
3 indictment is just to put the defendant on
4 notice for what he is being tried for and maybe
5 the date or the time so that he knows,
6 particular -- if it had said for example
7 9:30 a.m. instead of 9:00 a.m. I don't think
8 there's any significance to be attached to
9 that.

10 Q. Okay.

11 A. He's on notice. He knows what
12 he's charged with. If he had some questions,
13 he certainly never asked me if he was charged
14 with murder. We certainly felt like he knew he
15 was charged with murder.

16 Q. Would you agree that that's just one
17 item in the scheme of your criminal defense as to the
18 lack of date, time and place of the victim being
19 omitted from the indictment? That was a lot only one
20 my question is --

21 A. Yeah.

22 Q. I'm sorry.

23 A. I'm trying to follow that.

24 Q. My question is, that's just one item
25 relative to his entire defense?

1 A. Sure.

2 Q. Okay. So there could have been other
3 things relative to his defense that would have made a
4 difference?

5 A. Relative to his defense.

6 Q. Relative to Mr. Bing's defense?

7 A. Well, we didn't feel like
8 Mr. Bing had a defense, so I wouldn't say that
9 anything was relative to that because it didn't
10 exist at least in our opinion.

11 Q. You're saying that he had nothing
12 going for him?

13 A. He has a very supportive family,
14 he's a nice person, he was pleasant with us,
15 but in terms of the evidence and the facts
16 beyond change in the case, no, I don't think he
17 had a whole lot going for him.

18 Q. In the indictment relative to the
19 grand larceny --

20 A. The 2000 Chevrolet Corvette,
21 gray in color.

22 Q. Right. That's correct.

23 A. Right, sure.

24 Q. You don't need to see it you're
25 familiar with it?

1 A. Sure.

2 Q. Okay. Would it surprise you to know
3 that there is information contained in the record
4 which contradicts the color of that Corvette?

5 A. I would have to be shown that.
6 And I don't know that would be terribly
7 significant in terms of -- I mean I don't know
8 really where that would be relevant, you know.
9 There's a car that is stolen, everybody
10 identifies that car by the VIN number.

11 Mr. Bing is in possession of that car. If, for
12 example it said that the tires had Goodyear
13 instead of Goodrich I would not attach
14 significance to that.

15 It wasn't that there was a different car,
16 there was never any question it was a different car,
17 so no I wouldn't be terribly troubled by that unless
18 you know it was white and red and I would be
19 surprised to see that in the record.

20 Q. Okay. Were you part of the actual
21 investigation, Mr. Culler?

22 A. Yes.

23 Q. Okay. What did that investigation
24 consist of?

25 A. Well, it consisted of a number

1 of things. Number one, I remember Mr. Delgado
2 and I came down here to St. George to talk to a
3 witness and we went by a racetrack that
4 Mr. Bing had been racing motorcycles at the
5 racetrack.

6 We went to North Charleston and met with a
7 member of the police department there, we, of course,
8 met with his family members. I had an opportunity to
9 go to SLED to talk to, I believe it was Joe Powell,
10 who did the forensic analysis, the gunshot residue
11 analysis, and sort of explained to me at that point
12 in time that one of the six versions of the story
13 that we had been told was that it was a struggle and
14 that Mr. Bing had defended himself from Mr. Beals;
15 and unfortunately the -- I believe the antimony level
16 was 137, the lead level was about 1220; and
17 Mr. Powell explained to me that that would not be
18 consistent with someone having a weapon and firing
19 it. It would be much more consistent with the
20 defensive posture.

21 Also I got Mr. Jeff Hollifield, who is in
22 Greenville to review some fiber evidence that we
23 thought possibly might be helpful. We met with Don
24 Gurnt a number of times, we met with Daphne Dupre --
25 we didn't meet with, but we talked to her.

1 Mr. Delgado and I did. She had an opportunity --
2 she's a psychiatrist -- had an opportunity to meet
3 with Mr. Bing twice. We had Rick Johnson --

4 Q. What would have been the purpose of
5 the psychiatrist meeting with Mr. Bing?

6 A. Just to make sure that he was
7 not having any issues with regard to competence
8 and just generally to try to help us understand
9 what was going on with Mr. Bing. I believe
10 that she characterized him as an entitled
11 narcissist was her terms.

12 Q. What would that mean?

13 A. Someone who was, you know, very
14 interested in themselves and seeing everything
15 as it related to the world through their own
16 skin not how it affected other people and being
17 sort of feeling like he was entitled, you know,
18 better than other people. He comes from a
19 great family, so I can somewhat understand
20 that. At the time of this murder he was living
21 in Wildwood, driving, I think a '73 BMW owned
22 by his brother-in-law, who had two car
23 dealerships, but just briefly to continue with
24 the investigation part of it, met with
25 Mr. Hollifield, with Mr. Gurnt, Daphne Dupre,

1 Jim Aiken was going to come in, all these
2 people pretty much met with Mr. Bing. And one
3 of the things we did was, because we had so
4 many different stories, we had Rick Johnson,
5 formerly of SLED, polygraph him on two
6 occasions, both of which he failed with
7 significantly low scores; and that, of course,
8 is in addition to having reviewed the discovery
9 material.

10 And I would say we met with Mr. Bing
11 probably, by which I mean Mr. Delgado and I together,
12 I mean many, many times, 40, 50, 60 times. I don't
13 know it was a lot. Met with his parents in their
14 home, met with his brother-in-law and sister in
15 Mr. Delgado's office in Columbia. So we did quite a
16 bit.

17 Q. In all the stories that you allege
18 that Mr. Bing said to you, did any of them did he say
19 to you, I'm guilty?

20 A. Oh, well, yeah he said that a
21 number of times to the police.

22 Q. Did he ever tell you as his attorney?

23 A. I don't know that he used the
24 words I'm guilty. I think he said, I shot a
25 man, I can't forget the screaming. So I would

1 leave it to you, but I would interpret that to
2 mean, I'm guilty.

3 Q. Okay. Did you ever have the
4 opportunity to speak to a Ms. Brenda Clark?

5 A. I don't remember, frankly.

6 Q. Did you ever have the opportunity to
7 speak to Ms. Shameka Lewis?

8 A. Who is Shameka Louis.

9 Q. I'm going to show that to you?

10 A. Sure.

11 Q. Shameka Lewis would have been the
12 employee at one of the gas stations.

13 A. No, I don't recall talking to
14 her.

15 Q. Okay. Do you know whether or not
16 Mr. Delgado did?

17 A. I don't. I would say, though,
18 that a lot of the witnesses we sent Amos Jones,
19 who was an investigator that Mr. Delgado had
20 gotten involved. Mr. Jones tracked people
21 down, the illusive Clay, no last name, we
22 finally tracked him down at the Medical College
23 of Georgia Hospital, where he was a patient
24 after having been shot.

25 Q. Why did you go visit him or why did

1 you track him down?

2 A. That was one of the -- I believe
3 it was story number two that involved Clay,
4 that Mr. Bing alleged Clay had done this or was
5 with him somehow. There were a lot of
6 different names that we had, first names only,
7 but were able to track him down. And he
8 absolutely denied knowledge and said that he
9 had never been to Holly Hill and I think maybe
10 Clay had bought the car or gotten the \$20,000;
11 I don't remember.

12 Q. Do you know whether or not Mr. Clay
13 owned a truck?

14 A. I beg your pardon?

15 Q. Do you know whether or not Mr. Clay
16 owned a truck?

17 A. I don't.

18 Q. You don't know?

19 A. No.

20 Q. Okay. Did you ever speak to Lerlene
21 Burch, or Bunch?

22 A. Who is Lerlene Bunch, I'm sorry.

23 Q. She would have been also a person that
24 would have provided a statement or an affidavit
25 during the course of the investigation.

1 A. About what?

2 Q. About her witnessing the victim's
3 body.

4 A. That she -- oh, she's one of the
5 people that came upon the body?

6 Q. That's correct.

7 A. I didn't talk to her that I
8 remember. I'm sure we probably had Mr. Jones
9 do that, but I -- you know maybe we did, maybe
10 we didn't, I would think that we probably did.

11 Q. What about Loretta Bunch?

12 A. And that's the same sort of
13 witness?

14 Q. Yes.

15 A. I don't have any independent
16 recall on that.

17 Q. All right. If I could refresh your
18 recollection?

19 A. Sure.

20 Q. This is also statements. Mr. Michael,
21 I'm going to show you, I don't want you to read
22 anything, but just kind of refresh your recollection
23 if you don't mind, please.

24 A. Sure. Sure. Right I remember
25 these statements I remember reading these.

1 Q. You did read them?

2 A Sure.

3 Q Okay was there anything significant
4 contained in them?

5 A Significant? Significant.

6 Q. As far as your defense is concerned.

7 A. Sure. I think that it was
8 something that interested us that there was a
9 truck there, but I don't remember and I don't
10 see in these statements that anybody alleged
11 that the truck was stopped there. The fact
12 that a truck came down a secondary road and
13 continued was of interest to us and we did, in
14 fact, try to find out more about the truck,
15 but, you know, that in the absence of the
16 multiple, basically confessions that Mr. Bing
17 had made, was not terribly helpful. I mean
18 there, may have been a co-defendant involved in
19 the truck, I don't know.

20 Q. What did these witnesses say about the
21 truck? What did they say in their affidavit?

22 A. The truck was a full-sized
23 truck, light color. The truck ran off the of
24 the grass and kept going. I could not identify
25 the person. After we stopped, a truck came

1 from Boyer side, did not stop but kept going.
2 So it basically said a truck came by there and
3 continued.

4 Q. In your opinion as a criminal defense
5 attorney would that have been odd for a driver to
6 drive a car, see a body on the road and not stop?

7 A. Well, I would think it would be
8 curious that someone wouldn't stop if there
9 were a body in the road, but at that point in
10 time I don't know, I mean...

11 Q. Would you agree that it's kind of odd?

12 A. Yeah, I would say that it's odd,
13 but I would also say that there are many people
14 unfortunately, in this world who don't want to
15 be involved in such matters and they don't stop
16 because they don't want to be, you know,
17 involved at all. They don't want to give a
18 statement, they don't want to talk to the
19 police. Maybe they're -- you know a number of
20 reasons they might not want to participate.

21 Q. You're right. Let me ask. Do you
22 think it's suspicious that car would have sped from
23 the scene?

24 A. Would have sped from the scene?

25 Q. Yes.

1 A. I don't -- let me see those
2 again if I might?

3 Q. Yes, sure.

4 MR. BOOZER: Your Honor, I think she may be
5 going outside a little bit of these statements just
6 ask that she stick to the actual statement itself and
7 allow him to testify from what is actually in the
8 statement and not.

9 MS. DAVIS-BRANCH: Okay why don't we --

10 THE WITNESS: Sure.

11 MS. DAVIS-BRANCH: If I may, Your Honor.

12 BY MS. DAVIS-BRANCH:

13 Q. Why don't you read the statement into
14 evidence.

15 THE COURT: Which one all of them?

16 MS. DAVIS-BRANCH: Yes. Just the last
17 paragraph, but I don't care if -- I'm only interested
18 in this part and then the last paragraph, Your Honor?

19 THE WITNESS: Sure, I understand.

20 THE COURT: Whose statement is it?

21 THE WITNESS: This is Brenda Clark, Your
22 Honor.

23 THE COURT: Okay.

24 THE WITNESS: I was coming from Summerville
25 and turned down Boyer Road and saw a dead body in the

1 road and we stopped and got out of the car, and a
2 truck came by going fast and would not slow down.
3 The truck was a full-sized truck, light color. The
4 truck ran off the grass and kept going and I could
5 not identify the person. Loretta and I went to the
6 body, but we did not touch the body.

7 Loretta said, sir, and he would not answer
8 her. We walked off and went to call 911. She
9 stopped someone to call 911.

10 BY MS. DAVIS-BRANCH:

11 Q. Okay.

12 A. You want me to read this as
13 well?

14 Q. Yes, and then the one behind it. Not
15 the entire part.

16 A. Sure just the paragraph.

17 Q. And then the one behind it. Thank
18 you.

19 A. Okay. Soon after we stopped,
20 the truck came by from the Boyer side but did
21 not stop just kept going on toward Berkeley
22 County.

23 There was a full-sized, light colored truck
24 that was coming towards 176 they did not attempt to
25 stop, they sped right past the body. They drove on

1 the grass and kept going all going to the stop sign
2 and turned right.

3 Q. Again, I ask you, Mr. Culler, do you
4 think the statements contained in what you just read
5 would have been suspicious behavior on the part of
6 whoever that was?

7 A. You know, I would attach some
8 interest to it. Suspicious, you know, I think
9 we were interested in it just to see who was
10 there and whether they were involved in it.
11 You know you can characterize it that way I
12 suppose, but having said that.

13 Q. Did Mr. Bing ask you to have a meeting
14 with either one of these people that you just
15 mentioned Brenda Clark and Ms. Burch and her
16 daughter?

17 A. I don't independently recall
18 that.

19 Q. You don't recall that?

20 A. No. And I'm not sure frankly
21 what they could have told us that would have
22 really helped us given the fact that Mr. Bing
23 had said that he had shot Mr. Beals and had
24 made the statements that he'd made to law
25 enforcement other than perhaps as I said there

1 was a co-defendant perhaps involved, but he
2 never really told us that.

3 Q. Okay.

4 A. So it would have been maybe
5 interesting and I think we did try to find out
6 who owned the white pickup truck.

7 Q. What did you do to try to find that
8 out?

9 A. I'm sure Mr. Delgado and Amos
10 Jones and I talked about that, but you know,
11 how do you do that a white pickup truck in
12 South Carolina, how many are there. And again
13 what's, you know, the relevance when the client
14 is not telling you a story that really brings
15 that right to it. It could be involved.

16 Q. Did Mr. Bing indicate to you who owned
17 that truck?

18 A. I don't remember. I'm sure he
19 probably did tell us it was Clay or David
20 Clairage was another name that came out or
21 someone like that.

22 Q. Okay.

23 A. But that's about what I
24 remember.

25 Q. Were there any videos involved in your

1 investigation, Mr. Culler?

2 A. I believe there was a video of
3 Mr. Bing and Mr. Beals arriving on the way down
4 to Holly Hill and I remember there was a video
5 of them coming and going back in the car. I
6 think Mr. Bing was driving the car when they
7 left and then I remember that there was a video
8 up around the Dixianna exit or somewhere. I
9 don't remember if there was a photograph that
10 we got or that we didn't get it because they
11 taped over it, but I know that there were
12 supposedly two tapes. One of him coming down,
13 by which I mean Mr. Bing coming down with
14 Mr. Beals and another of him going back without
15 Mr. Beals.

16 Q. Do you recall -- are you testifying
17 that you personally observed that video or was this
18 something that someone else told you?

19 A. I don't have any memory.

20 Q. You don't remember, you don't
21 recollect whether or not you saw the video or not?

22 A. No. No.

23 Q. Okay.

24 A. I would say I probably did on a
25 fairly significant piece of evidence.

1 Q. This is a statement by Ms. Shameka
2 Lewis.

3 A. Sure, yes.

4 Q. Would you read that last paragraph
5 into evidence, please. Why don't you identify it
6 first?

7 A. Shameka Lewis, a statement from
8 11/24/03 given to Orangeburg County Sheriff's
9 Office. I spoke with him. He asked me was I
10 married. I responded by telling him yes. He
11 made a comment why are all the good ones taken.
12 The white man was talking with someone else.

13 Q. Okay. Do you recall Mr. Bing telling
14 you that he never had a conversation with her?

15 A. No, I don't remember that.

16 Q. Would that have been important to you?

17 A. In light of the conversations he
18 had with law enforcement and the statements he
19 had made?

20 Q. No, not in light of that.

21 A. Well, it's hard for me to answer
22 that question without considering all the other
23 factors. I would say it might be of some
24 interest, but not anything significant. It
25 seems to me that it was on the way down there a

1 brief trip into the gas station and a brief
2 trip out, so I don't know that it would have
3 been terribly significant.

4 Q. Do you recall whether Mr. Bing asked
5 you to review the video so that this witness'
6 statement could be impeached if he were to go to
7 trial?

8 A. No. I would tell that you I'm
9 fairly certain that did not occur. That would
10 be a very significant request and it would then
11 attach importance to it and it would be
12 something we would do to defend ourself as such
13 hearings like this. In other words, I would do
14 it prophylactically so I wouldn't have to say
15 well, we didn't do that. So we would have
16 absolutely have done that just to cover the
17 bases for the PCR hearing.

18 Q. Mr. Culler, did you recommend to
19 Mr. Bing that he accept a plea offer?

20 A. Yes, very much so.

21 Q. Why?

22 A. Well, we felt like, both
23 Mr. Delgado and I independently and together,
24 that there was a very good chance if we went to
25 trial that the death penalty would be a very

1 real possibility. I think guilt was a foregone
2 conclusion given the evidence. But the
3 troubling thing about the case was,
4 unfortunately, Mr. Bing had called the widow
5 twice after the murder had occurred.

6 Q. I'm sorry had done what?

7 A. Called the widow, the new widow.

8 Q. Oh, okay.

9 A. Had called her.

10 Q. The victim's wife?

11 A. Yes, and made some statements
12 about where is Randy, where is Mr. Beals, I
13 haven't met with him, I don't know where he is.
14 They, of course, traced those calls back to his
15 cell phone and we felt like that was not a good
16 thing, that was a bad thing. The other thing
17 we didn't like was that the body had been moved
18 so that the wallet could be taken and was, in
19 fact, taken and found on the side of I-26 going
20 back into Columbia; and the fact that Mr. Beals
21 had been shot twice in the back.

22 If I remember correctly Mr. Gurnt indicated
23 to us those were support wounds by which I mean it
24 would have been done while Mr. Beals was on the
25 ground. Those were three of just some of the

1 unfortunate factors that we thought could factor into
2 the death penalty being a very real chance and that
3 guilt was something that there was no way around.

4 Unfortunately it became really an exercise
5 of in-futility with Mr. Bing because there were so
6 many different stories and I will say when we had
7 that conversation with him he said, well, you know
8 what's wrong with this story and we would point out
9 the flaws and I remember him saying, Well, let's go
10 back to story number one at which point I wrote
11 professor freeman of the law school and got an
12 opinion from him as to how to handle that if, in
13 fact, we went to trial and had a client who was going
14 to testify or basically perjure himself.

15 Q. That would have been your decision to
16 have him testify?

17 A. No, I don't know that that would
18 have been a good decision because of so many
19 contradicting statements. But, yeah, we felt
20 like it was not going to happen for him to walk
21 out of the courtroom and if we went forward we
22 were either going to get life in prison with no
23 possibility of parole or the death penalty. As
24 it is he got 40 years, which is not a great
25 thing, but he does have the opportunity to get

1 out at some point in time.

2 Q. Would it surprise you if I said to you
3 my client has been told that he has no possibility of
4 being paroled?

5 A. Well, he'll parole after 40
6 years, is what I meant to say you know it's
7 day-f-or-day.

8 Q. That's correct.

9 A. As opposed to life without the
10 possibility.

11 Q. Right, I understand clearly.

12 A. I misspoke.

13 Q. That's okay. We all make mistakes.

14 Let's go back to you recommending him to
15 accept the plea offer.

16 A. Sure.

17 Q. Was there an offer made before that
18 time before you started getting into negotiation with
19 the solicitor's office?

20 A. I don't remember that Mr. Pascoe
21 offered anything other than 40 years. I think
22 that Mr. Delgado and I were trying to get less
23 than that of course, but I don't remember --
24 and, by the way --

25 Q. Did you counter with 30?

1 A. Oh, of course absolutely.

2 Absolutely we would have done that. We
3 wouldn't have just said you know 40's great.
4 But I remember having that conversation with
5 the solicitor, with Judge Jefferson on the
6 telephone when we were trying to figure out if
7 this was really going to go to trial or if it
8 was going to plead guilty or what was going to
9 happen. Talking about numbers.

10 Q. Yes.

11 A. And we, of course, tried to get
12 lower numbers; but that was not what happened.
13 The solicitor wasn't willing to do that.

14 Q. Did you explain that to Mr. Bing?

15 A. Absolutely.

16 Q. Did you -- did you put it to him in
17 the sense of, We've tried to get a lower number?

18 A. Oh, sure.

19 Q. Okay. And what did he say or what was
20 his response?

21 A. Well, I don't remember
22 specifically. I don't think he was very happy,
23 but I think he also recognized and I think his
24 father was a big factor in this, I think his
25 brother-in-law was a big factor in this saying,

1 We're going to talk together the family is
2 going to pull together, we're going to support
3 you and this is the way we're going to resolve
4 this. So I think his reaction was ultimately,
5 Okay. He pled guilty and he got the 40 years.

6 Q. You never saw any reluctance on his
7 part, Mr. Culler?

8 A I think there's always
9 reluctance on the part of a --

10 Q In Mr. Bing's part. I'm only
11 interested in him.

12 A May have been. May have been,
13 but as I say I think any criminal defendant
14 that's coming in is not happy about something
15 like that. I think, however, that as is
16 acknowledged in his guilty plea, he apologized
17 for what had occurred, said he wished he could
18 take it back; so I think he was at that point
19 in time, you know, okay with it. I don't think
20 he was happy about it.

21 Q. Did he ever say, Mr. Culler,
22 Mr. Culler I'm innocent. I don't want to take this
23 plea, I would rather take my opportunity by going to
24 trial. Did he ever say that to you?

25 A. No.

1 Q. Did you ever feel that, did you ever
2 get a gut reaction that this gentleman would just not
3 voluntarily enter into a plea?

4 A. It is absolutely beyond any
5 question in my mind true that he voluntarily,
6 knowingly and intentionally pled guilty, knew
7 what he was doing. He was not happy with the
8 situation, we were not happy with the
9 situation, his family was not happy with the
10 situation.

11 Anybody that goes to prison for 40 years
12 not going to be terribly thrilled with that process.
13 However, given the facts and given the case, we all
14 believed that that was a proper way to resolve it.

15 Q. Isn't it true that you went to see
16 Mr. Bing's parents about a week before the plea?

17 A. I think that's probably
18 accurate.

19 Q. Okay. And what would have been the
20 purpose of that visit?

21 A. Just to explain I guess what was
22 going to happen and to talk to them about him
23 and get them to talk to him and I don't know
24 specifically. You know, that could have been,
25 I don't remember independently.

1 Q. So is isn't it true that he still did
2 not want to take a plea up until a week before the
3 time if you felt the need to go talk to his father?

4 A. It's possible, sure.

5 Q. Okay. You were at the plea hearing;
6 were you not?

7 A. Yes.

8 Q. Okay. And what did you observe about
9 Mr. Bing at the time?

10 A. With regard to what?

11 Q. With regard to his feeling about
12 taking the plea.

13 A. It's my recollection he wanted
14 to do that. He signed the paperwork to do that
15 and then we went through the plea process.

16 Q. Okay. Do you recall being dismissed
17 by Mr. Bing, Mr. Culler?

18 A. No. That's one of the things
19 that I say categorically, absolutely did not
20 occur.

21 Q. Never fired you, never dismissed you,
22 never said, I'm dissatisfied with you?

23 A. No, because as I said earlier,
24 there are things I do now, sort of like
25 practicing defensive medicine to protect myself

1 from such things as post conviction; and had he
2 done that, I would have absolutely made a
3 record on that. He would have an appearance in
4 front of a judge. That's why, for example, I
5 got Professor Freeman to give us an opinion
6 about his stories and the ethics of what was
7 going on, try to insulate myself from this type
8 of environment and hearing questions that of
9 course you're asking.

10 Q. Sure. What about the appeal,
11 Mr. Culler, or the opportunity to appeal. What's
12 your normal practice when a defendant has either been
13 found guilty or pled to being guilty?

14 A. Well, the practice would be to,
15 of course, discuss that with the client prior
16 to the plea or the finding of guilt, in fact,
17 if that happens and then if it does the Court
18 as they did as Judge Jefferson did in this
19 matter, you know, advises the client of that
20 right to appeal and then if the client wishes
21 to do that, I'll do that.

22 Q. Okay. He never said to you, I want to
23 appeal?

24 A. No, and it would have been
25 somewhat unusual to go through the multiple

1 steps that we did to get into a plea and bring
2 Judge Jefferson up on a day that she was not
3 scheduled to be there just to accomplish this
4 plea and then immediately want to appeal it.
5 It would have been somewhat unusual to say the
6 least.

7 Q. But it would have been acceptable?

8 A. Sure it would have been
9 acceptable, absolutely would have been
10 acceptable.

11 Q. Has the time passed?

12 A. I beg your pardon.

13 Q. Has the time passed for him to appeal
14 his conviction?

15 A. At what point?

16 Q. After he pled?

17 A. No. He had ten days.

18 Q. Right.

19 A. So he had ten more days.

20 Q. And has the time passed now?

21 A. Of course, it has, yes, it has
22 been more than ten days.

23 Q. Okay. What would have been the --
24 even though your normal practice is what it is, what
25 would have been the problem with you filing an appeal

1 for him on his behalf?

2 A. Well, in this matter he
3 potentially would be back into the ballpark
4 where he was facing different penalties than he
5 got with the 40 years and given the fact that
6 we had negotiated that, that he had signed off
7 on that, that he had pled guilty, I think that
8 would have been an improper thing to do because
9 I would then potentially put my client in
10 significant jeopardy, whereas, we had averted,
11 if you will, the, you know, the crisis and
12 gotten the 40 years and not life with no chance
13 of getting out; so I don't think that would
14 have been a proper thing for me to do.

15 Q. Would that have been his decision?

16 A. Oh, sure, that would have been
17 his decision, yes, very much so.

18 Q. Did you have that discussion with him?

19 A. I don't recall having any great
20 discussions with him about an appeal. However,
21 had he wanted to do that, we absolutely would
22 have filed it.

23 Q. Okay.

24 A. There would have been no reason
25 for us to independently decide, Oh, I'm not

1 going to do what the client wants me to do.
2 Oh, I'm just going to ignore that request for
3 an appeal. That would have been just
4 unthinkable.

5 Q. Okay. Mr. Culler, I'm sure you
6 probably thought about this case before you came this
7 morning?

8 A. Sure, yes.

9 Q. In your mind, is there anything that
10 you could have done for Mr. Bing that would have made
11 things turn out differently for him?

12 A. No, I don't think so.

13 Q. You don't think by investigating these
14 witnesses would have been a help to his defense?

15 A. I don't think he had a defense.
16 I guess that's my problem.

17 Q. Okay.

18 A. I think the multiple statements
19 that he made which were inculpatory, the
20 multiple other problems, forensically, were
21 pretty much insurmountable. The defense, if
22 you will, quote unquote, was to prevent
23 Mr. Bing from getting the death penalty.

24 Q. Is that the goal?

25 A. Yeah, I think so. Absolutely I

1 do.

2 Q. Okay.

3 A. And that occurred, I think, for
4 multiple reasons, one which of which is the
5 solicitors changed and Mr. Pascoe was willing
6 to work with us on some sort of plea. But in
7 terms of anything that we could have done that
8 we didn't do, as I said, I think we met
9 probably 40, 50, 60 times; we spent hours on
10 this case. We went to multiple locations, we
11 had probably \$30,000 in funds that we expended
12 with experts. I don't think there was anything
13 else that we could do.

14 Q. In terms of all the incriminating
15 statements that you allege that Mr. Bing made --

16 A. Sure, right.

17 Q. Was there any effort to have those
18 statements resolved from the record or stricken from
19 the record or a motion to have them taken from the
20 records?

21 A. No, I don't know that that
22 really would have been possible with a
23 voluntary statement.

24 Q. Did you try?

25 A. Well, there wasn't a record at

1 that point in time, it simply was a file of
2 evidence. In terms of eliminating that,
3 physically, I don't know how we would
4 accomplish that. We would have, of course, at
5 trial discussed a Batson motion, the
6 voluntariness of those statements, but no,
7 there were, I think, two or three that he gave
8 and they were what they were.

9 He had written those on paper they had them
10 in the file we had copies of them, there was nothing
11 really to be done with them at that point in time.

12 MS. DAVIS-BRANCH: May I, for a moment just
13 talk to --

14 THE COURT: Sure, of course.

15 MS. DAVIS-BRANCH: Thank you, Your Honor.

16 (Ms. Davis branch conferring with
17 Mr. Bing.)

18 BY MS. DAVIS-BRANCH:

19 Q. Mr. Culler.

20 A. Yes.

21 Q. During your discussions with Mr. Bing
22 did you ever have an occasion to have a heated
23 discussion with him when he was so upset about
24 anything?

25 A. It's possible.

1 Q. Do you ever recall him saying anything
2 that would indicate to you that he didn't want you to
3 be his lawyer anymore?

4 A. I don't remember that. I mean I
5 think that would be something I would remember.
6 You know, when you're dealing with somebody
7 charged with murder, they're not going to be
8 necessarily happy times always, and I certainly
9 understood that and respected what he thought.
10 But it would have been more, if in fact that
11 was his theory, that he was going to fire us, I
12 certainly don't remember receiving anything in
13 writing from anybody or receiving --

14 Q Would that have been a requirement to
15 be in writing?

16 A. No, it wouldn't have been a
17 requirement, it would have been corroborative
18 to his story now which, unfortunately, there is
19 none; and I don't remember that. So I'm sure
20 we probably had heated discussions here and
21 there. Typically in those unfortunate set of
22 circumstances it happens.

23 Q. Did you and Mr. Delgado reach a
24 conclusion simultaneously that Mr. Bing should accept
25 a plea or was it his initiation and you followed or

1 your initiation he followed?

2 A. Neither.

3 Q Okay.

4 A Neither. Mr. Delgado is
5 extremely experienced, a very good lawyer. I,
6 of course, in reading this, came to that
7 conclusion. I think he did as well. It wasn't
8 really something we struggled with in terms of
9 what do we do here.

10 MS. DAVIS-BRANCH: Thank you, Your Honor.
11 No further questions.

12 THE COURT: All right. Cross-examination.

13 MR. BOOZER: Thank you, Your Honor. May we
14 approach briefly, Your Honor?

15 THE COURT: Of course.

16 (Whereupon, a bench conference was
17 held off the record.)

18 THE COURT: Mr. Boozer if you would,
19 please, just go ahead and proceed.

20 MR. BOOZER: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. BOOZER:

23 Q. Mr. Culler, do you recall during the
24 course of y'all's representation of the applicant how
25 many stories exactly or versions of the events that

1 occurred he came up with during the course of your
2 representation?

3 A. I think it was six.

4 Q. Now, did this concern you?

5 A. Yes, it concerned me to the
6 extent as I referenced earlier that I wrote
7 Professor Freeman, we engaged him to explain
8 the dilemma that we were in which unfortunately
9 I faced earlier and said what do we do with
10 this. We've got multiple different stories
11 that are contradicting and you know...

12 MR. BOOZER: And, Your Honor, at this time
13 I would like to make as part of the record the letter
14 Mr. Culler sent to Professor Freeman regarding the
15 ethics advice.

16 THE COURT: Sure. Very well. Any
17 objection?

18 MS. DAVIS-BRANCH: No.

19 THE COURT: Very well.

20 MR. BOOZER: And if we could have copies of
21 this, this is the only copy I have. Thank you.

22 BY MR. BOOZER:

23 Q. And Mr. Culler did -- in this letter
24 that you sent asking for advice on ethical concerns
25 you had with regard to presenting different stories

1 to the Court and portraying the truth to the Court
2 did Professor Freeman in response send a letter?

3 A. He did.

4 MR. BOOZER: And, Your Honor, if I may also
5 place this in evidence as well, thank you.

6 THE COURT: And request a copy, I gather.

7 MR. BOOZER: Thank you.

8 THE COURT: And copies as well?

9 MR. BOOZER: Copies as well, thank you.

10 BY MR. BOOZER:

11 Q. Do you recall what Professor Freeman's
12 advice was?

13 A. Well, his advice was that you
14 had, if the client wanted to testify to put him
15 on the stand. First you had to tell him in
16 writing that if he was going to perjure
17 himself, tell Court, I believe told him in
18 writing not to do that.

19 If you indicated, I want to testify, and
20 then if the client had breaks in testimony you could
21 say please proceed, but that was it. You couldn't
22 elicit anything if after he had testified, of course,
23 out of the presence of the jury, advise the Court.

24 Q. Now, in preparation of cases and
25 representation of clients, do you normally prepare or

1 put together a statement for -- to have the client
2 sign regarding what's kind of taken place and what
3 you've done to get up to a certain point?

4 A. I will. I would do that.

5 Q. And did you do that in this case?

6 A. I did.

7 MR. BOOZER: May I approach the witness,
8 Your Honor?

9 THE COURT: You may.

10 MR. BOOZER: I apologize, Mr. Culler. You
11 normally or you sometime prepare a statement that
12 you'll have the applicant sign just going over what
13 you've been over with the defendant and kind of where
14 you are in the course of your representation?

15 THE DEFENDANT: Yes.

16 BY MR. BOOZER:

17 Q. And in this instance you did do that?

18 A. I did.

19 Q. And IS this the statement that you
20 prepared for his case?

21 A. It is.

22 Q. If you could just briefly tell the
23 Court what it is what, what it contains --

24 A. It says, that he had met with
25 both Mr. Delgado and myself many many times.

1 It goes through the fact that Mr. Bing had
2 given several statements, that we've seen as
3 confessions, that his gun had been determined
4 to be the murder weapon, that he was in
5 possession of the car that belonged to
6 Mr. Beals, that there was evidence in phone
7 records that demonstrated he had called
8 Mr. Beals' home after this murder.

9 It goes over the multiple witnesses that we
10 had met with; that we had talked to both he and his
11 family; that we believed that he will be convicted of
12 murder; that we have recommended that he would enter
13 a plea bargain, the sentence would be substantial in
14 the 40 to 40-year range, I say in this letter; that
15 he had given contradictory statements which would
16 make it very difficult, if not impossible for him to
17 testify; that we've consulted with Professor Freeman
18 with regard to that; two polygraph examinations that
19 he had failed; and then it finishes that I recognize
20 all of this and I reject my lawyer's advice freely
21 and voluntarily. No promises have been made or
22 threats against me to get me to reject my lawyer's
23 advice.

24 Q. And did he sign that?

25 A. He did not. It was however

1 witnessed and notarized.

2 Q. Okay.

3 A. The fact that he didn't sign it.

4 MR. BOOZER: May I approach the witness,
5 Your Honor?

6 THE COURT: You may.

7 MR. BOOZER: And, Your Honor, I would like
8 to make this a part of the record as well and this is
9 the original, so may we have a few extra copies for
10 everyone?

11 THE COURT: Any objection?

12 MS. DAVIS-BRANCH: No, Your Honor.

13 THE COURT: Very well.

14 BY MR. BOOZER:

15 Q. Mr. Culler, do you think State had
16 overwhelming evidence in this case?

17 A. I do.

18 Q. Whose decision was it to plead guilty?

19 A. It was Mr. Bing's decision.

20 Q. And you've heard the testimony today
21 of Mr. Delgado. Are you in agreement with
22 Mr. Delgado's testimony?

23 A. I am.

24 Q. Thank you. No further questions.

25 THE COURT: All right. Ms. Branch-Davis,

1 redirect.

2 MS. DAVIS-BRANCH: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 Q. Mr. Culler, do you recognize this
5 document?

6 A. Something generated by the
7 Orangeburg County Sheriff's Office.

8 Q. Okay. Thank you.

9 A. Sure.

10 Q. Did Mr. Bing ever tell that you he
11 owned the car in question, the Corvette?

12 A. Yeah, he said that he had bought
13 it from his cousin who had acquired it, I
14 believe, at an auto sale in Aiken. That was
15 one of his stories.

16 Q. Did your investigation conclude that
17 that was a true statement or untrue statement?

18 A. An untrue statement.

19 Q. Okay. Did you ever find a bill of
20 sale in your investigation that the car had been sold
21 to Mr. Bing?

22 A. I think somewhere in the
23 discovery there was some bill of sale, but I
24 don't remember anything more than that.

25 Q. Would that have been important to you

1 to find that bill of sale? Would that not have
2 corroborated his story that he owned the car.

3 A. If my memory serves me
4 correctly, we could not find the person who, in
5 theory, he had bought the car from because he
6 didn't know their name, nor did he know their
7 phone number, so to try to confirm through
8 physical people was really not possible. That
9 bill of sale, I just don't remember that much
10 about it. Of course, if it had led us down
11 that path we would have done that, but it
12 didn't go that direction.

13 Q. Okay. Thank you.

14 MS. DAVIS-BRANCH: I have no further
15 questions of this witness, Your Honor.

16 THE COURT: All right. Any cross?

17 MR. BOOZER: No, Your Honor.

18 THE COURT: Is this witness free to leave?

19 MS. DAVIS-BRANCH: Yes, Your Honor.

20 MR. BOOZER: Yes, Your Honor.

21 (Whereupon, the witness steps down
22 from the witness stand.)

23 THE COURT: Call your next witness, please.

24 MS. DAVIS-BRANCH: Levi Bing, Sr.

25 THE COURT: If you would raise your right

1 hand.

2 (LEVI BING, SR., called as a witness,
3 having first been duly sworn, is
4 examined and testified as follows:)

5 THE COURT: If you would please be seated
6 and when the microphone is in place, if you would,
7 state your full name for the record.

8 THE WITNESS: Levi Bing, Sr.

9 DIRECT EXAMINATION

10 BY MS. DAVIS-BRANCH:

11 Q. Mr. Bing, Sr., I take it from that
12 Mr. Bing is your son?

13 A. Yes, ma'am.

14 Q. And I want to ask you about the time
15 when -- let me put it this way did, Mr. Culler and
16 Mr. Delgado come to see you at any time?

17 A. Yes.

18 Q. Okay. When?

19 A. I don't quite remember exactly
20 when.

21 Q. Was it before Mr. Bing, your son, took
22 a plea?

23 A. Yes.

24 Q. Okay. And what was the purpose of
25 their investigation?

1 A. Well, they came to talk to us to
2 tell us that things didn't look too good and it
3 would be good if we could maybe get him to
4 plea.

5 Q. Did Mr. Bing, want to take a plea?

6 A. No, he didn't.

7 Q. Did he tell that you?

8 A. Yes, he did.

9 Q. Do you know whether or not he told his
10 lawyer that?

11 A. No, I don't recall.

12 Q But they came to see you.

13 A Yes, they did.

14 Q Okay. And so what was your response
15 when they made that visit to you?

16 A. They respond that --

17 Q. What was your response?

18 A. Well, I gave it some thought and
19 there was some stuff said and if someone comes
20 to talk to you about your son or any of your
21 kids, yeah, well, he can get death row or get
22 the rest of his life in prison if they don't
23 get him to plea.

24 Q. Was this a major decision of yours
25 about your son getting the death penalty?

1 A. Yes, ma'am.

2 Q. And that would have been a
3 contributing factor in you going to talk to your son?

4 A. Yes, ma'am.

5 Q. How soon after did you go speak to Mr.
6 Bing after meeting with Mr. Delgado and Mr. Culler?

7 A. Well, I think it's like two
8 weeks later. I think it's that time frame that
9 we had to make a decision on that.

10 Q. Okay.

11 A. It was like two weeks.

12 Q. So you visited your son while he was
13 incarcerated?

14 A. Yes, I did.

15 Q. And, in your opinion, did you
16 encourage him to take a plea?

17 A. Yes, I did.

18 Q. And did he want to?

19 A. No, ma'am.

20 Q. What did he say?

21 A. Well, we spent I think maybe a
22 couple hours, me and my son-in-law. We kept
23 talking about he needs it take this plea, just
24 take it.

25 Q. What did he say?

1 A. He said he didn't want to. He
2 even broke down at that time crying. But we
3 just felt like he needed to do this.

4 Q. Did your son express to you why he did
5 not want to take a plea?

6 A. He said, the only thing he said
7 to me and my son-in-law that he wanted to go to
8 trial.

9 Q Because he was innocent?

10 A Well, he didn't say all the
11 right words, but he said he wouldn't want to go
12 to take the chances.

13 Q. You paid Mr. Delgado a monetary
14 compensation to represent your son, did you not?

15 MR. BOOZER: Your Honor, I'm going to
16 object to monetary compensation or any discussion
17 about fees. I don't believe that's relevant. I
18 think that whether he's appointed or retained -- I
19 think it's been testified that he was retained, so I
20 don't think it's relative to his effectiveness
21 whether he's paid or whether he was paid at all.

22 MS. DAVIS-BRANCH: My questions wasn't to
23 suggest that he was not doing what he was supposed to
24 do whether representing by private counsel. I was
25 just merely setting up a foundation to get some place

1 else with that, but if that's going to be a problem,
2 I can withdraw the question.

3 THE COURT: You can lay a foundation.

4 MS. DAVIS-BRANCH: I'm trying to.

5 What were your expectations of Mr. Delgado?

6 THE COURT: I don't know that his
7 expectations matter. His father's expectations --
8 why are they --

9 MS. DAVIS-BRANCH: Well because when they
10 entered into a contractual relationship that Mr.
11 Delgado would represent his son he certainly had
12 expectation that he would represent him in the manner
13 of being a good defense counsel and I think he's
14 going to testify that he didn't think Mr. Delgado had
15 done that.

16 THE COURT: What relevance does that have?

17 MS. DAVIS-BRANCH: Because my client is
18 claiming he had ineffective assistance of counsel.

19 THE COURT: But this is not your client.

20 MS. DAVIS-BRANCH: You're right.

21 THE COURT: This is not an expert, I don't
22 think.

23 MS. DAVIS-BRANCH: No, it isn't.

24 THE COURT: This is a father who has paid
25 money to hire.

1 MS. DAVIS-BRANCH: That's correct.

2 THE COURT: I certainly want you to have an
3 opportunity to lay foundation, but if the foundation
4 you're laying is this gentleman can testify he didn't
5 like what he did, he didn't do a very good job, that
6 doesn't have any relevance in these proceedings.

7 MS. DAVIS-BRANCH: Okay. Okay.

8 THE COURT: If you want to ask him, you
9 know, his opinion regarding the quality of
10 representation from Mr. Delgado and Mr. Culler has no
11 relevance to these proceedings now. If there's
12 something you need to tell me, I heard a conversation
13 or this is the way it went or something like that --

14 MS. DAVIS-BRANCH: I was only interested in
15 his opinion, Your Honor.

16 THE COURT: Okay.

17 MS. DAVIS-BRANCH: Sorry. What was your
18 opinion in regards --

19 THE COURT: To these proceedings.
20 Mr. Bing, I know that sounds crude, but there are
21 standards, there are legal standards. There's even a
22 question about whether or not a lawyer can testify as
23 an expert to that standard. You're going to tell me
24 particular things, but you'll lay an opinion about
25 that and I don't mean it could be insulting I just

1 want you to understand it just doesn't have any
2 relevance.

3 MS. DAVIS-BRANCH: I don't think my client
4 thought that Your Honor would ever be insulting.

5 THE COURT: All right. Go ahead.

6 BY MS. DAVIS-BRANCH:

7 Q. Is there anything in particular about
8 Mr. Delgado or Mr. Culler's representation of Mr.
9 Bing you found to be particularly disturbing?

10 A. Performance. Can I say that?

11 THE COURT: There are some things that you
12 found disturbing, absolutely.

13 THE DEFENDANT: I wasn't pleased with the
14 performance. I thought that a few things might have
15 slipped through the crack and I talked that over with
16 me wife and I think they should have went out on the
17 edge, maybe done more investigation with the things.
18 I thought that they should be done a little more.

19 BY MS. DAVIS-BRANCH:

20 Q. Did you share that with Mr. Culler and
21 Mr. Delgado?

22 A. I didn't talk directly with
23 Mr. Culler, but me and Mr. Delgado had
24 conversations over the phone. We talked things
25 and he would say things, if he took a plea to

1 get 30 and that was told to me and then the
2 last couple of times I was told, I just said
3 that I talked to my wife and son-in-law. Got
4 in the car slipped up one morning I didn't even
5 tell my wife about it and I just talked to my
6 son-in-law and told him, I said, Maybe the best
7 thing for us to do is try to go up and get my
8 son to plea.

9 Q. Was there anything else, Mr. Bing,
10 anything else in regard to anything else that you
11 found disturbing in Mr. Delgado's representation?

12 A. Well, like I said I just didn't
13 think that they really went out and done a
14 great job.

15 Q. Okay.

16 A. I don't think they done a great
17 job, I'm sorry.

18 Q. Answer any questions that Mr. Lance or
19 the Court may have, okay?

20 THE COURT: Sure. Sure.

21 MR. BOOZER: No questions of this witness,
22 Your Honor.

23 THE COURT: Very well. All right. Thank
24 you so much. You can take your water with you if
25 you'd like.

1 THE WITNESS: Okay. Thank you.

2 THE COURT: You need some more?

3 THE WITNESS: No, I'm fine.

4 THE COURT: Would you like some more?

5 Thank you, sir.

6 (Whereupon, the witness steps down from the
7 Witness stand.)

8 THE COURT: All right. Call your next
9 witness please, ma'am.

10 MS. DAVIS-BRANCH: Yes, Your Honor. Your
11 Honor, I have a document that Mr Bing has prepared on
12 his own behalf. Mr. Boozer doesn't have any problem
13 with me including it as part of the record on behalf
14 of Mr. Bing.

15 MR. BOOZER: To be treated as an amendment
16 to his application.

17 MR. BOOZER: It really encompasses what
18 we've been over already. It's really the subject
19 matter jurisdiction claim, the flawed indictment.

20 THE COURT: Sure. Let me see if I have any
21 questions about it.

22 Very well. Thank you. I have reviewed it
23 and there's no objection to this document being
24 entered as an amendment to Mr. Bing's PCR
25 application.

1 MR. BOOZER: That's correct, Your Honor.

2 THE COURT: Very well. Okay.

3 MS. DAVIS-BRANCH: Your Honor, Mrs. Bing,
4 Levi Bing's mother is here. I've indicated to her
5 it's not appropriate because she is not a part of our
6 case but I just wanted, if you would just explain to
7 her why she could not come to you and say what she
8 wants to say. I told her that it would not be
9 appropriate for her to do that.

10 THE COURT: You know, it would be
11 impossible for me to know, Ms. Davis-Branch, if she
12 has evidence that you would call her to offer.

13 MS. DAVIS-BRANCH: Right.

14 THE COURT: It's impossible for me to know,
15 you know, I don't know.

16 MS. DAVIS-BRANCH: Okay.

17 THE COURT: And I haven't spoken with her,
18 so it would be impossible.

19 MS. DAVIS-BRANCH: She just wants to make a
20 statement to you, Your Honor. I do not have any
21 evidence from her, I do not want to solicit any
22 evidence from her she just wants to make a statement
23 to you, Your Honor. I've explained to her that would
24 not be appropriate at this time.

25 THE COURT: You're so kind, thank you,

1 yeah, because obviously at this point this is an
2 evidentiary proceeding.

3 MS. DAVIS-BRANCH: Yes, Your Honor.

4 THE COURT: And if there's no evidence
5 which you would have from her then it would not be
6 appropriate for me to just hear a statement.

7 Very well. Do you need to take a break
8 Ms. Branch-Davis?

9 MS. DAVIS-BRANCH: No, Your Honor, Mr. Levi
10 Bing would want to.

11 THE COURT: You want to call Mr. Bing? Of
12 course.

13 MS. DAVIS-BRANCH: Come onto the stand.

14 THE DEFENDANT: Thank you, Your Honor, I
15 appreciate opportunity.

16 THE COURT: Of course. And you know
17 Mr. Bing, you are under oath and you continue under
18 oath.

19 THE DEFENDANT: Yes, ma'am.

20 DIRECT EXAMINATION

21 BY MS. DAVIS-BRANCH:

22 Q. Mr. Bing, what is your sentence for
23 the murder of the gentleman we've been talking about
24 today? What is your sentence? What did the Court
25 sentence you?

1 A. Forty years day-for-day,
2 mandatory.

3 Q. What was your understanding before you
4 received that sentence from your attorneys?

5 A. That I would have been eligible
6 for a parole date.

7 Q. And have you been told differently?

8 A. Yes, ma'am.

9 Q. What have you been told now?

10 A. That I will have to do 40 years
11 day-for-day.

12 Q. Okay. And --

13 A. One hundred percent.

14 Q. Had you known that at an earlier time,
15 at the time that you took your plea, would that have
16 made a difference?

17 A. Yes, ma'am.

18 Q. Do you feel that your attorneys misled
19 you, as far as that statement's concerned?

20 A. Yes, ma'am.

21 Q. Okay. And have you been harmed by
22 those statements?

23 A. Yes, ma'am.

24 Q. Okay. Answer any questions that
25 Mr. Boozer may have?

1 MR. BOOZER: No questions, Your Honor.

2 MS. DAVIS-BRANCH: No further questions,
3 Your Honor.

4 THE COURT: Hold on one second.

5 MS. DAVIS-BRANCH: Okay. Sorry, Your
6 Honor.

7 THE COURT: Well, let me just ask you this
8 question.

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And I'm looking at your
11 colloquy with Judge Jefferson.

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: And this is at page 8, line 11,
14 and Mr. Bing it says, sir, I want to explain to you
15 that you may have discussed parole or parole
16 eligibility with your lawyer or with other people.

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: But until you're sentenced, no
19 one can tell you when, if ever you will be eligible
20 for parole or under what conditions. You should
21 assume that you will serve the entire time in jail
22 that you are sentenced to. Do you understand that?
23 And this says here that your answer is, yes, ma'am.

24 Sir, is it correct that you have reached,
25 your lawyers have reached a negotiated plea of 40

1 years with the solicitor; and your answer, it says
2 here is, yes, ma'am.

3 And question, And that whatever time you
4 receive on the other charges that will run
5 concurrent? You say yes, ma'am.

6 And then on page 9, line 1, it says, Sir, I
7 will advise you that if I cannot accept the
8 negotiated plea, I will allow you to withdraw your
9 plea?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: Okay. But Judge Jefferson told
12 you. Is that accurate, your colloquy with Judge
13 Jefferson?

14 THE DEFENDANT: Yes, ma'am. It was.

15 THE COURT: Okay.

16 THE DEFENDANT: After the plea.

17 THE COURT: Yeah, what you mean after the
18 plea?

19 THE DEFENDANT: After, after the court
20 hearing was over with.

21 THE COURT: Yes.

22 THE DEFENDANT: They were saying that I
23 have 85 percent after, also John Delgado had
24 mentioned that today that I would have -- I wouldn't
25 have to do the entire time.

1 THE COURT: Okay. But the judge, Judge
2 Jefferson told you differently, didn't she.

3 THE DEFENDANT: Yes, ma'am. And that would
4 cause me not to put into the appeal because I'm going
5 off what the attorney had told me.

6 THE COURT: Okay. Any other questions?
7 Does that prompt any questions from you Ms. Davis?

8 MS. DAVIS-BRANCH: We rest, Your Honor.

9 THE COURT: How about from you?

10 MR. BOOZER: No questions of this witness,
11 Your Honor.

12 THE COURT: Thank you.

13 THE DEFENDANT: Thank you.

14 THE COURT: You can come on down.

15 (Whereupon, the witness steps down
16 from the witness stand.)

17 THE COURT: Let me ask you this question
18 and I just want to be sure that -- you can come right
19 on -- Mr. Bing has a copy of the transcript, doesn't
20 he? I know he has a copy of this.

21 MS. DAVIS-BRANCH: He's seen it. He may
22 not have a copy of it, but he's seen it. We've gone
23 over it.

24 THE COURT: Gone over it?

25 MS. DAVIS-BRANCH: Yes, Your Honor.

1 THE COURT: Any other witnesses?

2 MS. DAVIS-BRANCH: No, Your Honor.

3 THE COURT: All right. Would there be any
4 witnesses?

5 MR. BOOZER: None from the State, Your
6 Honor.

7 THE COURT: Very well. Well, I'm going to
8 consider these matters. What will happen next is I
9 will take some time, consider these matters and I'll
10 write a letter. And Mr. Bing so you know it will go
11 to Ms. Davis-Branch, the letter will, it will go, of
12 course, to Counsel for the State and I will discuss
13 in that letter with you, it will probably be with
14 some other matters that I'm hearing, but I will just
15 notify you of my decision and will -- I will ask one
16 of you to draft an order for me, a proposed order
17 and -- but both of you will receive.

18 Counsel, you will receive that letter
19 Ms. Branch-Davis or Davis-Branch, I know I'll share
20 that then with Mr. Bing, as well of course, as an
21 order that you would draft or that Mr. Boozer would
22 draft as directed by the letter and I'll get back
23 with you just as expeditiously as I can because I
24 know I've got a number of things that I'll be hearing
25 this week, so I appreciate your patience. Thank you

1 all.

2 MS. DAVIS-BRANCH: Thank you, Your Honor.

3 MR. BOOZER: Thank you, Your Honor.

4 THE COURT: All right.

5 (Entered into evidence was Applicant's
6 Exhibit an 1, applicant's brief.)

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*****END OF TRANSCRIPT*****

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Brenda W. Sigwald, Court Reporter
and Notary Public for the
State of South Carolina
My commission expires
February 25, 2010

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MAY 15 2007
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Mr. Levi Bing, Jr. 308051
Le Corrections Institution
Sumter - South - 1143
990 Winckley Hwy.
Bishopville, SC 29010

Mrs. Belinda Q. Branch
1111 Bayle St.
Orangeburg, SC 29115

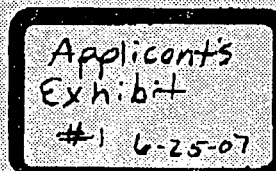
April 28, 2007

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2007 JUN 28 PM 12:55

Dear Mrs. Branch,

Would you please review my
brief on my improper indictment,
and gather knowledge from the Herman
Munnis V. State of South Carolina case.
(Case Number: 01-CP-08-1281) I need you
to file a motion for amendment to my
(P.C.R.) application. Thank you for your
time, and support.



Sincerely,
LEVI BING, JR.
[Signature] 4/28/07

165

①
 Mr. Louis Ring, Jr. 308051
 Lee Corrections Institution
 Sumter - South - 1143
 990 Wiscoky Hwy.
 Bishopville, SC 29010

Mrs. Belinda D. Branch
 1111 Bayle St.
 Orangeburg, SC 29115

Sept 26, 2007

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Dear Mrs. Branch,

I would first like to thank you so much for your hard effort, and support on my Post Conviction Relief case. In writing you this letter to advise you, that I would like for you to amend the claims to my Post Conviction Relief application as follows before next Post Conviction Relief hearing in July: "Please file a Motion for amendment"

- Ⓐ Flawed Indictments
- Ⓑ Flawed Warrants
- Ⓒ Flawed Video Tape in Evidence.

(continue) →

②

- ② Involuntary Plea
- ③ Ineffective Assistance of Counsel.
- ④ Involuntary Statements

Improper Indictment

- ① I allege that my conviction of murder must be vacated, because the indictment failed to allege the essential elements of murder as required by S.C. Code 17-19-30 (1985).
- ② I contend that in order to properly charge an accused with the crime of Murder, an indictment must allege the time, and place of the assault upon the deceased and the time and place of the death of the deceased.
- ③ I contend that the indictment does not satisfy the notice requirements of subject matter jurisdiction set forth in the South Carolina Constitution and statutes.
- ④ The circuit court does not ordinarily have subject matter jurisdiction to convict a defendant of an offense unless, (continue,

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- ③
- ① There has been an indictment which sufficiently states the offense.
 - ② There has been a waiver of presentment
 - ③ The offense is a lesser included offense of the crime charged in the indictment.

- *Carter v. State*, 329 S.C. 355, 495 S.E.2D 773
- *State v. Lyach*, 344 S.C. 635, 545 S.E.2D 511 (2001)
- *Joseph V. State*, 2002 WL 31296304 (S.C. 2002)

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- ⑤ Lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal or Post Conviction Relief.

- *State v. Funderburk*, 259 S.C. 256, 191 S.E.2D 520 (1972)

- ⑥ An indictment for murder is sufficient "if the offense is stated with sufficient certainty, and Particularity to enable the Court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if on acquittal or a conviction thereon may be pleaded as a bar to (continue)..."

④

any subsequent prosecution."

- *State v. Owens*, 293 S.C. 161, 165, 359 S.E.2D 275, 277 (1987) *Joseph, Supra.*

⑦ South Carolina Code Section 17-19-30 states, "Every indictment for Murder shall be deemed and adjudged sufficient, and good in law, which in addition to setting forth the time and place together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought kill, and murder the deceased."

⑧ This statute is consistent with statutes enacted in (1880) and amended in (1887). SC. Code Ann. 17-19-30 (History) Based on case law interpretation as discussed herein, it appears this statute can be broken down and construed as follows:

① The indictment must set forth the time, and place "of Murder". Although the words, (continue, -

⑤ "of Murder" are not part of the statute, cases have apparently read these words into the statute.

③ The indictment must include a plain statement of the manner in which the death of the deceased was caused.

④ The indictment must charge that the defendant, with malice aforethought, murdered the deceased.

⑨ S.C. code 16-3-10 (1985) defines Murder as the killing of any person with malice aforethought, either express or implied. Although this statutory definition of murder exists, it remains, nevertheless, a common law crime. The statutory definition in no wise affects the ingredients which are necessary to constitute murder, but leaves them exactly and in every particular as they stand at common law.

⑩ State v. Ludge, 208 S.C. 497, 38 S.E.2D 715, 719 (1946.) The crime of murder is composite one. It includes the assault committed upon a person with intent to kill, and the resulting

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⑥ death from that assault. The assault alone does not constitute the crime. Neither does the death of the person of itself make the crime. The crime cannot become complete until after the death of the assaulted person has occurred. The state must prove not only the assault, and the death occurring from it, but the time of the assault, and the time of the death, as time is recognized in the law. In addition, the state must prove the place of the assault and the place of death. These necessary elements of the crime of murder must not only be proved, before a person accused may be lawfully convicted, but they must be alleged in the indictment returned against the accused by the grand jury.

⑦ I contends that the present indictment does not state the time and place of the murder sufficient to confer subject matter jurisdiction and does not set forth the manner in which the deceased was killed. The indictment in this case states:

(continue) →

⑦
 ① That Luis Bing, Jr. did in Orangeburg County, SC, on, or about November 10, 2003 with malice aforethought, kill one Randy Bills, by means of shooting the victim with a 9mm handgun, and the said victim did die as a proximate result thereof. This offense being in violation of the common law of South Carolina, and Section 16-3-10 of the Code of Laws of South Carolina, as amended.

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② The true test of the sufficiency of an indictment is not whether it could be made more definite, and certain, but whether it contains the necessary elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet. *Browning v. State*, 320 SC 366, 465 S.E.2D 358 (1995)

③ *State v. Rector*, 158 S.C. 212, 155 S.E.2D 385 (1930)
 The Rector court directs this court to its decision rendered only eight months earlier in *State v. Platt*, 154 SC. 1, 151 S.E. 206 (1930), stating "We went fully into the necessity

(Continue) →

of alleging and providing the place of death
of the person alleged to have been murdered" ⑧

— *Reiter*, 155 SE 385 AT 387

- ⑬ An indictment phrased substantially in the language of the statute that creates and defines the offense is ordinarily sufficient.

— *State v. Shoemaker*, 276 S.C. 86, 275 S.E. 2D 878 (1981)

However, it is absolutely necessary in this state, in an indictment for murder, to allege the place of death of the deceased. (*Platt*, Supra)

The court in (*Platt*) cited a case from the South Carolina Supreme Court decided in 1882, *State v. Coleman*, 17 S.C. 473, 1882 WL 5605 (1882). The question before the court in (*Coleman*) was whether the omission of the place where the deceased died in the indictment is a fatal defect. In the (*Coleman*) indictment there was an allegation that the injuries causing the death were inflicted in Laurens County, upon the deceased while

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⑨

in that county, yet there was no allegation as to where the death ensued from such injuries - whether within, or without the state, or whether within, or without the county of Laurens." The (Calhoun) court concluded that the indictment caused that it sustained as a good indictment at common law because it omits an allegation essential to the validity of a common law indictment.

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- ⑩ The (platt) court found that the (calhoun) decision has not been questioned in this state. Platt 151 S.E. 206 AT 211. The (Platt) court further cites State v. Blakeney, 33 SC 111, 11 SE. 637 (1890) a case in which the defendants were charged with murder in Chesterfield County and which was decided after the enactment of the statutes as to indictments. (Platt), 151 S.E. 206 AT 211. The (Blakeney) indictment alleged properly that the injuries were inflicted in Chesterfield County. There was at that time some question as to the sufficiency of the allegation as to the place of death.

(Continued) →

(10) "It can hardly be necessary to cite authority to the fact that [SIC] is absolutely essential in an indictment... that the place of death of the party killed should be alleged therein, and that, in the absence of such allegation, such indictment is fatally defective, and should be quashed on motion made, and such a defective indictment is beyond the reach of amendment" (Blakeney, 11 SE. 637 AT 637-638). A matter so vital as the place of death of the party killed is absolutely necessary to be alleged in a jurisdiction point of venue and must be passed upon by the grand jury in accordance with the constitutional rights of the accused. (Platt, 151 SE. 206 AT 211, (Blakeney, supra). Thus, the court determined that this matter was jurisdiction in nature. The (platt) court concluded, after "a somewhat exhaustive research," that the decision of the court for at least a third of a century tends to modify or weaken the holdings made in (Blakeney).

(15) An objection to a defect appearing on the face of an indictment usually must be

(continued) →

raised before the jury is sworn. S.C. Code Ann. 17-19-90 (1985) (*State v. Smalls*) 336 SC 301, 519 SE2D 793 (CT. APP. 1999) Issues related to subject matter jurisdiction, however, may be raised at any time. (*Smalls, Supra*).

The allegations of an indictment as to the place of an assault and the place of the death are generally regarded as essential allegations in an indictment for murder.

State V. Bestill, 243 S.C. 14, 131 S.E.2D 841 (1963)
(Att. Supra)

Such allegations affect the jurisdiction or the essential elements of the crime. This issue has been determined to be jurisdictional in nature and thus was timely raised by the applicant.

(No) Likewise, the time of death is also a critical jurisdictional element. Indictments for murder must also allege, in addition to the place of assault and death, the time of the assault and death. (Bastick, Supra) (Putter Supra). The common law placed a

(B)

limit on the time that could elapse between the injury and death, the conclusive presumption being that the injury did not cause the death if the interval exceeded a year and a day.

— *State v. Sutton* 333 SC 192, 508 SE2D 41 (CT. APP. 1998) (affirmed as modified), 532 SE2D 283, 340 SC 393 (2000)

in (*Sutton*), the Supreme court acknowledged the existence of the "year, and a day" rule, although it "questions the applicability of this rule with present day medical advances which could sustain a victim's life for an indefinite period (AT 395, FN.1)

(*Browning v. State*) 320 SC 346, 465 SE2D 358 (1995)

① The indictment here alleges that an assault occurred, which allegation also asserts the time and place of the actual assault.

However, the indictment in question fails as to the second element of the composite crime of murder set forth in (*Factor*), it fails to allege time or place of death of the deceased. Under (*Platt*), an indictment

(Continue) —

may be dispensed with, and omissions of mere forms may be cured by amendment; but this act neither dispensed with essential allegations, nor has it attempted to cure their omission by allowing amendments to that end. A matter so vital as the place of the death of the party killed, which is absolutely necessary to be alleged, in a jurisdictional point of view. Must be passed upon by the grand jury in accordance with the constitutional rights of the accused.

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— Blakely, Exora AT 638.

4/28/97

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Levi Bing, Jr., #308051,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

06-CP-38-273

**ORDER OF DISMISSAL
WITH PREJUDICE***Belinda Davis-Branch, Esq. appearing for the Applicant.**Lance S. Boozer, Esq., Assistant Attorney General, appearing for the Respondent.*

This is a post-conviction relief (PCR) matter. The Applicant alleges in his PCR application filed March 7, 2006, that he is being held in custody unlawfully due to the ineffective assistance of plea counsel. An evidentiary hearing was convened at the Dorchester County Courthouse on June 25, 2007.

I. PROCEDURAL BACKGROUND

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for Murder (03-GS-38-2411); Grand Larceny (03-GS-38-2412); and Possession of a Weapon during the Commission of a Violent Crime (03-GS-38-2413). The Applicant was represented by John Delgado, Esquire and Michael R. Culler, Jr., Esquire. On March 14, 2005, Applicant pled guilty to the charges. He was sentenced by the

Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. Applicant did not appeal his conviction or sentence.

II. APPLICABLE LAW

a. Involuntary Guilty Plea

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A PCR applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the accused had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's

accusers. Id. Moreover, a criminal defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. 597, 524 S.E.2d 523 (1999). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea must be established by a complete record, and may be accomplished by colloquy between the court and the accused, between the court and the accused's counsel, or both. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). A guilty plea is a solemn, judicial admission of the truth of the charges against the applicant. Statements made during the plea should be considered conclusive unless the applicant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

III. SUMMARY OF TESTIMONY PRESENTED AT THE PCR EVIDENTIARY HEARING, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant, the Applicant's former plea counsels John Delgado, Esquire and Michael R. Culler, Esquire and Applicant's father testified at the PCR evidentiary hearing. The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to

S.C. Code Ann. 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

Allegation of involuntary plea as a result of ineffective assistance of counsel.

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

The Applicant testified at the PCR hearing that plea counsels were ineffective for failing to investigate and review with him a gas station surveillance video near the crime scene. Applicant testified counsels refused to allow him to see the video. Applicant also testified counsels were ineffective for failing to interview witnesses. Specifically, Applicant testified counsels should have investigated witness Shameka Lewis (Ms. Lewis). Applicant further testified his plea was not voluntary and he hesitated on his answers during the plea. Applicant also stated counsels would give the Applicant and his family conflicting information. Applicant further testified counsels failed to investigate another truck seen leaving the scene of the crime.

On cross-examination, Applicant admitted that he pled guilty and that he informed the plea judge that he was satisfied with his attorneys. Applicant also testified he admitted to the crime and acknowledged his counsels explained his rights at the plea.

John Delgado (Mr. Delgado) testified they met with the Applicant on dozens of occasions. Mr. Delgado indicated they did everything possible in this case to prevent Applicant from receiving the death penalty. Mr. Delgado also testified they received and reviewed discovery with the Applicant. Mr. Delgado indicated he discussed the surveillance video with the Applicant. Counsel testified he would never tell a client he could not view evidence. Mr. Delgado further testified he

obtained experts through the Office of Appellate Defense to assist in the investigation of the case. Counsel indicated he hired a private investigator to assist in obtaining witness statements. Counsel testified Applicant admitted what was on video. Counsel indicated in his opinion, he did not believe Ms. Lewis would have been beneficial to the Applicant at a trial. Mr. Culler testified he did not recall the Applicant requesting the counselors to interview Ms. Lewis. However, Mr. Culler further testified he did not believe Ms. Lewis's testimony would have been significant for the Applicant. Both counsels testified they investigated the truck seen leaving the crime but were unable to get any details with regard to the owner or driver of the alleged truck.

Mr. Delgado acknowledged the evidence against the Applicant was very strong. Mr. Delgado testified the Applicant was with the victim a half an hour prior to the crime; the Applicant purchased the gun linked to the crime; and the Applicant possessed the car stolen in the crime. Both Mr. Delgado and Mr. Culler testified the Applicant admitted shooting the victim. Mr. Delgado also testified he did not observe any hesitancy in the Applicant's plea.

Mr. Delgado further testified that the Applicant gave numerous conflicting accounts of what occurred during the crime. Mr. Delgado and Mr. Culler testified they was so concerned with the implications of the Applicant's conflicting statements, they consulted an ethics professor regarding their duties as officers of the court.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences. This Court finds that trial counsel was not deficient in any aspect of her representation and performed well within reasonable professional norms for a criminal defense attorney. Strickland v. Washington,

466 U.S. 668, 104 S.Ct. 2052 (1984); Hill v. Lockhart. This Court further finds the Applicant also failed to carry his burden of proof to show that but for trial counsel's alleged deficient representation he would have not pled guilty but would have insisted on going to trial. Roscoe v. State. Furthermore, this Court finds the Applicant's guilty plea was knowingly and voluntarily made. Boykin v. Alabama; Pittman v. State. Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel. Applicant failed to produce Ms. Lewis at the PCR hearing. This Court finds the Applicant's testimony to what Ms. Lewis would have testified to had he proceeded to trial to be purely speculative. Accordingly, the allegation of involuntary guilty plea resulting from the allegation of ineffective assistance of counsel is denied.

Allegation that the plea court lacked subject matter jurisdiction

The Applicant testified the plea court lacked subject matter jurisdiction due to defects in the indictments. Mr. Delgado testified he was comfortable with the indictments and was on notice of the charges the Applicant was facing.

Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his

trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45 and -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005); See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Accordingly, this allegation is denied.

Allegation of ineffective assistance of counsel for failing to file an appeal.

At the PCR hearing, Applicant alleged he was denied the right to a direct appeal from his guilty plea. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California.¹ White, Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).²

¹386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967).

²“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.” [Emphasis

Mr. Delgado and Mr. Culler testified Applicant never asked either counsel to file an appeal. Mr. Delgado further testified had Applicant asked him to file an appeal, he would have done so. Mr. Delgado testified there was nothing to appeal as this was a guilty plea. Counsel also testified he normally does not appeal guilty pleas.

This Court finds that counsels' testimony was credible and the Applicant's testimony was not credible. This Court finds Applicant did not ask counsels to file an appeal from the guilty plea. The Court affirmatively finds that the Applicant knowingly and voluntarily waived his right to a direct appeal. Accordingly, this allegation is denied.

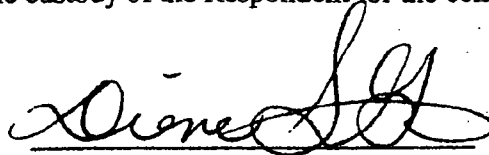
Applicant's Right to Appeal

Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues in order to safeguard the right to appeal. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal on the Applicant's behalf. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

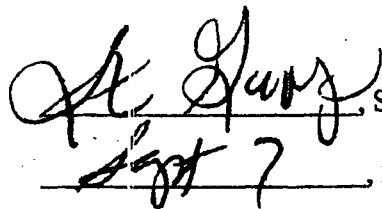
IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.



Diane S. Goodstein
Presiding Judge,
First Judicial Circuit



South Carolina

Sept 7, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

INDICTMENT
2003GS38-2411

At a Court of General Sessions, convened on March 01, 2004 the Grand Jurors of Orangeburg County present upon their oath:

MURDER

That Levi Bing, Jr., did in Orangeburg County, on or about November 10, 2003, with malice aforethought, kill one Randy Bills, by means of shooting the victim with a 9mm handgun, and the said victim did die as a proximate result thereof. This offense being in violation of the Common Law of South Carolina, and Section 16-3-10 of the Code of Laws of South Carolina, as amended.

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

Richard D. [Signature]

WITNESSES

DOCKET NO. 2003GS38-2411

The State of South Carolina

County of

ORANGEBURG

DET. M. THOMPSON

Arresting Agency:
Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

H310758

Arrested: Nov 14, 2003

ACTION OF GRAND JURY

TRUE BILL

MAR 04 2004

David D. Daniel
Foreperson of Grand Jury
Date: March 4, 2004

VERDICT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

Levi Bing, Jr.

Indictment for

MURDER

SC Code: 16-03-10
CDR Code: 0116
Class: FEL-EXM

82-4-113 4-2004

Deperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

INDICTMENT
2003GS38-2412

At a Court of General Sessions, convened on March 01, 2004 the Grand Jurors of Orangeburg County present upon their oath:

GRAND LARCENY >\$5000

That Levi Bing, Jr., did in Orangeburg County, on or about November 10, 2003, feloniously take and carry away, a 2000 Chevrolet Corvette silver and gray in color, with the intent to permanently deprive the owner, Randy Bills, of such property, said property being valued at more than five thousand dollars, (\$5000.00) and as a result violated Section 16-13-30, Code of Laws of South Carolina, 1976, as amended.

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



Robert D. Robbins SOLICITOR

WITNESSES

DOCKET NO. 213GS38-2412

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

The State of South Carolina

County of

ORANGEBURG

I hereby appear in my own proper person and plead guilty to the within indictment or to

DET. M. THOMPSON

Arresting Agency:

Orangeburg Co. Sheriff Dept.

COURT OF GENERAL SESSIONS

March 01, 2004 TERM

Defendant

ARREST WARRANT NUMBER

H310759

Arrested: Nov 14, 2003

THE STATE

VS.

Witness:

C.C.C. PLS. AND G.S.

06

ACTION OF GRAND JURY

Levi Bing, Jr.

FILED

MAR 04 2004

Indictment for

GRAND LARCENY >\$5000

Foreperson of Grand Jury

Date: March 4, 2004

VERDICT

David Daniel

SC Code: 16-13-30
CDR Code: 0479
Class: FEL-E

82-1134-12110

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

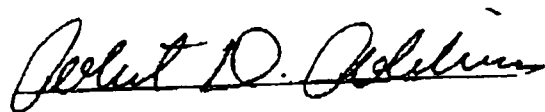
INDICTMENT
2003GS38-2413

At a Court of General Sessions, convened on March 01, 2004 the Grand Jurors of Orangeburg County present upon their oath:

**POSSESSION OF A WEAPON DURING THE COMMISSION OF CERTAIN
CRIMES**

That Levi Bing, Jr., did in Orangeburg County, on or about November 10, 2003, while committing the violent crime of Murder, have in his possession and/or did visibly display a firearm during the commission of the aforementioned crime and as a result violated Section 16-23-490, Code of Laws of South Carolina, 1976, as amended.

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



Robert D. Robbins SOLICITOR

WITNESSES

DOCKET NO. 2003GSS38-2413

The State of South Carolina

County of

ORANGEBURG

DET. M. THOMPSON

Arresting Agency:

Orangeburg Co. Sheriff Dept.

ARREST WARRANT NUMBER

H310757

Arrested: Nov 14, 2003

ACTION OF GRAND JURY

TRUE BILL

MAR 04 2004

Devin Davis

Foreperson of Grand Jury

Date: March 4, 2004

VERDICT

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

COURT OF GENERAL SESSIONS

March 01, 2004 TERM

THE STATE

vs.

Levi Bing, Jr.

Indictment for

POSSESSION OF A WEAPON DURING
THE COMMISSION OF CERTAIN
CRIMES

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
1132 L STREET, N.W.
WASHINGTON, D.C. 20535

82:1 HD 4 - MAR 70

SC Code: 16-23-490

CDR Code: 0549

Class: FEL-F

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY

DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

LEVI BING, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

STATEMENT

Petitioner Levi Bing pled guilty to murder, grand larceny, and possession of a weapon during the March 2005 term of the Orangeburg County General Sessions Court before the Honorable Deadra L. Jefferson, Judge. Petitioner was sentenced to imprisonment for an aggregate period of forty years. App. pp. 1 – 23. Petitioner did not appeal his convictions or sentences.

On March 7, 2006, petitioner filed a PCR application with the Orangeburg County Office of the Clerk of Court. App. pp. 25 – 31. The respondent filed a return dated March 29, 2007. App. pp. 32 – 36. A hearing was convened on June 25, 2007, at the Dorchester County Courthouse before the Honorable Diane Schafer Goodstein, Judge. App. pp. 37 – 126.

On September 7, 2007, Judge Goodstein issued an order of dismissal in the case therein denying petitioner's PCR application. App. pp. 178 – 186.

Petitioner appealed Judge Goodstein's order. This petition follows.

ARGUMENT

The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

During the PCR hearing, petitioner testified that he did not appeal (or in effect request an appeal) because he "didn't even know anything about it" as counsel did not discuss appellate rights with him. App. p. 48, line 8 – 13. Trial counsel testified during the hearing that "an appeal would have put him back in the same position as he had been before this matter was resolved ...[as] we thought a sentence of forty years as opposed to life in prison was an extraordinary victory . . . and it would [have been] contrary to his best interest to have appealed." App. p. 96, line 24 – p. 97, line 11. Counsel testified that "there was nothing to appeal from," that he did not normally appeal his guilty pleas, and that the trial judge advised petitioner of his right to appeal. App. p. 99, line 3 – p. 100, line 21. Additionally, counsel testified that he did not recall discussing the right to appeal with petitioner (App. p. 133, lines 18 – 2), and that it would have been unusual and "improper" to plead "and then immediately appeal it" because an appeal would have put him "back in the ballpark where he was." App. p. 131, line 22 – p. 133, line 14.

First, petitioner stated that he was not advised of his right to appeal and counsel admitted not recalling a discussion with petitioner about the right to appeal. Petitioner could not waive a right which was not made know to him. A waiver is a voluntary relinquishment of a known right. See Johnson v. Zerbst, 304 U.S. 458 (1938). In addition, counsel believed that an appeal would place petitioner in a position that was detrimental to him in that he would have received a sentence (life imprisonment) more grave than the forty-year sentence he obtained. However, counsel's assessment of how fortunate petitioner was to avoid a life sentence and how being re-exposed to the

same would be detrimental cannot be controlling in light of petitioner's right to appeal if he so desired. And finally, the fact that the trial judge advised petitioner of the right to appeal is of no consequence in the case, because counsel must advise of the same.

It is not the duty of the trial judge to advise a defendant of his appellate rights, and the right to appeal is not conditioned upon whether there is a reason for or merit to the appeal. It is the duty of trial counsel to advise the client of the right to an appeal and follow through (in a timely fashion) with filing a notice of appeal if the client so requests an appeal. After a client is convicted, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal and ascertain whether the client wishes to appeal. Cherry v. State, 300 S.C. 116, 386 S.E.2d 623 (1989). See also In Re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 382 (1991) where the court held that if upon advising an indigent client regarding an appeal the client wishes to appeal, then the trial attorney must serve and file a notice of appeal.

The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

CONCLUSION

Based on the foregoing argument, petitioner's writ of certiorari should be granted in order to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wanda H. Carter", is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2009.

STATEMENT OF ISSUE ON APPEAL

The lower court erred in failing to advise petitioner that he was not bound to sentence him per the solicitor's recommendation set forth in the plea agreement reached in the case.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

LEVI BING, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

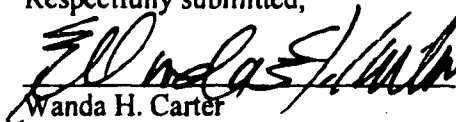
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Levi Bing, Jr. states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on 6-25-07. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Levi Bing, Jr..

Respectfully submitted,


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

LEVI BING, JR.,

PETITIONER,

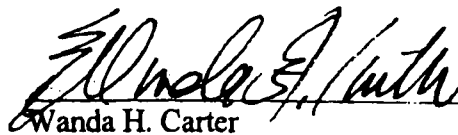
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

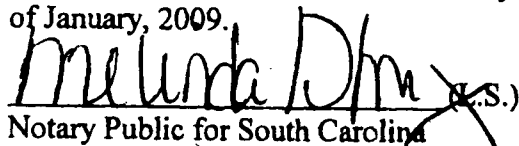
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Mary S. Williams, Esquire, and Levi Bing, Jr., #308051, Lee Correctional Institution, this 5th day of January, 2009.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of January, 2009.

 (N.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

INITIAL PRO SE BRIEF TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

INITIAL PRO SE BRIEF OF PETITIONER

LEVI BING, JR. #308051

PETITIONER

LEE CORRECTIONS INSTITUTION

SUMTER SOUTH 2153

990 WISACKY HWY.

BISHOPVILLE, SC 29010

1)

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2)

TABLE OF AUTHORITIES

CASES

S.C. CODE 17-27-80GARNER V. STATE 636 S.E.2d 860 (2006)PIERCE V. STATE 526 S.E.2d 222 (2000)HILL V. LOCKHART 106 S.ct 366 (1985)ROSCOE V. STATE 546 S.E.2d 417 (2001)JACKSON V. STATE 535 S.E.2d 926 (S.ct 2000)HINSON V. STATE 377 S.E.2d 338 (1989)

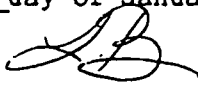
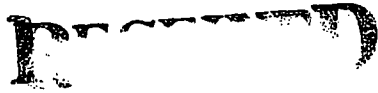
STATEMENT OF ISSUE

Whether the (PCR) Judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility that induced involuntary plea?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Orangeburg county clerk of court. Petitioner was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for count (1) murder (03-GS-38-2411), count (2) grand larceny (03-GS-38-2412), and possession of a weapon during the commission of a violent crime (03-GS-38_2413). On March 14, 2005) petitioner, pled guilty to the charges. Petitioner was sentenced by, Honorable Deidra L. Jefferson to confinement for concurrent periods of (40) years for murder, (10) years for grand larceny and, (5) years for possession of a weapon. Petitioner filed a (PCR) application March 7, 2006. that he is being held in custody due to ineffective assistance of plea counsel. An evidentiary hearing was convened at the dorchester county court house on June 25, 2007) with the presiding (PCR) Judge Diane S. Goodstein.

Petitioners (PCR) application was denied September 7, 2007) by notice of a order of dismissal with prejudice. Petitioner appealed the order of dismissal of Honorable Diane S. Goodstein dated September 7, 2007) Petitioners counsel Chief Appellate Defender Wanda H. Carter filed a Writ of Certiorari indicating that petitioners appeal is without merit, on January 5, 2009). Petitioner filed a Pro-Se Brief on This 27th day of January 2009).

JAN 27 2009

LEECI MAIL ROOM

ARGUMENT

The (PCR) Judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility, that induced involuntary plea?

Inasmuch as at the evidentiary hearing convened in this case, the petitioner advanced several allegations of ineffective assistance of counsel, though unreasonable the (PCR) Judge failed to address in the receipt of the order of dismissal petitioners claim. Whereas the petitioner 14th amendment right was violated due to the (PCR) Judge incomppliance of S.C. Code 17-27-80, that assures a (PCR) Judge will make findings of fact, and state expressly it's conclusions of law relating to each issue presented. Garner V. State 371 sci, 636 S.E 2d 860 (2006) emphasizing lanuage in Section 17-27-80 that specific finding of fact, and conclusions of law regarding each issue, presented at the (PCR) hearing. Moreover the Supreme court gives great deference to the (PCR) courts findings which will be upheld if there is any evidence of probative value sufficient to support there

ruling, and where no probative evidence exist to support the findings the ruling will be reversed Pierce V. State 338 SC 139, 526 S.E.2d 222 (2000).

Now comes the petitioner asserting respectfully that he will show unto this court that counsel is ineffective, and had not been for counsels error, there is reasonable probability the petitioner would not have pled guilty. The petitioner factually brings forth that his guilty plea was induced by erroneous advice that was not within the competency norms demanded of a attorney in a criminal case.

HILL V. LOCKHART 106 S.ct 366 (1985). Therefore the petitioner is collaterlly attacking the plea. Roscoe V.State 546 S.E.2d 417 (2001).

Inconsequentially there is no probative value evidence to support the (PCR) Judge decision that counsel was not ineffective. However, there is an undisputed amount of probative value evidence that counsel was ineffective for inducing involuntary plea, by advising the petitioner in this matter that he would be eligible for parole. In accordance the (PCR) Transcript reflects the following testimonies that arose at the evidentiary hearing.

CROSS EXAMINATION BY MR. BOOZER PCR TRANSCRIPT PAGE 61 LINES 7-9

- 7). He will
- 8). be eligible for parole one day and will walk
- 9). out of jail one day with that sentence

REDIRECT EXAMINATION BY MS. DAVIS BRANCH PCR TRANSCRIPT PAGE 62 LINES 16-21).

- 16). Q. Okay. Are you aware of the fact that
- 17). he's not eligible for parole?
- 18). A. No ma'am
- 19). Q. I'm sorry?
- 20). A. I thought 40 years he is
- 21). eligible for parole ma'am is he not?

CROSS EXAMINATION BY MS. DAVIS BRANCH PCR TRANSCRIPT PAGE 121 LINES 3-20

- 3). Q. What was your understanding before you
- 4). received that sentence from your attorney?
- 5). A. That I would have been eligible
- 6). for a parole date
- 7). Q. And have you been told differently?
- 8). A. Yes ma'am
- 9). Q. What have you been told now?
- 10). A. That I will have to do 40 years
- 11). day for day
- 12). Q. Okay and
- 13). A. One hundred percent
- 14). Q. Had you known that at an earlier time,
- 15). at the time that you took your plea, would that have
- 16). made a difference?
- 17). A. Yes ma'am
- 18). Q. Do you feel that your attorneys misled
- 19). you, as far as that statements concerned
- 20). A. Yes ma'am.

Additionally petitioners cites Jackson V. State 535 S.E.2d 926, in which counsel was found to be ineffective for failing to advise the petitioner that threatening a public official is a felony rather than a misdemeanor. Most importantly, and parallel to petitioners claim in this present matter he cites Hinson V. State 377 S.E.2d 338, in which the supreme court held that counsel was ineffective, and the petitioner was granted a new trial ^{JB} where counsels incorrect parole, eligibility advice induced petitioners plea. Lastly the petitioner request that this court intervenes to restore his rights that have been violated.

CONCLUSION

Petitioner was prejudiced by counsels error, therefore the plea should be vacated, and remanded for a new trial.

RESPECTFULLY SUBMITTED



LEVI BING, JR.

#308051

PETITIONER

LEE C. I. S. S. 2153

990 WISACKY HWY.

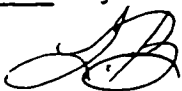
BISHOPVILLE, S.C 29010

RECEIVED

JAN 27 2009

LEECI MAIL ROOM

This 27th day of January 2009.



STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

PRO SE BRIEF TO ORANGEBURG COUNTY

DIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

RECEIVED

JAN 27 2009

LEECI MAIL ROOM

DESIGNATION OF MATTER TO BE

INCLUDED IN RECORD OF SUPREME COURT

PETITIONERS PROPOSES THE FOLLOWING TO BE

INCLUDED IN THE RECORD.

- 1).(PCR) Transcript Page 61 Lines 7-9
- 2).(PCR) Transcript Page 62 Lines 16-21
- 3).(PCR) Transcript Page 121 Lines 3-20

I CERTIFY THAT THIS DESIGNATION CONTAINS

NO MATTER THAT IS IRRELEVANT TO THIS BRIEF.

This 27th day of January 2009.

Levi Bing, Jr.
LEVI BING, JR.
PETITIONER
LEE C. I.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

INITIAL PRO SE BRIEF TO ORANGEBURG COUNTY

DIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

v.

STATE OF SOUTH CAROLINA

RESPONDENT

CERTIFICATE OF SERVICE

RECEIVED
JAN 27 2009
LEECI MAIL ROOM

I CERTIFY THAT A TRUE COPY OF THE INITIAL PRO-SE BRIEF HAS BEEN MAILED
TO MARY S. WILLIAMS esq. THE ASSISTANT ATTORNEY GENERAL ON THE BELOW
DATE.

This 27th day of January 2009.

LB

Levi Bing, Jr.
LEVI BING, JR.
PETITIONER
LEE C. I.

Respondent.

ORDER

George J. ... C. J.
FOR THE COURT

June 10, 2009



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 29, 2009

REMITTITUR

The Honorable Winnifa Brown-Clark
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116

Re: Bing, Levi Jr. v. The State – 2006-CP-38-00273

Dear Mrs. Brown-Clark:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,


CLERK

DES/jj

cc: Deputy Chief Appellate Defender Wanda H. Carter
Levi Bing Jr. #308051
Assistant Attorney General Mary S. Williams

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

RECEIVED
USDC, CLERK, CHARLESTON, S.C.

United States District Court		District <u>South Carolina</u>
Name (under which you were convicted): <u>Levi Bing, Jr.</u>		Docket or Case No.: <u>2:09-cv-1759-RBH-RSC</u>
Place of Confinement: <u>Lee County Correctional Institution</u>		Prisoner No.: <u>308051</u>
Petitioner (include the name under which you were convicted): <u>Levi Bing, Jr.</u>		Respondent (authorized person having custody of petitioner): <u>Anthony Padula, Warden Lee Correctional</u>
The Attorney General of the State of <u>South Carolina</u>		

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging:
Orangeburg County Court of General Sessions,
Orangeburg, S.C.
- (b) Criminal docket or case number (if you know): 2003-65-38-2411, 2412, 2413
- (a) Date of the judgment of conviction (if you know): March 14, 2005
- (b) Date of sentencing: March 14, 2005
- Length of sentence: 40 years, day for day, no parole
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case:
Murder 40 years
Possession of a Firearm during Commission of a Violent Crime 5 years
Grand Larceny 10 years
Sentences all concurrent
- (a) What was your plea? (Check one)

(1) Not guilty ☐	(3) Nolo contendere (no contest) ☐
(2) Guilty ☒	(4) Insanity plea ☐
- (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?
N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☒

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you seek further review by a higher state court? Yes ☐ No ☐

If yes, answer the following:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Result: _____

(4) Date of result (if you know): _____

(5) Citation to the case (if you know): _____

(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Orangeburg County Court of Common Pleas

(2) Docket or case number (if you know): 2006-CP-38-273

(3) Date of filing (if you know): March 7, 2006

(4) Nature of the proceeding: Post-Conviction Relief Application

(5) Grounds raised: Ineffective Assistance of Counsel in

violation of my Sixth Amendment Rights-

Involuntary guilty pleas in violation of my
due process rights-

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☒ No ☐

(7) Result: Application denied

(8) Date of result (if you know): Order dated September 7, 2007, Attachment A

- (b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: I received ineffective assistance of counsel prior to

and during my guilty pleas in violation of my Sixth and Fourteenth Amendment Rights. My plea was involuntarily entered because of it.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCR

Name and location of the court where the motion or petition was filed:

Orangeburg County Court of Common Pleas

Docket or case number (if you know): 06-CP-38-273

Date of the court's decision: September 7, 2007

Result (attach a copy of the court's opinion or order, if available):

Dismissed Attached, Relief denied, Application

(3) Did you receive a hearing on your motion or petition?

Yes ☒ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐ In my pro se Brief of Petitioner, Attached, Attachment B

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Supreme Court of South Carolina

Docket or case number (if you know):

Date of the court's decision: June 10, 2009; Remittitur went to lower court

Result (attach a copy of the court's opinion or order, if available):

Attached; Certiorari petition denied.

June 26, 2009
Attachment D

Attachment C

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: _____

(a) **Supporting facts** (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐(2) If you did not raise this issue in your direct appeal, explain why:

(d) Post-Conviction Proceedings:(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Michael B. Culler, Jr., P.O. Box 1112, Orangeburg, SC 29115

John D. Delgado, Jr., Main lawyer, 1614 Taylor Street, Columbia, SC 29202

(b) At arraignment and plea: Michael B. Culler, Jr.

John D. Delgado, Jr., 1614 Taylor Street, Columbia, S.C. 29202

(c) At trial: _____

(d) At sentencing: Same as above

(e) On appeal: _____

(f) In any post-conviction proceeding: _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.* On time.

Sentenced March 14, 2005

Filed PCR March 7, 2006

PCR Appeal denied June 10, 2009

Remittitur Returned to Lower Court June 26, 2009

Copy of Remittitur attached

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(continued...)

Therefore, petitioner asks that the Court grant the following relief:

Vacation of my pleas and sentences; I want a jury trial.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Petition for Writ of Habeas Corpus was ~~placed in the prison mailing system on~~ given to a third party to hand
deliver to the Court on July 1, 2009 (month, date, year).

Executed (signed) on July 1, 2009 (date).

Mr. Luis Bing, Jr.
Signature of Petitioner

(...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. _____

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

06-CP-38-273

Levi Bing, Jr., #308051,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**ORDER OF DISMISSAL
WITH PREJUDICE***Belinda Davis-Branch, Esq. appearing for the Applicant.**Lance S. Boozer, Esq., Assistant Attorney General, appearing for the Respondent.*

This is a post-conviction relief (PCR) matter. The Applicant alleges in his PCR application filed March 7, 2006, that he is being held in custody unlawfully due to the ineffective assistance of plea counsel. An evidentiary hearing was convened at the Dorchester County Courthouse on June 25, 2007.

I. PROCEDURAL BACKGROUND

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for Murder (03-GS-38-2411); Grand Larceny (03-GS-38-2412); and Possession of a Weapon during the Commission of a Violent Crime (03-GS-38-2413). The Applicant was represented by John Delgado, Esquire and Michael R. Culler, Jr., Esquire. On March 14, 2005, Applicant pled guilty to the charges. He was sentenced by the

Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. Applicant did not appeal his conviction or sentence.

II. APPLICABLE LAW

a. Involuntary Guilty Plea

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A PCR applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366, 369 (1985).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the accused had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's

accusers. Id. Moreover, a criminal defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. 597, 524 S.E.2d 523 (1999). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea must be established by a complete record, and may be accomplished by colloquy between the court and the accused, between the court and the accused's counsel, or both. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000). A guilty plea is a solemn, judicial admission of the truth of the charges against the applicant. Statements made during the plea should be considered conclusive unless the applicant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

III. SUMMARY OF TESTIMONY PRESENTED AT THE PCR EVIDENTIARY HEARING, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant, the Applicant's former plea counsels John Delgado, Esquire and Michael R. Culler, Esquire and Applicant's father testified at the PCR evidentiary hearing. The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to

S.C. Code Ann. 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

Allegation of involuntary plea as a result of ineffective assistance of counsel.

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

The Applicant testified at the PCR hearing that plea counsels were ineffective for failing to investigate and review with him a gas station surveillance video near the crime scene. Applicant testified counsels refused to allow him to see the video. Applicant also testified counsels were ineffective for failing to interview witnesses. Specifically, Applicant testified counsels should have investigated witness Shameka Lewis (Ms. Lewis). Applicant further testified his plea was not voluntary and he hesitated on his answers during the plea. Applicant also stated counsels would give the Applicant and his family conflicting information. Applicant further testified counsels failed to investigate another truck seen leaving the scene of the crime.

On cross-examination, Applicant admitted that he pled guilty and that he informed the plea judge that he was satisfied with his attorneys. Applicant also testified he admitted to the crime and acknowledged his counsels explained his rights at the plea.

John Delgado (Mr. Delgado) testified they met with the Applicant on dozens of occasions. Mr. Delgado indicated they did everything possible in this case to prevent Applicant from receiving the death penalty. Mr. Delgado also testified they received and reviewed discovery with the Applicant. Mr. Delgado indicated he discussed the surveillance video with the Applicant. Counsel testified he would never tell a client he could not view evidence. Mr. Delgado further testified he

obtained experts through the Office of Appellate Defense to assist in the investigation of the case. Counsel indicated he hired a private investigator to assist in obtaining witness statements. Counsel testified Applicant admitted what was on video. Counsel indicated in his opinion, he did not believe Ms. Lewis would have been beneficial to the Applicant at a trial. Mr. Culler testified he did not recall the Applicant requesting the counselors to interview Ms. Lewis. However, Mr. Culler further testified he did not believe Ms. Lewis's testimony would have been significant for the Applicant. Both counsels testified they investigated the truck seen leaving the crime but were unable to get any details with regard to the owner or driver of the alleged truck.

Mr. Delgado acknowledged the evidence against the Applicant was very strong. Mr. Delgado testified the Applicant was with the victim a half an hour prior to the crime; the Applicant purchased the gun linked to the crime; and the Applicant possessed the car stolen in the crime. Both Mr. Delgado and Mr. Culler testified the Applicant admitted shooting the victim. Mr. Delgado also testified he did not observe any hesitancy in the Applicant's plea.

Mr. Delgado further testified that the Applicant gave numerous conflicting accounts of what occurred during the crime. Mr. Delgado and Mr. Culler testified they were so concerned with the implications of the Applicant's conflicting statements, they consulted an ethics professor regarding their duties as officers of the court.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences. This Court finds that trial counsel was not deficient in any aspect of her representation and performed well within reasonable professional norms for a criminal defense attorney. Strickland v. Washington.

466 U.S. 668, 104 S.Ct. 2052 (1984); Hill v. Lockhart. This Court further finds the Applicant also failed to carry his burden of proof to show that but for trial counsel's alleged deficient representation he would have not pled guilty but would have insisted on going to trial. Roscoe v. State. Furthermore, this Court finds the Applicant's guilty plea was knowingly and voluntarily made. Boykin v. Alabama; Pittman v. State. Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel. Applicant failed to produce Ms. Lewis at the PCR hearing. This Court finds the Applicant's testimony to what Ms. Lewis would have testified to had he proceeded to trial to be purely speculative. Accordingly, the allegation of involuntary guilty plea resulting from the allegation of ineffective assistance of counsel is denied.

Allegation that the plea court lacked subject matter jurisdiction

The Applicant testified the plea court lacked subject matter jurisdiction due to defects in the indictments. Mr. Delgado testified he was comfortable with the indictments and was on notice of the charges the Applicant was facing.

Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his

trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act—notably the statute of limitations and successiveness. See S.C. Code §§ 17-27-45 and -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, 363 S.C. 93, 610 S.E.2d 494, 499 (2005); See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction. Accordingly, this allegation is denied.

Allegation of ineffective assistance of counsel for failing to file an appeal.

At the PCR hearing, Applicant alleged he was denied the right to a direct appeal from his guilty plea. Trial counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by Anders v. California.¹ White, Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive their appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).²

¹386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493 (1967).

²“Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a White v. State review.” [Emphasis Page 7 of 9]

185

Mr. Delgado and Mr. Culler testified Applicant never asked either counsel to file an appeal. Mr. Delgado further testified had Applicant asked him to file an appeal, he would have done so. Mr. Delgado testified there was nothing to appeal as this was a guilty plea. Counsel also testified he normally does not appeal guilty pleas.

This Court finds that counsels' testimony was credible and the Applicant's testimony was not credible. This Court finds Applicant did not ask counsels to file an appeal from the guilty plea. The Court affirmatively finds that the Applicant knowingly and voluntarily waived his right to a direct appeal. Accordingly, this allegation is denied.

Applicant's Right to Appeal

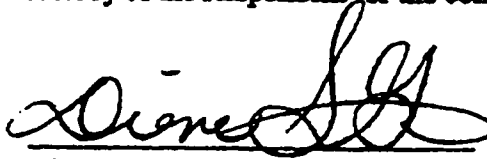
Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Appellate counsel is required to brief arguable issues in order to safeguard the right to appeal. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must file a Notice of Appeal on the Applicant's behalf. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

IT IS THEREFORE ORDERED THAT:

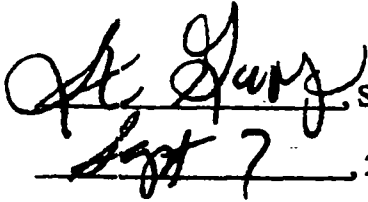
1. The post-conviction relief application is **DENIED**.
2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.

added]. *Davis*, 288 S.C. at 291, n. 1, 342 S.E.2d at 60.

3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.



Diane S. Goodstein
Presiding Judge,
First Judicial Circuit



South Carolina

Sept 7, 2007

2:09-cv-01759-RBH-RSC

Date Filed 07/17/2009

Entry Number 5

Attachment B

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

INITIAL PRO SE BRIEF TO ORANGEBURG COUNTY
DIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

INITIAL PRO SE BRIEF OF PETITIONER

LEVI BING, JR. #308051

PETITIONER

LEE CORRECTIONS INSTITUTION

SUMTER SOUTH 2153

990 WISACKY HWY.

BISHOPVILLE, SC 29010

1)

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2)

TABLE OF AUTHORITIES**CASES**S.C. CODE 17-27-80GARNER V. STATE 636 S.E.2d 860 (2006)PIERCE V. STATE 526 S.E.2d 222 (2000)HILL V. LOCKHART 106 S.ct 366 (1985)ROSCOE V. STATE 546 S.E.2d 417 (2001)JACKSON V. STATE 535 S.E.2d 926 (S.ct 2000)HINSON V. STATE 377 S.E.2d 338 (1989)

3)

STATEMENT OF ISSUE

Whether the (PCR) Judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility that induced involuntary plea?

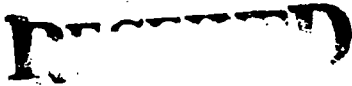
4)

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Orangeburg county clerk of court. Petitioner was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for count (1) murder (03-GS-38-2411), count (2) grand larceny (03-GS-38-2412), and possession of a weapon during the commission of a violent crime (03-GS-38-2413). On March 14, 2005) petitioner, pled guilty to the charges. Petitioner was sentenced by, Honorable Deidra L. Jefferson to confinement for concurrent periods of (40) years for murder, (10) years for grand larceny and, (5) years for possession of a weapon. Petitioner filed a (PCR) application March 7, 2006. that he is being held in custody due to ineffective assistance of plea counsel. An evidentiary hearing was convened at the dorchester county court house on June 25, 2007) with the presiding (PCR) Judge Diane S. Goodstein.

5)

Petitioners (PCR) application was denied September 7, 2007) by notice of a order of dismissal with prejudice. Petitioner appealed the order of dismissal of Honorable Diane S. Goodstein dated September 7, 2007) Petitioners counsel Chief Appellate Defender Wanda H. Carter filed a Writ of Certiorari indicating that petitioners appeal is without merit, on January 5, 2009). Petitioner filed a Pro-Se Brief on This 27th day of January 2009).

JAN 27 2009

LEECI MAIL ROOM

6)

ARGUMENT

The (PCR) Judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility, that induced involuntary plea?

Inasmuch as at the evidentiary hearing convened in this case, the petitioner advanced several allegations of ineffective assistance of counsel, though unreasonable the (PCR) Judge failed to address in the receipt of the order of dismissal petitioners claim. Whereas the petitioner 14th amendment right was violated due to the (PCR) Judge in compliance of S.C. Code 17-27-80, that assures a (PCR) Judge will make findings of fact, and state expressly it's conclusions of law relating to each issue presented. Garner V. State 371 sci, 636 S.E 2d 860 (2006) emphasizing language in Section 17-27-80 that specific finding of fact, and conclusions of law regarding each issue, presented at the (PCR) hearing. Moreover the Supreme court gives great deference to the (PCR) courts findings which will be upheld if there is any evidence of probative value sufficient to support there

7)

ruling, and where no probative evidence exist to support the findings the ruling will be reversed Pierce V. State 338 SC 139, 526 S.E.2d 222 (2000).

Now comes the petitioner asserting respectfully that he will show unto this court that counsel is ineffective, and had not been for counsels error, there is reasonable probability the petitioner would not have pled guilty. The petitioner factually brings forth that his guilty plea was induced by erroneous advice that was not within the competency norms demanded of a attorney in a criminal case.

HILL V. LOCKHART 106 S.ct 366 (1985). Therefore the petitioner is collaterlly attacking the plea. Roscoe V.State 546 S.E.2d 417 (2001).

Inconsequentially there is no probative value evidence to support the (PCR) Judge decision that counsel was not ineffective. However, there is an undisputed amount of probative value evidence that counsel was ineffective for inducing involuntary plea, by advising the petitioner in this matter that he would be eligible for parole. In accordance the (PCR) Transcript reflects the following testimonies that arose at the evidentiary hearing.

8)

CROSS EXAMINATION BY MR. BOOZER PCR TRANSCRIPT PAGE 61 LINES 7-9

- 7). He will
- 8). be eligible for parole one day and will walk
- 9). out of jail one day with that sentence

REDIRECT EXAMINATION BY MS. DAVIS BRANCH PCR TRANSCRIPT PAGE 62 LINES 16-21).

- 16). Q. Okay. Are you aware of the fact that
- 17). he's not eligible for parole?
- 18). A. No ma'am
- 19). Q. I'm sorry?
- 20). A. I thought 40 years he is
- 21). eligible for parole ma'am is he not?

CROSS EXAMINATION BY MS. DAVIS BRANCH PCR TRANSCRIPT PAGE 121 LINES 3-20

- 3). Q. What was your understanding before you
- 4). received that sentence from your attorney?
- 5). A. That I would have been eligible
- 6). for a parole date
- 7). Q. And have you been told differently?
- 8). A. Yes ma'am
- 9). Q. What have you been told now?
- 10). A. That I will have to do 40 years
- 11). day for day
- 12). Q. Okay and
- 13). A. One hundred percent
- 14). Q. Had you known that at an earlier time,
- 15). at the time that you took your plea, would that have
- 16). made a difference?
- 17). A. Yes ma'am
- 18). Q. Do you feel that your attorneys misled
- 19). you, as far as that statements concerned
- 20). A. Yes ma'am.

9)

Additionally petitioners cites Jackson V. State 535 S.E.2d 926, in which counsel was found to be ineffective for failing to advise the petitioner that threatening a public official is a felony rather than a misdemeanor. Most importantly, and parallel to petitioners claim in this present matter he cites Hinson V. State 377 S.E.2d 338, in which the supreme court held that counsel was ineffective, and the petitioner was granted a new trial ^{DB} where counsels incorrect parole, eligibility advice induced petitioners plea. Lastly the petitioner request that this court intervenes to restore his rights that have been violated.

CONCLUSION

Petitioner was prejudiced by counsels error, therefore the plea should be vacated, and remanded for a new trial.

RESPECTFULLY SUBMITTED



LEVI BING, JR.

#308051

PETITIONER

LEE C. I. S. S. 2153

990 WISACKY HWY.

BISHOPVILLE, S.C 29010

RECEIVED

JAN 27 2009

LEE C I MAIL ROOM

This 27th day of January 2009.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

PRO SE BRIEF TO ORANGEBURG COUNTY

DIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

RECEIVED

JAN 27 2009

LEECI MAIL ROOM

DESIGNATION OF MATTER TO BE

INCLUDED IN RECORD OF SUPREME COURT

PETITIONERS PROPOSES THE FOLLOWING TO BE
INCLUDED IN THE RECORD.

- 1).(PCR) Transcript Page 61 Lines 7-9
- 2).(PCR) Transcript Page 62 Lines 16-21
- 3).(PCR) Transcript Page 121 Lines 3-20

I CERTIFY THAT THIS DESIGNATION CONTAINS
NO MATTER THAT IS IRRELEVANT TO THIS BRIEF.

This 27th day of January 2009.




LEVI BING, JR.
PETITIONER
LEE C. I.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

INITIAL PRO SE BRIEF TO ORANGEBURG COUNTYDIANE SCHAFER GOODSTEIN CIRCUIT COURT JUDGE

LEVI BING, JR. #308051

PETITIONER

V.

STATE OF SOUTH CAROLINA

RESPONDENT

CERTIFICATE OF SERVICE

RECEIVED
JAN 27 2009
LEECI MAIL ROOM

I CERTIFY THAT A TRUE COPY OF THE INITIAL PRO-SE BRIEF HAS BEEN MAILED
TO MARY S. WILLIAMS esq. THE ASSISTANT ATTORNEY GENERAL ON THE BELOW
DATE.

This 27th day of January 2009.

LB

Levi Bing, Jr.
LEVI BING, JR.
PETITIONER
LEE C. I.

The Supreme Court of South Carolina

Levi Bing Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.



FOR THE COURT

C. J.

Columbia, South Carolina

June 10, 2009



Attachment D

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1480

June 29, 2009

REMITTITUR

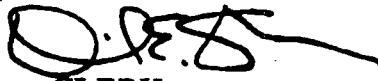
The Honorable Winnifa Brown-Clark
190 Gibson Street
PO Box 9000
Orangeburg, SC 29116

Re: Bing, Levi Jr. v. The State – 2006-CP-38-00273

Dear Mrs. Brown-Clark:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,



CLERK

DES/jj

cc: Deputy Chief Appellate Defender Wanda H. Carter
Levi Bing Jr. #308051
Assistant Attorney General Mary S. Williams

CLIENT COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

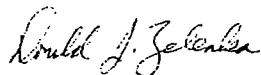
Levi Bing, Jr., #308051,	)	C/A No. 2:09-1759-RBH-RSC
	)	
Petitioner,	)	
	)	
v.	)	MOTION FOR SUMMARY
	)	JUDGEMENT
Anthony Padula, Warden, Lee Correctional,	)	
	)	
Respondents.	)	

The Respondent, above-named, by and through the undersigned attorneys, respectfully
move this Court, pursuant to Rule 56(b) F.R.C.P., for summary judgment based upon the
pleadings.

Respectfully submitted,
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
I.D. No. 4425



By: s/Donald J. Zelenka
ATTORNEYS FOR RESPONDENT

P.O. Box 11549
Columbia, SC
October 8, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Levi Bing, Jr., #308051,	)	C/A No. 2:09-1759-RBH-RSC
	)	
Petitioner,	)	RETURN AND MEMORANDUM
	)	OF LAW IN SUPPORT OF
v.	)	MOTION FOR SUMMARY
	)	JUDGEMENT
Anthony Padula, Warden, Lee Correctional,	)	
	)	
Respondents.	)	
	)	

The Respondents above-named, by and through the undersigned attorneys, would make a Return to the Rule to Show Cause entered July 17, 2009, by the Honorable Robert S. Carr to the pro se petition for a writ of habeas corpus July 1, 2009. Subsequently, the Petitioner retained Tara D. Shurling to represent him in this matter. The Respondent would show this Court the following:

I.

The Petitioner, Levi Bing, # 308051, is presently confined in Lee Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for Murder (03-GS-38-2411); Grand Larceny (03-GS-38-2412); and Possession of a Weapon during the Commission of a Violent Crime (03-GS-38-2413). App.p. 187-192. The Petitioner was represented by John Delgado, Esquire and Michael R. Culler, Jr., Esquire. On March 14, 2005, Petitioner pled guilty to the charges. App.p. 1-23. He was sentenced by the Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. App.p. 22-23. A notice of appeal from the guilty plea would have had to been served by March 24, 2005. SCACR

Rule 203. Petitioner did not appeal his conviction or sentence. The conviction was final for purposes of 28 U.S.C. Section 2244 on March 24, 2005.

The Petitioner made an application for postconviction relief in Orangeburg County on March 7, 2006. App.p. 25. [348 days after finality]. In the application, the Petitioner, pro se alleged as grounds for relief:

- I. Ineffective Assistance of Counsel - no specifications
- II. Involuntary Guilty plea - no specifications.

App.p. 27. See also App.p. 39. The Respondents made a Return on March 27, 2007. App.p. 32-36.

On June 25, 2007, an evidentiary hearing was held in the matter before the Honorable Diane S. Goodstein, Presiding Judge. App.p. 37-162. The Petitioner was present and represented by Belinda Davis Branch. The Respondent was represented by then Assistant Attorney General Lance S. Boozer. Testimony was received from Levi Bing, Jr., John Delgado, Michael Culler, and Levi Bing Sr. At the conclusion of the hearing, Judge Goodstein took the matter under advisement. App.p. 161-162. On September 7, 2007, Judge Goodstein entered a written Order of Dismissal in the matter. App.p. 178-186.

The Petitioner appealed the dismissal to the South Carolina Supreme Court. In the appeal, he was represented by Wanda H. Carter, Deputy Chief Appellate Defender of the South Carolina Commission on Indigent Defense. On January 5, 2009, counsel made a "Johnson Petition for Writ of Certiorari and Petition to Be Relieved as Counsel" asserting as the sole argument, but meritless, ground:

"The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case.

Johnson Petition, p. 2. The Petitioner made a "Initial Pro Se Brief of Petitioner" on January 27, 2009. In that petition, he asserted for the first time the following issue:

Whether the (PCR) judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility that induced involuntary plea?

Initial Pro Se brief, Statement of Issue, p. 3.

On June 10, 2009, the Supreme Court of South Carolina entered an order denying the petition for writ of certiorari after review pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) and granting appellate counsel's request to be relieved. Levi BING, Jr. V. State, Order (S.C.S.Ct. June 10, 2009)(order denying certiorari under Johnson v. State) The remittitur was entered June 29, 2009.

The Petition for writ of habeas corpus was received on July 1, 2009. It is timely, under 28 U.S.C. Sections 2244, 2254. The Petitioner had until July 16, 2009 to timely file his petition.

Respondent attaches and incorporates herein by reference the following:

1. Johnson Petition for Writ of Certiorari.
2. "Initial Pro Se Brief of Petitioner," January 27, 2009.
3. Levi BING, Jr. V. State, Order (S.C.S.Ct. June 10, 2009)(order denying certiorari under Johnson v. State) .
4. Remittitur Letter, June 29, 2009.
5. PCR Appendix, 192 pages.

II.

In the pro se petition for a writ of habeas corpus, the petitioner makes the following allegation as to why he is being held in custody unlawfully:

I. I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was involuntary because of it.

A. "My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

III.

EXHAUSTION

"It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." Breard v. Greene, 523 U.S. 371, 375, 118 S.Ct. 1352, 140 L.Ed.2d 529 (1998) (internal citation omitted). Thus, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). The Petitioner's procedural default may be excused only if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). If the PCR court failed to make specific findings, Petitioner was required to file a timely Rule 59(e) motion requesting that the PCR court make specific findings on all of his claims raised in his PCR applications. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (S.C.2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not

preserved for appellate review").

Under the doctrine of procedural default, when a federal habeas petitioner fails to raise a claim at the appropriate time in state court and has no further means of bringing that issue before the state courts, the claim will be considered procedurally defaulted. McNeill v. Polk, 476 F.3d 206, 211 (4th Cir.2007). Absent a showing of cause for the default and actual prejudice resulting therefrom or a showing that a failure to consider the claims will result in a fundamental miscarriage of justice, a federal habeas court may not review claims that have been procedurally defaulted. *Id.*

In his petition, he essentially contends that his lawyer misadvised him that he would be eligible for parole and therefore his plea was involuntary. A review of the application and subsequent exhibit that contained allegations (App.p. 165-177) reveals that the claim that he was misadvised as to parole eligibility was not raised in any written allegation. In its pertinent part, Judge Goodstein's order did not address this specific claim nor even mention the word "parole":

The Applicant, the Applicant's former plea counsels John Delgado, Esquire and Michael R. Culler, Esquire and Applicant's father testified at the PCR evidentiary hearing. The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

Allegation of involuntary plea as a result of ineffective assistance of counsel.

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

The Applicant testified at the PCR hearing that plea counsels were ineffective for failing to investigate and review with him a gas station surveillance video near the crime scene. Applicant testified counsels refused to allow him to see the video. Applicant also testified counsels were ineffective for failing to interview witnesses. Specifically, Applicant testified counsels should have investigated witness Shameka Lewis (Ms. Lewis). Applicant further testified his plea was not voluntary and he hesitated on his answers during the plea. Applicant also stated counsels would give the Applicant and his family conflicting information. Applicant further testified counsels failed to investigate another truck seen leaving the scene of the crime.

On cross-examination, Applicant admitted that he pled guilty and that he informed the plea judge that he was satisfied with his attorneys. Applicant also testified he admitted to the crime and acknowledged his counsels explained his rights at the plea.

John Delgado (Mr. Delgado) testified they met with the Applicant on dozens of occasions. Mr. Delgado indicated they did everything possible in this case to prevent Applicant from receiving the death penalty. Mr. Delgado also testified they received and reviewed discovery with the Applicant. Mr. Delgado indicated he discussed the surveillance video with the Applicant. Counsel testified he would never tell a client he could not view evidence. Mr. Delgado further testified he obtained experts through the Office of Appellate Defense to assist in the investigation of the case. Counsel indicated he hired a private investigator to assist in obtaining witness statements. Counsel testified Applicant admitted what was on video. Counsel indicated in his opinion, he did not believe Ms. Lewis would have been beneficial to the Applicant at a trial. Mr. Culler testified he did not recall the Applicant requesting the counselors to interview Ms. Lewis. However, Mr. Culler further testified he did not believe Ms. Lewis's testimony would have been significant for the Applicant. Both counsels testified they investigated the truck seen leaving the crime but were unable to get any details with regard to the owner or driver of the alleged truck.

Mr. Delgado acknowledged the evidence against the Applicant was very strong. Mr. Delgado testified the Applicant was with the victim a half an hour prior to the crime; the Applicant purchased the gun linked to the crime; and the Applicant possessed the car stolen in the crime. Both Mr. Delgado and Mr. Culler testified the Applicant admitted shooting the victim. Mr. Delgado also testified he did not observe any hesitancy in the Applicant's plea.

Mr. Delgado further testified that the Applicant gave numerous conflicting accounts of what occurred during the crime. Mr. Delgado and Mr. Culler testified they was so concerned with the implications of the Applicant's conflicting statements, they consulted an ethics professor regarding their duties as officers of the court.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences. This Court finds that trial counsel was not deficient in any aspect of her representation and performed well within reasonable professional norms for a criminal defense attorney. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Hill v. Lockhart. This Court further finds the Applicant also failed to carry his burden of proof to show that but for trial counsel's alleged deficient representation he would have not pled guilty but would have insisted on going to trial. Roscoe v. State. Furthermore, this Court finds the Applicant's guilty plea was knowingly and voluntarily made. Boykin v. Alabama; Pittman v. State. Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel. Applicant failed to produce Ms. Lewis at the PCR hearing. This Court finds the Applicant's testimony to what Ms. Lewis would have testified to had he proceeded to trial to be purely speculative. Accordingly, the allegation of involuntary guilty plea resulting from the allegation of ineffective assistance of counsel is denied.

App.p. 180-183. No motion to letter or amend was made pursuant to Rule 59 concerning any claim about misadvice concerning parole eligibility.¹

The Petitioner made a "Johnson" no merit petition for writ of certiorari. In that petition counsel Carter made no mention of any alleged claim of ineffective assistance of counsel due to alleged misadvice about parole. For the first time, in the pro se "*Initial Pro Se Brief of Petitioner*" made, Bing made a claim about parole. Within that Brief, he asserted in the PCR transcript various portions at PCR transcript pages 61-62 (testimony of counsel Delgado), page 121 (reply testimony of Petitioner) (App.p. 97-98, 157) testimony that he claims supports his position.

The Respondent submits that the Petitioner has no further state remedies available to exhaust

¹ If the PCR court failed to make specific findings, Petitioner was required to file a timely Rule 59(e) motion requesting that the PCR court make specific findings on all of his claims raised in his PCR applications. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (S.C.2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review").

this particular claim. We submit that this claim was barred during the state PCR hearing before the Circuit Court when the claim that he is now alleging was not addressed in the Order and not raised in a Rule 59 motion. Thus, as a matter of state law it was abandoned and not preserved for an appeal. Since there can be no relitigation of the claim in state court under Section 17-27-90 and *Aice v. State*, 305 S.C. 448 (409 S.E.2d 392 (1991)), technical exhaustion has been satisfied for the procedurally barred claim.

IV.

Scope of Review

The Court's review of collateral attacks on state criminal convictions is governed by the parameters set forth in the AEDPA, which amended Section 2254. Under the AEDPA, a federal court may only grant habeas corpus relief under Section 2254(d) with respect to a claim adjudicated on its merits in a state court proceeding if that state court's adjudication: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Frazer v. South Carolina, 430 F.3d 696, 703 (4th Cir.2003), quoting 28 U.S.C. § 2254(d) and citing Williams v. Taylor, 529 U.S. 362, 402-413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (discussing 2254(d)).

With respect to the first prong of the analysis, the United States Supreme Court has explained that a state court adjudication is "contrary to" clearly established Federal law only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially

indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412- 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). An "unreasonable application" of Federal law will be found "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-413. An "unreasonable application" likewise will be found if the state court "was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. Ramdass v. Angelone, 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (opinion of Kennedy, J.). Yet as Williams teaches, a state court's "unreasonable application" of the law informs the federal court to the extent that the latter "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Bates v. Lee, 308 F.3d 411, 417 (4th Cir.2002), cert. denied, 538 U.S. 1061, 123 S.Ct. 2223, 155 L.Ed.2d 1113 (2003), quoting Williams, 529 U.S. at 411. The Fourth Circuit has held that this application of federal law must be "objectively unreasonable." Oken v. Corcoran, 220 F.3d 259, 264 (4th Cir.2000) (noting that the Supreme Court in Williams "adopted" the holding in Green v. French, 143 F.3d 865, 870 (4th Cir.1998), cert. denied, 525 U.S. 1090, 119 S.Ct. 844, 142 L.Ed.2d 698 (1999) that the "unreasonable application" inquiry is an objective inquiry.).

Turning to Section 2254(d)(2), the proper analysis for establishing whether there exists an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" is framed by Section 2254(e)(1), which provides that the findings of fact by a state court are entitled to a "presumption of correctness" and the petitioner must bear the burden of rebutting that presumption by "clear and convincing evidence." See 28 U.S.C. § 2254(e)(1). The federal courts

must accord "considerable deference in their review of state habeas proceedings." Lovitt v. True, 403 F.3d 171, 178 (4th Cir.2005), citing (Terry) Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Thus, even if an error were identified in the record, "the habeas petitioner will be entitled to relief only if the habeas court is 'in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" Jones v. Polk, 401 F.3d 257, 265 (4th Cir.2005), quoting O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (internal quotation marks and citation omitted). As Jones explains, "[t]he proper inquiry is not 'merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'" Jones, 401 F.3d at 265, quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Credibility of Witnesses

But for a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear. *See id.* § 2254(e)(1) (protecting state courts' factual judgments unless disproved in federal court by "clear and convincing evidence"). Indeed, "federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Cagle v. Branker* 520 F.3d 320, 324 (C.A.4 (N.C.),2008).

Guilty Plea Issues

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore,

statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States*, 519 F.2d 347 (4th Cir.1975); *Edmonds v. Lewis*, 546 F.2d 566 (4th Cir.1976).

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. *Porter v. State*, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Roddy v. State*, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *Pittman v. State*, 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).

"[T]he voluntariness of a guilty plea is not determined by an examination of the 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 the record of the post-conviction hearing." *Harres v. Leeke*, 282

S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." *Roddy*, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, *139 the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. *Wolfe v. State*, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997). See *Dalton v. State*, 376 S.C. 130, 137-139, 654 S.E.2d 870, 874 (S.C.App.,2007)

V.

MERITS

Assuming *arguendo* that the procedurally barred issue can be addressed, the claim is without merit. The record of the guilty plea reveals the following conclusive inquiry which eliminates this claim:

COURT: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced no one can tell you when , if ever, you will be eligible for parole or under what conditions. *You should assume that you will serve the entire time in jail that you're sentenced to.* Do you understand that?

BING : Yes, sir.

App.p. 8, ll. 11-17. The record revealed a negotiated plea that he was to receive a 40 year sentence on murder and that the charges would run concurrent in lieu of no longer seeking the death penalty. App.p. 2-3, 8. At the time of the plea, the Petitioner confirmed the state's version of the facts and that he was pleading guilty because he was guilty. App.p. 12-13.

A review of the initial testimony of the Petitioner reveals in reference to the decision to appeal after the plea that he spoke with his family about it and "they (the family) were saying I would have a parole something. It was a parole date somewhere into it and I didn't ... get anything on that. App.p. 48, l. 14- p. 49, l. 1. Bing admitted on cross- examination that he was aware of the maximum sentence was life and minimum was thirty years and that there was a negotiated sentence of 40 years. App.p. 62-63. In his opening testimony he makes no mention or assertion that he was misadvised by his counsel prior to the plea about parole eligibility, only that his family advised him after his sentence about parole.

During counsel John Delgado's testimony did not address any parole issue on opening or cross -examination concerning advice prior to the plea. However, on re-direct examination, counsel Delgado testified that the 40 year sentence was a reasonable resolution of the case. The following then occurred:

Q. Are you aware of the fact that he's not eligible for parole?

A. No, ma'am.

Q. I'm Sorry.

A. I though 40 years he is eligible for parole, ,ma'am is he not?

Q. Mr. Bing doesn't think that he's eligible for parole.

A. I think he's eligible for parole if you get a numerical sentence, ma'am, 85% of that 40 years, he is eligible for parole.

App.p. 98-99.²

²Contrary to this impression of counsel Delgado, individuals convicted of murder are never eligible for parole, but is consistent with the early release possibility of Section 24-13-150. Section 16-3-20 (A).

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, 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 life imprisonment required by this section. **No person sentenced to a mandatory minimum term of imprisonment for thirty years 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 required by this section. . . .**

Code 1976 § 16-3-20 .

Further the crime of murder has been a defined "no parole" offense under South Carolina law.

§ 24-13-100. Definition of no parole offense; classification. For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.

Code 1976 § 24-13-100 .

However, counsel Delgado was actually discussing early release rather than "parole:"

§ 24-13-150. Early release, discharge, and community supervision; limitations; forfeiture of credits.

(A) Notwithstanding any other provision of law, **except in a case in which the death penalty or a term of life imprisonment is imposed**, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the

Co-counsel Michael Culler testified that he worked with Delgado and felt that there was a good chance if they went to trial that there would be a death penalty. App.p. 123-124. Counsel testified that if they went to trial they would get either life in prison without the possibility of parole or the death penalty. "As he got 40 years, which is not a great thing, but he does have the opportunity to get out at some point in time." App.p. 125-126.

Q. Would it surprise you if I said to you my client has been told that he has no possibility of being paroled?

A. We'll he parole after 40 years, is what I meant to say - you know its day for day.

Q. That's correct.

A. As opposed to life without the possibility.

App.p. 126, l. 2-10. See also, App.p. 133, l. 2-14.

On reply testimony, the Petitioner testified that the court sentenced him to "forty years day for day. App.p. 157, l. 1. The following occurred:

Q. What was your understanding before you received that sentence from your attorneys?

custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended. Nothing in this section may be construed to allow a prisoner convicted of murder or a prisoner prohibited from participating in work release, early release, discharge, or community supervision by another provision of law to be eligible for work release, early release, discharge, or community supervision.

Code 1976 § 24-13-150

A. That I would be eligible for a parole date.

Q. And have you been told differently?

A. Yes, ma'am.

Q. What have you been told now.

A. That I will have to do 40 years day for day.

A. 100 %.

Q. Had you known at an earlier time , at the time that you took your plea , would that have made a difference?

A. Yes, ma'am.

Q. Do you feel that your attorneys misled you, as far as that statement's concerned?

A. Yes, ma'am.

App.p. 157, l. 1-25.

Respondent submit that claim is without merit. Importantly, the PCR Court assessing credibility and veracity of the witnesses declared:

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences.

App.p. 182. This assessment must be given deference by this court. But for a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear. *See id.* § 2254(e)(1) (protecting state courts' factual judgments unless disproved in federal court by "clear and convincing evidence"). Indeed, "federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court,

but not by them.” *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Cagle v. Branker* 520 F.3d 320, 324 (C.A.4 (N.C.),2008). The Petitioner’s own statements are self-defeating. First, at the plea, the Court told him he had to assume that he would do his entire 40 years sentence if he pleaded guilty. This plea statement was given a presumption of verity under *Blackledge*. Second, in his opening testimony, Bing makes no mention about parole as inducing the plea, but only mentions that his parents mentioned something about parole.

Thirdly, neither counsel Delgado or Culler testified that they ever advised Petitioner that he would be eligible for parole at any time. To the contrary, they were only asked whether they thought now that he would be eligible for parole and Delgado stated that he would have to do 85% of his sentence (see Section 24-13-150) and counsel Culler stated that he would have to do 40 years day for day.

The record reveals that the guilty plea was freely and knowing entered. The Petitioner as determined by the state plea judge could not be misled at the entry of the plea with any expectation of early release or parole. Further, at the PCR hearing, the PCR Court rejected the belated factual assertion as general lacking credibility. Nevertheless, lacking a straight up claim that his plea was induced as a result of some statement by counsel, he failed in his burden of proof in state court. His entire petition must be dismissed.

The state court reasonably applied the precedent of *Hill v. Lockhart* and *Boykin v. Alabama*. The claim must be dismissed.

VI.

Each and every allegation contained within the Petition not hereinbefore either expressly

admitted, qualified or explained is hereby denied.

WHEREFORE, having made Return, the Respondents request that the Petition be dismissed for the reasons set forth above.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS



S/Donald J. Zelenka

By: _____

DONALD J. ZELENKA

October 8, 2009.

IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF SOUTH CAROLINA

LEVI BING, JR., #308051,	)	CASE NO.: 2:09-CV-1759-RBH-RSC
	)	
Petitioner,	)	
	)	
v.	)	REPLY AND MEMORANDUM OF LAW
	)	IN OPPOSITION TO MOTION FOR
ANTHONY PADULA, WARDEN,	)	SUMMARY JUDGMENT
LEE CORRECTIONAL	)	
INSTITUTION,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court pursuant to Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus filed July 1, 2009. This Memorandum is submitted in Reply to the Respondent's Motion for Summary Judgment and Memorandum in Support filed October 8, 2009. The Petitioner now respectfully asserts that summary judgment is inappropriate for the reasons set forth below.

I.
PROCEDURAL HISTORY

The procedural history set forth in the Return and Memorandum of Law in Support of Motion for Summary Judgment is substantially correct. See Return at 1-3. For reasons set forth in more detail below, however, the Petitioner disagrees with the Respondent's contention that he asserted the issue presented in his habeas petition "for the first time" during his PCR appeal to the Supreme Court of South Carolina. The instant Petition was filed within one year of the finality of the judgment of conviction. Therefore, it is timely filed under 28 U.S.C. §2254.

II. GROUNDS FOR RELIEF

The Petitioner has asserted that he was deprived of his Sixth and Fourteenth Amendments' guarantees of the effective assistance of counsel at trial in the following respects:

- **Ground One:** I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was involuntarily entered because of it.

Supporting Facts: My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

III. STANDARD OF REVIEW

When a habeas petitioner has properly presented a federal claim to the state court, but that state court does not decide the issue on the merits, the federal court must decide that issue *de novo*. See Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003). However, if the state court has decided that issue on the merits, a petition for a writ of habeas corpus shall not be issued unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d). The deferential standard of review applies even when the state court fails to identify the

prevailing federal standards and principles to address the claim. See Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002).

IV. ARGUMENT

The Respondent argues that the Petitioner's issue is procedurally barred due to his failure to adequately present this claim to the state courts. See Return at 4-8. For this reason, the Petitioner will first address the Respondent's procedural bar argument before turning to the merits of his claim.

1. Factual Background

The Petitioner was charged with murder and other charges stemming from the death of Randy Bills in Holly Hill, South Carolina, on November 10, 2003. After the Petitioner hired lead trial counsel, John Delgado, the State served him with a death penalty notice, and another attorney, Michael Culler, was appointed to represent him in addition to lead trial counsel. The Petitioner ultimately pleaded guilty to the charges for a negotiated forty-year sentence. See PCR App. pp. 1-23.

During the Petitioner's plea, the presiding judge advised him as follows regarding how long he would actually have to serve on his sentence:

Q: Do you also understand that since it is classified as violent and most serious that that will affect the way you serve your time?

A: Yes, ma'am.

Q: Okay. Do you understand that the Court makes no representations about that?

A: Yes, ma'am.

Q: And do you understand that how your sentence is calculated will be calculated by the Department of Corrections?

A: Yes, ma'am.

Q: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced, no one can tell you when, if ever, you will be eligible for parole or under what conditions. You should

assume that you will serve the entire time in jail that you're sentenced to. Do you understand that?

A: Yes, ma'am.

PCR App. p. 7, line 25-p. 8, line 18.

During the Petitioner's Post-Conviction Relief hearing, the issue of his parole eligibility first arose during attorney Delgado's testimony:

Q: Okay. Are you aware of the fact that [the Petitioner's] not eligible for parole?

A: No ma'am.

Q: I'm sorry?

A: I thought 40 years he is eligible for parole, ma'am. Is he not?

Q: Mr. Bing doesn't think that he's eligible for parole?

A: I think he is eligible for parole if you get a numerical sentence, ma'am, 85 percent of that 40 years, he is eligible for parole.

PCR App. p. 98, line 16-p. 99, line 2. Attorney Culler testified that "he'll parole after 40 years, is what I meant to say you know it's day-for-day." PCR App. p. 126, lines 5-7. The Petitioner then testified that he had been advised that he would be eligible for parole:

Q: Mr. Bing, what is your sentence for the murder of the gentlemen we've been talking about today? What is your sentence? What did the Court sentence you?

A: Forty years day-for-day, mandatory.

Q: What was your understanding before you received that sentence from your attorneys?

A: That I would have been eligible for a parole date.

Q: And have you been told differently?

A: Yes, ma'am.

Q: What have you been told now?

A: That I will have to do 40 years day-for-day.

Q: Okay. And—

A: One hundred percent.

Q: Had you known that at an earlier time, at the time that you took your plea, would that have made a difference?

A: Yes, ma'am.

Q: Do you feel that your attorneys misled you, as far as that statement's concerned?

A: Yes ma'am.

Q: Okay. And have you been harmed by those statements?

A: Yes, ma'am.

PCR App. p. 156, line 22-p. 157, line 23. The Petitioner, upon examination by the PCR judge, stated that attorney Delgado told him after the plea that he would only have to serve 85% of his sentence. PCR App. p. 159, lines 11-25.

In its Order of Dismissal with Prejudice, the PCR court denied the Petitioner's allegation that defense counsel was ineffective for incorrectly advising him regarding how long he would actually have to serve on his sentence:

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

...

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that the Applicant *understood the consequences of a guilty plea*, his Constitutional rights, *and the possible sentences*. ... Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel.

PCR App. pp. 181-183 (emphasis added). No motion to alter or amend the Order of Dismissal was filed by either party.

On appeal to the Supreme Court of South Carolina, the Petitioner's appellate counsel filed a no-merit brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and argued that the Petitioner did not knowingly and voluntarily waive his right to a direct appeal. Johnson Petition at 2. In accordance with the Johnson procedure, the Petitioner filed a *pro se* brief, arguing that plea counsel was ineffective "for advising petitioner with incorrect parole eligibility that induced involuntary plea." *Pro se* Petition at 4. The Supreme Court of South

Carolina denied both petitions and dismissed the PCR appeal. See Bing v. State, S.C. Sup. Ct. Order dated June 10, 2009.

2. Procedural Bar

A federal habeas corpus petitioner must exhaust all remedies available in State court before the federal courts may grant relief. 28 U.S.C. §2254(b)(1)(A). This rule requires that the petitioner give the State court the “opportunity to correct and pass upon” the alleged violations of federal law. Duncan v. Henry, 513 U.S. 364, 365 (1995). A litigant wishing to raise a federal issue may “fairly present” the issue to the State court “by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’” Baldwin v. Reese, 541 U.S. 27, 31 (2004). “A federal court is unable to consider a claim dismissed by a state court on a procedural ground, unless the petitioner shows cause and prejudice in failing to follow the relevant state procedure.” Daniels v. Lee, 316 F.3d 477, 487 (4th Cir. 2003); see also Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000) (“a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural bar”).

The Respondent appears to make two arguments in support of its contention that the Petitioner’s allegation is procedurally barred: (1) the PCR court failed to include the allegation in its Order of Dismissal; and (2) the Petitioner’s attempt to raise the allegation on appeal from the PCR denial *would have been* barred by a state procedural rule. See Return at 8 (“this claim was barred during the state PCR hearing before the Circuit Court when the claim that he is now alleging was not addressed in the Order and not raised in a Rule 59 motion”). The Petitioner will address each contention in turn.

With regard to the Respondent's argument that the Petitioner's habeas claim is procedurally barred because the PCR court may have not directly addressed the Petitioner's claim, the Petitioner would submit that such an argument is clearly incorrect as a matter of law. There is no federal exhaustion requirement that the state court must actually review the federal claim on the merits and issue a decision specifically on the federal claim. Instead, the federal courts presume that the state court reviewed the federal claim on the merits even when the state court did not mention the federal claim once in its decision. See generally Thomas v. Davis, 192 F.3d 445 (4th Cir. 1999). The Petitioner clearly testified that he would not have pleaded guilty had he known that he was going to have to serve, as a matter of law, every day of his forty-year sentence. Therefore, the Petitioner would submit that he fairly presented this claim to the PCR court in the first instance, and that nothing more was required of him.

Furthermore, as a practical matter, the Petitioner would submit that the claim was addressed in the Order of Dismissal. The PCR court clearly found that the Petitioner understood the consequences of his plea, notably failing to differentiate between direct and collateral consequences, as well as the sentences that he was facing. See PCR App. pp. 181-183. Considering that the Petitioner's entire claim was that he did not understand the consequences of his plea and the scope of his sentence, due to counsel's misadvice, the Order of Dismissal appears to squarely address the Petitioner's claim.

With respect to the Respondent's argument that the Petitioner's argument would have been procedurally barred on appeal to the Supreme Court of South Carolina,¹ the Petitioner

¹ The Respondent relies on the Supreme Court's decision in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) for support for its argument. In Marlar, the Supreme Court was presented with a PCR court's decision that read, in full:

As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any

respectfully submits that since the PCR court clearly addressed his habeas claim, this argument is without merit. Assuming, *arguendo*, that the PCR court failed to address his habeas claim, thus failing to preserve the issue for appeal, the Petitioner respectfully submits that the Respondent's argument still fails. The Fourth Circuit has consistently held that the claim *must actually be dismissed because of the state procedural bar* in order for the claim to be procedurally barred in federal court. See Daniels v. Lee, *supra* at 487 (holding that a "federal court is unable to consider a claim *dismissed by a state court* on a procedural ground, unless the petitioner shows cause and prejudice in failing to follow the relevant state procedure") (emphasis added); Burket v. Angelone, *supra* at 183 (holding that "a federal habeas court may not review constitutional claims when a state court *has declined to consider their merits* on the basis of an adequate and independent state procedural bar") (emphasis added); McNeill v. Polk, 476 F.3d 206, 219 (holding that "pursuit of a federal habeas corpus claim is barred when a state court *has declined to address the claim* because the petitioner failed to satisfy an adequate state procedural requirement") (emphasis added). These holdings stem from the United States Supreme Court's pronouncement that a state court must "clearly and expressly" rely on state procedural rules when dismissing a claim in order for that claim to be procedurally barred in federal court. Coleman v. Thompson, 501 U.S. 722, 734 (1991) (citing Harris v. Reed, 489 U.S. 255, 266 (1989)); see also Michigan v. Long, 463 U.S. 1032, 1041 (1983).

evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

375 S.C. at 409, 653 S.E.2d at 266. Under these very limited circumstances, the Supreme Court held that because the PCR applicant "did not make a Rule 59(e)[, SCRC] motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review." *Id.* at 410, 653 S.E.2d at 267.

The Supreme Court of South Carolina's Order denying the Petitioner's petition for a writ of certiorari reads, in full, as follows:

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.

See Bing v. State, S.C. Sup. Ct. Order dated June 10, 2009. It is abundantly clear from the text of the Supreme Court's order that the Supreme Court did not "clearly and expressly" rely on any state procedural bar in dismissing the Petitioner's appeal. See Coleman, *supra*. Therefore, absent such a clear ruling by the Supreme Court, consideration of the Petitioner's claim by this Court is appropriate. See Harris, *supra*; see also McNeill, *supra* at 223 (noting that "if we are uncertain of the scope of a state procedural rule, and unsure if it could be considered an "adequate and independent" ground, assessing the merits of a prisoner's claim is appropriate") (footnote 6).

3. Merits

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In the context of ineffective assistance of counsel during a guilty plea, the moving party must show that but for counsel's errors and omissions, he would have exercised his right to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

For a guilty to be constitutionally valid, a defendant must be made aware of all the "direct," but not the "collateral," consequences of

his plea. "Direct" consequences have "a definite, immediate, and largely automatic effect on the range of the defendant's punishment." A consequence is "collateral" when it is uncertain or beyond the direct control of the court.

Meyer v. Branker, 506 F.3d 358, 367-368 (4th Cir. 2007) (internal citations omitted). A criminal defendant must only comprehend the direct consequences of his plea in order for his plea to be made knowingly, voluntarily, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969). However, several federal courts, including the Fourth Circuit, have held that *misadvice* regarding parole eligibility can give rise to federal habeas relief. See Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) ("though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel"); Sparks v. Sowders, 852 F.2d 822 (6th Cir. 1988); see also Meyers v. Gillis, 93 F.3d 1147, 1153-1154 (3rd Cir. 1996) (discussing various federal decisions on the issue).²

The evidence presented to the PCR court clearly demonstrated that the Petitioner was grossly misadvised regarding the length of sentence. As a matter of state law, the Petitioner *must* serve every day of his forty-year sentence for murder. See S.C. Code Ann. §16-3-20 ("No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive ... any ... credits that would reduce the mandatory minimum term of imprisonment").³ The

² The Petitioner would also note that the United States Supreme Court currently has a case pending before it which concerns the scope of a defense attorney's advice regarding collateral consequences of a plea. See Commonwealth of Kentucky v. Padilla, 253 S.W.3d 482 (Ky. 2008), cert. granted, 129 S.Ct. 1317 (2009).

³ As an initial matter, there appeared to be some confusion between the witnesses regarding what the technical term for the Petitioner's release from prison should be called. Throughout the PCR hearing, the Petitioner's release from prison was termed "parole." However, the Petitioner is not, and was never, eligible for parole. See S.C. Code Ann.

Respondent appears to concede this fact, and appears to concede that attorney Delgado's testimony regarding how much time the Petitioner would have to serve was incorrect as a matter of law. See Return at 13 (footnote 2). Since attorney Delgado's misadvice regarding the Petitioner's parole eligibility induced the Petitioner to plead guilty, see PCR App. p. 98, line 16-p. 99, line 2; p. 156, line 22-p. 159, lines 25, he is entitled to habeas relief.

The Respondent attempts to argue that the plea court's statements to the Petitioner during his guilty plea rectified attorney Delgado's obvious ineffectiveness. However, the plea court's statements did not *correct* attorney Delgado's incorrect statements. Instead, the plea court simply advised the Petitioner that the court was not making any statement about how much time he would *have* to serve, and that the Petitioner should simply assume, for the sake of proceeding forward with the plea, that he would have to serve every day of his sentence. Notably, the plea court clearly left the distinct impression that the Petitioner *might* get released early, via parole, after serving 85% of his sentence, or some other method of release. The plea court's refusal to explicitly tell the Petitioner that he would have to serve every day of his sentence does not trump attorney Delgado's undeniably incorrect advice to the Petitioner, given both prior to and after the guilty plea, that he *definitely* would be released after serving 85% of his sentence. Therefore, the Petitioner has demonstrated that his attorney was ineffective and that but for his attorney's ineffectiveness he would not have pleaded guilty. Accordingly, summary judgment is inappropriate on this issue, and the Petitioner is entitled to a new trial. See Hill v. Lockhart, supra.

§24-13-100. Instead, during the PCR hearing, the term "parole" was equated with the requirement that any person sentenced to a "no parole offense" must serve 85% of his sentence pursuant to S.C. Code Ann. §24-13-150 prior to being eligible for early release into South Carolina's community supervision program. Therefore, the true dispute was not whether the Petitioner would ever be eligible for parole, but whether the Petitioner would have to serve 85% or 100% of his sentence. Though the witnesses were using the incorrect terminology, the scope of the dispute is abundantly clear.

V.
CONCLUSION

For all the reasons set forth herein, the Respondent's Motion for Summary Judgment should be denied.

Respectfully submitted,

s/ Tara Dawn Shurling
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ATTORNEY FOR PETITIONER

This 23rd day of November, 2009.

RECEIVED
USDC, CLERK, CHARLESTON, SCIN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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Levi Bing, Jr., #308051,	)	C/A No. 2:09-1759-RBH-RSC
	)	
Petitioner,	)	
	)	
-versus-	)	<u>REPORT AND RECOMMENDATION</u>
	)	
Anthony Padula, Warden, Lee	)	
Correctional,	)	
	)	
Respondents.	)	
	)	

This habeas corpus petition under 28 U.S.C. § 2254 brought by a state prisoner represented by counsel is before the undersigned United States Magistrate Judge for a report and recommendation on the respondent's motion for summary judgment filed on October 8, 2009. 28 U.S.C. § 636(b).

The petitioner, Levi Bing, #308051, is presently confined in Lee Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted at the March 1, 2004 term of the Orangeburg County Grand Jury for Murder (03-GS-38-2411); Grand Larceny (03-GS-38-2412); and Possession of a Weapon during the Commission of a Violent Crime (03-GS-38-2413). App.p. 187-192. Petitioner was represented by John Delgado, Esquire, and Michael R. Culler, Jr., Esquire. The solicitor served the Petitioner with a notice of intent to seek the death

penalty. On March 14, 2005, Petitioner entered a negotiated plea of guilty to the charges. App.p. 1-23. He was sentenced by the Honorable Deadra L. Jefferson to confinement for concurrent periods of forty (40) years for Murder, ten (10) years for Grand Larceny and five (5) years for Possession of a Weapon. App.p. 22-23. A notice of appeal from the guilty plea would have had to been served by March 24, 2005. SCACR Rule 203. Petitioner did not appeal his conviction or sentence. The conviction was final for purposes of 28 U.S.C. § 2244 on March 24, 2005.

The petitioner made an application for post conviction relief in Orangeburg County on March 7, 2006, 348 days after his conviction became final. App.p. 25. In the pro se application, the Petitioner alleged as grounds for relief:

I. Ineffective Assistance of Counsel

II. Involuntary Guilty plea

The petitioner provide no specifics regarding either ground. App.p. 27, see also App.p. 39. The Respondents made a Return on March 27, 2007. App.p. 32-36.

On June 25, 2007, an evidentiary hearing was held in the matter before the Honorable Diane S. Goodstein, Presiding Judge. App.p. 37-162. The petitioner was present and testified, represented by Belinda Davis Branch, Esquire. Testimony was also received from John Delgado, Michael Culler, and Levi Bing, Sr. At the conclusion of the hearing, Judge Goodstein took the matter

under advisement. App.p. 161-162.

On September 7, 2007, Judge Goodstein entered a written Order of Dismissal in the matter. App.p. 178-186.

The petitioner appealed the dismissal to the South Carolina Supreme Court and was represented by Wanda H. Carter, Deputy Chief Appellate Defender of the South Carolina Commission on Indigent Defense. On January 5, 2009, counsel made a "Johnson Petition for Writ of Certiorari and Petition to Be Relieved as Counsel" asserting as the sole ground:

"The PCR court erred in denying petitioner's allegation that he did not voluntarily and intelligently waive his right to a direct appeal in the case."

Johnson Petition, p. 2. The petitioner made an "Initial Pro Se Brief of Petitioner" on January 27, 2009, in which he raised the following issue:

Whether the (PCR) judge erred, by failing to find defense counsel ineffective, for advising petitioner with incorrect parole eligibility that induced involuntary plea?

Initial Pro Se brief Statement of Issue, p. 3.

On June 10, 2009, the Supreme Court of South Carolina entered an order denying the petition for writ of certiorari after review pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) and granting appellate counsel's request to be relieved. Levi Bing, Jr. v. State, Order (S.C.S.Ct. June 10, 2009) (order denying certiorari under Johnson v. State). The

remittitur was entered June 29, 2009.

The Petition for writ of habeas corpus was received on July 1, 2009, and is timely under 28 U.S.C. §§ 2244, 2254.

The following exhibits have been made part of the record here:

1. Johnson Petition for Writ of Certiorari.
2. "Initial Pro Se Brief of Petitioner," January 27, 2009.
3. Levi Bing, Jr. v. State, Order (S.C.S.Ct. June 10, 2009) (order denying certiorari under Johnson v. State)
4. Remittitur Letter, June 29, 2009.
5. PCR Appendix, 192 pages.

II.

In the pro se petition¹ for a writ of habeas corpus under 28 U.S.C. § 2254, the petitioner made the following allegation as to why he is being held in custody unlawfully:

Ground One: I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was involuntary because of it.

Supporting Facts: "My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole date and I did not find out I don't till I got to SCDC. Lawyer admitted he

¹ Petitioner's attorney noticed her appearance in this matter on July 27, 2009.

thought I was parole eligible at my PCR hearing.

The respondent filed a motion for summary judgment on October 8, 2009, to which the petitioner filed his opposition on November 23, 2009. Hence it appears consideration of the summary judgment motion is appropriate.

SUMMARY JUDGMENT STANDARD

Pursuant to Fed.R.Civ.P. 56(c), a district court must enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed.R.Civ.P. 56(c). To avoid summary judgment on defendants' motion, a plaintiff must produce evidence creating a genuine issue of material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he

evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."

Anderson, Id. at 255, 106 S.Ct. at 2513-14.

APPLICABLE LAW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), effective April 24, 1996, is applicable to this action filed in 2009. Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The Supreme Court expounded upon this language in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000). Writing for the

majority with respect to this matter, Justice O'Connor stated that a state court's decision can be contrary to the Supreme Court's precedent in two ways: first, "if the state court arrives at a conclusion opposite to that reached by the Court on a question of law. Second, a state-court decision is also contrary to the Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that of the Supreme Court. Id. at 1519.

Justice O'Connor further stated that "[t]he text of § 2254(d)(1) ... suggests that the state court's decision must be substantially different from the relevant precedent of the Court." Id. She added that a "state-court decision will also be contrary to the Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the Court and nevertheless arrives at a result different from the Court precedent." Id. at 1519-20. Even if "the federal court considering the prisoner's habeas application might reach a different result applying" relevant Supreme Court precedent, so long as the state court applied the correct legal rule from Supreme Court cases, such a "run-of-the-mill" state court decision could not be deemed "contrary to" Supreme Court precedent. Id. at 1520.

As for the "unreasonable application" prong of § 2254(d)(1),

Justice O'Connor stated that a state court decision involves an unreasonable application of the Court's precedent if "the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of the Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. Justice O'Connor added that "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 1522. In making the "unreasonable application" inquiry, "a federal habeas court ... should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

In another change brought by the AEDPA, 28 U.S.C. § 2254(e)(1) now states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. ... The touchstone

for a reasonable determination is 'whether the determination is at least minimally consistent with the facts and circumstances of the case.'" Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.), cert. denied, 522 U.S. 819 (1997).

THE HABEAS CORPUS EXHAUSTION REQUIREMENT

Relief under Section 2254 may be had only after a habeas petitioner has exhausted his state court remedies: "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas corpus. Claims not so raised are considered defaulted." Breard v. Green, 523 U.S. 371, 375, 118 S.Ct. 1352 (1998), citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); see also, 28 U.S.C. § 2254(b). The theory of exhaustion is based on 28 U.S.C. § 2254, which gives the federal court jurisdiction of habeas petitions. See generally, O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, (1999). The court's exhaustion requirements under § 2254 are explained in Matthews v. Evatt, 105 F.3d 907, 910-911 (4th Cir.), cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997). In the interest of giving state courts the first opportunity to consider alleged constitutional errors occurring in a defendant's state trial and sentencing, a § 2254 petitioner is required to "exhaust" all state court remedies before a federal district court can entertain his claims. Thus, a federal habeas court may consider

only those issues which have been properly presented to the highest state courts with jurisdiction to decide them. The burden of proving that a claim has been exhausted lies with the petitioner. The exhaustion requirement, though not jurisdictional, is strictly enforced. (Citations omitted).

Additionally, a claim has not been exhausted unless the substance of a petitioner's claim is "fairly presented" to the state courts. The Matthews court explained, "[t]he ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court." Matthews v. Evatt, 105 F.3d at 911.

In order to exhaust his collateral claims in state court, a South Carolina habeas corpus petitioner must pursue a direct appeal and/or file an application for relief under the South Carolina Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 - 160. As the South Carolina Supreme Court has explained: "[W]hen the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies." In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454,

454 (1990).

Petitioner here did not have a direct appeal. Petitioner did have a full round of PCR proceedings. His PCR application was denied at the trial court level, and he had a timely petition for a writ of certiorari. The South Carolina Supreme Court denied the petition. Petitioner has no remaining state remedies which can be pursued.

PROCEDURAL DEFAULT

When a federal habeas petitioner has failed to raise a claim at the appropriate time in state court and has no further means of bringing that issue before the state courts, the claim will be considered procedurally defaulted, and he will be procedurally barred from raising the issue in his federal habeas petition. The United States Supreme Court has clearly stated that the procedural default of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. See, e.g., Smith v. Murray, 477 U.S. 527, 533, 106 S.Ct. 2661 (1986).

Procedural default can occur at any level of the state proceedings, if a state has procedural rules which bar its courts from considering claims not raised in a timely fashion. The South Carolina Supreme Court will refuse to consider claims raised in a second appeal which could have been raised at an earlier time. Furthermore, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed,

he is barred from proceeding in state court. A petitioner must also raise all grounds raised but denied at the PCR hearing level in his subsequent petition to the South Carolina Supreme Court for a writ of certiorari from the denial of PCR if he is to preserve them for consideration here. Issues preserved for review in the South Carolina Supreme Court must have been raised to, and ruled on by the PCR judge.

THE RELATIONSHIP BETWEEN EXHAUSTION AND PROCEDURAL DEFAULT

If a petitioner in federal court has failed to raise a claim in state court at the appropriate juncture, and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed (or defaulted) his opportunity for relief in the state courts. Under these circumstances, the exhaustion requirement is "technically met" and the rules of procedural bar apply. Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997); cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997), citing Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546 (1991); Teague v. Lane, 489 U.S. 288, 297-98, 109 S.Ct. 1060 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). In other words, where the state court has not had the opportunity to apply its own procedural bar, the federal court will nevertheless bar the claim where application of the bar is clear. Teague v. Lane, 489 U.S. at 297-98.

EXCUSING PROCEDURAL DEFAULT

Notwithstanding the foregoing, the requirement of exhaustion is not jurisdictional, and a federal court may consider claims which have not been presented to the highest South Carolina court with jurisdiction to hear the claim in very limited circumstances. Cranberry v. Greer, 481 U.S. 129, 131, 107 S.Ct. 1671 (1989). A federal court will review a procedurally defaulted claim if the petitioner can demonstrate cause for the default and actual prejudice therefrom, or his actual innocence of the crimes for which he is being held. Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546 (1991). In this context, "cause" is defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." Strickler v. Greene, 527 U.S. 263, 283 n. 24, 119 S.Ct. 1936 (1999), quoting Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner must show reasonable diligence in pursuing his claim to establish cause. Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir. 1996). Moreover, the claim of cause must itself be exhausted. Edwards v. Carpenter, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (failure of counsel to present issue on direct appeal must be exhausted in collateral proceeding as ineffective assistance to establish cause for default).

Next, with respect to establishing "actual prejudice," a

petitioner generally must show some error. Tucker v. Catoe, 221 F.3d 600, 615 (4th Cir.), cert. denied, 531 U.S. 1054, 121 S.Ct. 661 (2000). In addition, a petitioner must show an actual and substantial disadvantage as a result of the error, not merely a possibility of harm, to show prejudice. Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997).

"Actual innocence" is not an independent claim, but only a method of excusing default. O'Dell v. Netherland, 95 F.3d 1214, 1246 (4th Cir. 1996), aff'd, 521 U.S. 151, 117 S.Ct. 1969 (1997). To prevail under this theory, a petitioner must produce new evidence that was not available at trial to establish his factual innocence. Royal v. Taylor, 188 F.3d 239 (4th Cir.1999). A petitioner may establish actual innocence as to his guilt, Id., or his sentence. Matthews v. Evatt, 105 F.3d 907, 916 (4th Cir. 1997). It is a habeas petitioner's burden to raise cause and prejudice or actual innocence; if these are not raised by petitioner, the court need not consider the defaulted claim. Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995), cert. denied, 517 U.S. 1171, 116 S.Ct. 1575 (1996).

DISCUSSION

A review of the record and relevant case law reveals that the respondent's motion should be granted because his claim has been procedurally defaulted and cannot be reviewed here on the merits.

Petitioner's sole ground for relief is:

Ground One: I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was involuntary because of it.

Supporting Facts: "My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

In his habeas petition, the petitioner contends that his lawyer misadvised him prior to his plea that he would be eligible for parole and had he received the correct information he would not have pled guilty. Therefore his guilty plea was involuntary.

However, a review of the petitioner's application for PCR did not contain any such claim. (App. 165-177). It merely raised "ineffective assistance of counsel" without indicating what portion of his lawyers' representation he was challenging.

Additionally, Petitioner wrote to his lawyer prior to the PCR hearing advising her that he wanted to amend his PCR application and that letter was admitted at the PCR hearing as exhibit 1 without opposition. App. p. 162, 164-177). That thirteen page amendment did not assert that Petitioner's plea was involuntary as a result of his counsels' ineffectiveness in telling him he would be eligible for parole at any point.

In its pertinent part, Judge Goodstein's order did not

address this specific claim or even mention the word "parole":

The Applicant, the Applicant's former plea counsels John Delgado, Esquire and Michael R. Culler, Esquire and Applicant's father testified at the PCR evidentiary hearing. The 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 reviewed the Clerk of Court records regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the application for postconviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

Allegation of involuntary plea as a result of ineffective assistance of counsel.

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

The Applicant testified at the PCR hearing that plea counsels were ineffective for failing to investigate and review with him a gas station surveillance video near the crime scene. Applicant testified counsels refused to allow him to see the video. Applicant also testified counsels were ineffective for failing to interview witnesses. Specifically, Applicant testified counsels should have investigated witness Shameka Lewis (Ms. Lewis). Applicant further testified his plea was not voluntary and he hesitated on his answers during the plea. Applicant also stated counsels would give the Applicant and his family conflicting information. Applicant further testified counsels failed to investigate another truck seen leaving the scene of the crime.

On cross-examination, Applicant admitted that he pled guilty and that he informed the plea judge that he was satisfied with his attorneys. Applicant also testified he admitted to the crime and acknowledged his counsels explained his rights at the plea.

John Delgado (Mr. Delgado) testified they met with the Applicant on dozens of occasions. Mr. Delgado indicated they did everything possible in this case to prevent Applicant from receiving the death penalty. Mr. Delgado also testified they received and reviewed discovery with the Applicant. Mr.

Delgado indicated he discussed the surveillance video with the Applicant. Counsel testified he would never tell a client he could not view evidence. Mr. Delgado further testified he obtained experts through the Office of Appellate Defense to assist in the investigation of the case. Counsel indicated he hired a private investigator to assist in obtaining witness statements. Counsel testified Applicant admitted what was on video. Counsel indicated in his opinion, he did not believe Ms. Lewis would have been beneficial to the Applicant at a trial. Mr. Culler testified he did not recall the Applicant requesting the counselors to interview Ms. Lewis. However, Mr. Culler further testified he did not believe Ms. Lewis's testimony would have been significant for the Applicant. Both counsels testified they investigated the truck seen leaving the crime but were unable to get any details with regard to the owner or driver of the alleged truck.

Mr. Delgado acknowledged the evidence against the Applicant was very strong. Mr. Delgado testified the Applicant was with the victim a half an hour prior to the crime; the Applicant purchased the gun linked to the crime; and the Applicant possessed the car stolen in the crime. Both Mr. Delgado and Mr. Culler testified the Applicant admitted shooting the victim. Mr. Delgado also testified he did not observe any hesitancy in the Applicant's plea.

Mr. Delgado further testified that the Applicant gave numerous conflicting accounts of what occurred during the crime. Mr. Delgado and Mr. Culler testified they were so concerned with the implications of the Applicant's conflicting statements, they consulted an ethics professor regarding their duties as officers of the court.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences. This Court finds that trial counsel was not deficient in any aspect of her representation and performed well within reasonable professional norms for a criminal defense attorney. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Hill v. Lockhart. This Court further finds the Applicant also failed to carry his burden of proof to show that but for trial counsel's alleged deficient representation he would have not pled guilty but would have insisted on going to trial. Roscoe v. State. Furthermore, this Court finds the Applicant's guilty plea was knowingly and voluntarily made. Boykin v. Alabama;

Pittman v. State. Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel. Applicant failed to produce Ms. Lewis at the PCR hearing. This Court finds the Applicant's testimony to what Ms. Lewis would have testified to had he proceeded to trial to be purely speculative. Accordingly, the allegation of involuntary guilty plea resulting from the allegation of ineffective assistance of counsel is denied.

App. p. 180-183.

Here, Judge Goodstein did not make specific findings of fact or conclusions of law concerning alleged parole misadvice. If a PCR judge failed to make specific findings, Petitioner was required to file a timely SCRA Rule 59(e) motion requesting that the PCR court make specific findings on any claim raised but not ruled upon. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (S.C. 2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review").

Having not filed a Rule 59(e) motion and therefore not having gotten findings of facts nor conclusions of law on his allegation, Petitioner nonetheless filed a pro se "Initial Pro Se Brief of Petitioner" which presented his allegation about parole eligibility misadvice. Within that Brief, he asserted that various portions of the PCR transcript, pages 61-62 (testimony of counsel Delgado), page 121 (reply testimony of Petitioner)

supports his position². (App. pages 97-98, 157).

"Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues." Malar v. State, 375 S.C. 407, 653 S.E. 2d 266 (S.C. 2007) quoting Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). The Malar court noted that while Rule 59(e) had not been consistently enforced prior to the date of the decision on November 5, 2007, it would be consistently enforced from the date of the decision. As noted, in the instant case the South Carolina Supreme Court denied the petition for certiorari on June 10, 2009, well after the date of the Malar decision. The order of the PCR judge in this matter simply failed to specifically address the allegation raised here and in the pro se brief in the petition for a writ of certiorari from the denial of PCR relief by respondent. When neither PCR counsel nor the petitioner filed a Rule 59(e) motion in the PCR court, the claim was defaulted and not preserved for review.

The petitioner argued that Judge Goodstein's general

² Neither counsel Delgado or Culler testified that they ever advised Petitioner that he would be eligible for parole at any time. To the contrary, they were only asked whether they thought now that he would be eligible for parole and Delgado stated that he would have to do 85% of his sentence (see Section 24-13-150) and counsel Culler stated that he would have to do 40 years day for day.

conclusion that Petitioner's plea was a knowing and voluntary plea and that Petitioner received constitutionally effective assistance of counsel is a ruling on the specific issue raised here is unpersuasive. The Malar court rejected that position and found that a ruling was insufficient "since it does not set forth specific findings of fact and conclusions of law." Id. at 409. Therefore, the issue was not preserved for appellate review. Id.

Likewise, the Fourth Circuit has explained, "[t]he ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court." Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997); cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997).

Thus this ground was not properly exhausted and should be found procedurally defaulted under independent and adequate state procedural rules. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991). Further, Petitioner has not alleged or demonstrated cause for the default or actual prejudice as a result or that failure to consider the claim will result in a fundamental miscarriage of justice to excuse the default. Coleman, 501 U.S. at 750. He is not entitled to habeas relief.

CONCLUSION

Accordingly for the aforementioned reasons, it is recommended that the respondents' summary judgment motion be granted and this matter ended.

Respectfully Submitted,



Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

February 23, 2010

IN THE DISTRICT COURT OF THE UNITED STATES

DISTRICT OF SOUTH CAROLINA

DIVISION OF ORANGEBURG

LEVI BING, JR., #308051,	)	CASE NO.: 2:09-CV-1759-RBH-RSC
	)	
Petitioner,	)	
	)	
v.	)	OBJECTIONS TO THE REPORT AND
	)	RECOMMENDATION OF THE
ANTHONY PADULA, WARDEN,	)	MAGISTRATE JUDGE
LEE CORRECTIONAL	)	
INSTITUTION,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court pursuant to Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus filed July 1, 2009. On February 23, 2010, the Honorable Robert S. Carr, United States Magistrate Judge, issued a Report and Recommendation ("the Report") in this matter, which recommended that the Respondent's motion for summary judgment filed October 8, 2009, be granted. The Petitioner would now respectfully submit the following objections to the Report.

The Report recommends granting summary dismissal of the Petitioner's habeas petition solely on the basis that the Petitioner procedurally defaulted on his claim in state court. The reasoning behind the Report's recommendation is that the claim the Petitioner presents here was not included in the PCR court's Order of Dismissal, and thus could not have been appealed to the Supreme Court of South Carolina. The Petitioner disagrees with, and objects to, the Report's finding that the Petitioner's issue was not included in the Order of Dismissal. Assuming, *arguendo*, that the Petitioner's habeas claim was not directly addressed by the PCR court's Order of Dismissal, the Petitioner respectfully submits that the Report recommends summary dismissal of the Petitioner's claim based on a reading of procedural default law that has heretofore never

previously been applied in the federal habeas context, and that the Report's reading runs directly contrary to clear precedent set forth by the United States Supreme Court. Accordingly, the Petitioner would object to the Report on that basis as well. Finally, the Petitioner would object to the Report's failure to address his substantive claim of ineffective assistance of counsel.

A. Factual Background

The Petitioner was charged with murder and other charges stemming from the death of Randy Bills in Holly Hill, South Carolina, on November 10, 2003. After the Petitioner hired lead trial counsel, John Delgado, the State served him with a death penalty notice, and another attorney, Michael Culler, was appointed to represent him in addition to lead trial counsel. The Petitioner ultimately pleaded guilty to the charges for a negotiated forty-year sentence. See PCR App. pp. 1-23.

During the Petitioner's plea, the presiding judge advised him as follows regarding how long he would actually have to serve on his sentence:

Q: Do you also understand that since it is classified as violent and most serious that that will affect the way you serve your time?

A: Yes, ma'am.

Q: Okay. Do you understand that the Court makes no representations about that?

A: Yes, ma'am.

Q: And do you understand that how your sentence is calculated will be calculated by the Department of Corrections?

A: Yes, ma'am.

Q: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced, no one can tell you when, if ever, you will be eligible for parole or under what conditions. You should assume that you will serve the entire time in jail that you're sentenced to. Do you understand that?

A: Yes, ma'am.

PCR App. p. 7, line 25-p. 8, line 18.

During the Petitioner's Post-Conviction Relief hearing, the issue of how long he would have to serve in prison before being released first arose during attorney Delgado's testimony:

Q: Okay. Are you aware of the fact that [the Petitioner's] not eligible for parole?

A: No ma'am.

Q: I'm sorry?

A: I thought 40 years he is eligible for parole, ma'am. Is he not?

Q: Mr. Bing doesn't think that he's eligible for parole?

A: I think he is eligible for parole if you get a numerical sentence, ma'am, 85 percent of that 40 years, he is eligible for parole.

PCR App. p. 98, line 16-p. 99, line 2. Attorney Culler testified that "he'll parole after 40 years, is what I meant to say you know it's day-for-day." PCR App. p. 126, lines 5-7. The Petitioner then testified that he had been advised that he would be eligible for parole:

Q: Mr. Bing, what is your sentence for the murder of the gentlemen we've been talking about today? What is your sentence? What did the Court sentence you?

A: Forty years day-for-day, mandatory.

Q: What was your understanding before you received that sentence from your attorneys?

A: That I would have been eligible for a parole date.

Q: And have you been told differently?

A: Yes, ma'am.

Q: What have you been told now?

A: That I will have to do 40 years day-for-day.

Q: Okay. And—

A: One hundred percent.

Q: Had you known that at an earlier time, at the time that you took your plea, would that have made a difference?

A: Yes, ma'am.

Q: Do you feel that your attorneys misled you, as far as that statement's concerned?

A: Yes ma'am.

Q: Okay. And have you been harmed by those statements?

A: Yes, ma'am.

PCR App. p. 156, line 22-p. 157, line 23. The Petitioner, upon examination by the PCR judge, stated that attorney Delgado told him after the plea that he would only have to serve 85% of his sentence prior to being released from prison. PCR App. p. 159, lines 11-25.

In its Order of Dismissal with Prejudice, the PCR court denied the Petitioner's allegation that defense counsel was ineffective for incorrectly advising him regarding how long he would actually have to serve on his sentence:

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

...

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that the Applicant *understood the consequences of a guilty plea*, his Constitutional rights, *and the possible sentences*. ... Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel.

PCR App. pp. 181-183 (emphasis added). No motion to alter or amend the Order of Dismissal was filed by either party.

On appeal to the Supreme Court of South Carolina, the Petitioner's appellate counsel filed a no-merit brief pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), and argued that the Petitioner did not knowingly and voluntarily waive his right to a direct appeal. Johnson Petition at 2. In accordance with the Johnson procedure, the Petitioner filed a *pro se* brief, arguing that plea counsel was ineffective "for advising petitioner with incorrect parole eligibility that induced involuntary plea." *Pro se* Petition at 4. The Supreme Court of South Carolina denied both petitions and dismissed the PCR appeal. See Bing v. State, S.C. Sup. Ct. Order dated June 10, 2009. The Supreme Court's decision read, in its entirety, as follows:

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.

Id.

B. Procedural Default

1. The Report's New Form of Procedural Default¹

Fundamentally, there are two types of procedural default in the habeas context: (1) failure to exhaust state remedies ("default by exhaustion"); and (2) dismissal of a habeas claim in state court based on an independent and adequate state ground ("default by an independent and adequate state ground"). Though the standards for each type of default are different, running afoul of either type of default will result in a habeas claim not being preserved for federal review. An examination of the standards for the application of each type of default, and how they apply to the Petitioner's case, is necessary to demonstrate how the Report applied neither type of default and instead created a new type of procedural default to recommend summary dismissal of the Petitioner's claim.

a. Default by Exhaustion

The doctrine of default by exhaustion requires that a habeas "petitioner must exhaust all available state remedies before he can apply for federal habeas relief." Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000) (footnote 11). "To exhaust state remedies, the petitioner must

¹ For the sake of argument, this portion of the Petitioner's Objections assumes that his claim of ineffective assistance of counsel was not preserved for appellate review following the denial of his PCR by the PCR judge. The Petitioner's objection to *that* finding—that his claim would have been procedurally barred due to his failure to file a Rule 59(e), SCRPC, motion—is addressed below.

fairly present the substance of his claim to the state's highest court." Id. A petitioner fairly presents his claim to the state court "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" Baldwin v. Reese, 541 U.S. 27, 31 (2004). The doctrine of default by exhaustion will be applied to dismiss a habeas petitioner's claim if the petitioner failed to fairly present the claims in the first instance to the state courts *and* "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 (1991) (footnote 1). The doctrine of default by exhaustion has been statutorily codified. See 28 U.S.C. §2254(b)(1).

In essence, the doctrine of default by exhaustion places the burden on the habeas petitioner to adequately present his claims to the state courts. However, once he has done so, there is no requirement that the state court actually rule on his arguments. Instead, the petitioner's presentation of the argument to the state courts is sufficient to pass muster under §2254(b)(1). See generally Soffar v. Dretke, 368 F.3d 441, 467 (5th Cir. 2004) ("Once a federal claim has been submitted to the state's highest court, the exhaustion requirement is satisfied, even if the state court fails to address the federal claim"); Atkins v. Moore, 139 F.3d 887 (4th Cir. 1998) (footnote 1) ("[T]he fact that the state court does not rule on the merits of a claim does not mean that it is unexhausted") (unpublished opinion) (citing Smith v. Digmon, 434 U.S. 332 (1978) (per curiam)).

In the present case, the Petitioner has fairly presented his claim to the state courts. At the PCR hearing, the Petitioner alleged that defense counsel was ineffective for advising him incorrectly regarding the length of time he would have to serve if he pleaded guilty to murder.

See PCR App. p. 156, line 22-p. 157, line 23. After this claim was dismissed by the PCR court, he presented this issue to the Supreme Court of South Carolina in his *pro se* Petition, arguing that plea counsel was ineffective “for advising petitioner with incorrect parole eligibility that induced involuntary plea.” *Pro se* Petition at 4. The Petitioner’s certiorari petition was dismissed by the Supreme Court.

In order to fairly present his claim to the state courts, a habeas petitioner “must give the state courts one full opportunity to resolve any constitutional issue by invoking one complete round of the State’s established appellate review process.” O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The Petitioner first presented his claim to the state PCR court and then again to the Supreme Court, which was the highest state court possessing jurisdiction over his claim. Accordingly, the Petitioner has satisfied the default by exhaustion requirement in this case.

b. Default by an Independent and Adequate State Ground

The doctrine of default by an independent and adequate state ground “applies to bar federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.” Coleman v. Thompson, *supra*, at 729-730. In order for the doctrine to be applied, three questions must be answered: (1) what is the rule of procedure that would potentially bar the claim from consideration by the state court; (2) is the rule one that may be deemed adequate and independent; and (3) was the rule actually relied upon by the state court? Thomas v. Davis, 192 F.3d 445, 450 (4th Cir. 1999). “A state rule of procedure cannot command default of a claim asserted by a federal habeas petitioner *unless the last state court to consider the claim actually relies on the rule to reject it.*” Id. at 453 (emphasis added).

Whereas the doctrine of default by exhaustion places the onus on the habeas petitioner to present his claims to the state court, the doctrine of default by an independent and adequate state ground places the burden on the highest state court to address the claim to dismiss it because of the habeas petitioner's failure to comply with state procedural rules. The doctrine of default by an independent and adequate state ground will not be applied where the state court's decision "did not clearly and expressly rely on an independent and adequate state ground." Coleman v. Thompson, *supra*, at 735.

When a state appellate court's decision is summary in nature, the United States Supreme Court has set forth a presumption that the appellate court's decision decides the issues presented to it on the same grounds addressed by the lower court:

We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, *later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground*. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," Coleman, 501 U.S. at 740, 111 S.Ct. at 2559, *we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place*. Similarly where ... the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (emphasis added).

In the present case, the state procedural rule that would have ostensibly operated as a bar to the Petitioner's claim was the Supreme Court of South Carolina's rule that a "PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented" and that the "failure to specifically rule on the issues precludes appellate review of

the issues.” Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007).² If the PCR claim is not specifically addressed by the PCR court’s order, “a Rule 59(e)[, SCRCP] motion must be filed ... in order to preserve the issues for appellate review.” Id. at 410, 653 S.E.2d at 267.

However, the Supreme Court did not rely on Marlar to dismiss the Petitioner’s certiorari petition. Instead, the Supreme Court’s decision read:

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner’s application for post-conviction relief.

Petitioner’s counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel’s request to withdraw.

Bing v. State, S.C. Sup. Ct. Order dated June 10, 2009. Specifically, the Supreme Court did not mention the Petitioner’s failure to file a Rule 59(e), SCRCP, motion, nor did the Supreme Court hold that the Petitioner’s appeal was in any way procedurally barred based on any state rule. Importantly, the PCR court’s decision extensively addressed the Petitioner’s Sixth Amendment claims. See PCR App. pp. 181-183.

The Petitioner’s habeas claim should not have been dismissed due to the doctrine of default by an independent and adequate state ground. The Supreme Court of South Carolina’s decision is silent on the issue of procedural bar. Since the PCR court’s Order of Dismissal explicitly addressed the Petitioner’s substantive claims of ineffective assistance of counsel, the Supreme Court’s “later unexplained order[] upholding that judgment ... rest[ed] upon the same ground.” Ylst v. Nunnemaker, *supra*, at 803. Absent an explicit finding by the Supreme Court

² The Report correctly cites Marlar when it is first referenced; however, all subsequent references to Marlar in the Report refer to the decision as “Malar.” See Report at 18-20.

that the Petitioner's claims were procedurally barred in some way based on South Carolina law, the Report should not have assumed that the Supreme Court's decision rested on a procedural bar. Accordingly, the Petitioner has satisfied the doctrine of default by an independent and adequate state ground in this case.

c. The Report's Version of Procedural Default

The Report has apparently melded the requirements for default by exhaustion and the requirements for default by an independent and adequate state ground into a new hybrid form of procedural default that previously did not exist:

The order of the PCR judge in this matter simply failed to specifically address the allegation raised here and in the pro se brief in the petition for a writ of certiorari from the denial of PCR relief by respondent. When neither PCR counsel nor the petitioner filed a Rule 59(e) motion in the PCR court, the claim was defaulted and not preserved for review.

The petitioner argued that Judge Goodstein's general conclusion that Petitioner's plea was a knowing and voluntary plea and that Petitioner received constitutionally effective assistance of counsel is a ruling on the specific issue raised here is unpersuasive. The Ma[r]lar court rejected that position and found that a ruling was insufficient "since it does not set forth specific findings of fact and conclusions of law." Id. at 409. Therefore, the issue was not preserved for appellate review.

Likewise, the Fourth Circuit has explained, "[t]he ground relied upon must be presented face-up and squarely; the federal question must be plainly defined. Oblique references which hint that a theory may be lurking in the woodwork will not suffice. In other words, fair presentation contemplates that both operative facts and the controlling legal principles must be presented to the state court." Matthews v. Evatt, 105 F.3d 907 (4th Cir. 1997); cert. denied, 522 U.S. 833, 118 S.Ct. 102 (1997).

Thus this ground was not properly exhausted and should be found procedurally defaulted under independent and adequate state procedural rules. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991).

Report at 19-20. Under the Report's form of procedural default, a habeas claim is barred when that claim was fairly presented to the highest state court but *could* have been dismissed on state procedural grounds. In other words, the Report has extended the doctrine of default by an independent and adequate state ground to cases where the state procedural rule *could* have been applied but was not. This is simply not the law.

The doctrine of default by exhaustion requires only that a habeas petitioner present his claims to the state courts. The Petitioner has unquestionably satisfied the exhaustion requirement. Once the habeas petitioner has fairly presented his claims to the state courts, it is up to the state court to determine whether or not a state procedural rule operates to bar consideration of those claims. If the state court makes such a ruling, the doctrine of default by an independent and adequate state ground will operate to bar consideration of the defaulted claims in federal court. However, when the state court did not dismiss the claim based on its own procedural bar, the doctrine of default by an independent and adequate state ground simply does not apply. Neither the Supreme Court of South Carolina nor the PCR court dismissed any of the Petitioner's claims based on a state procedural rule. Therefore, the doctrine of default by an independent and adequate state ground should not operate to bar federal review of the Petitioner's claim.

Finally, the Report's ruling is directly contrary to clearly established law set forth by the United States Supreme Court. The United States Supreme Court has explicitly held that when a judgment issued by a state court—such as a PCR court's order—rests upon federal law and that judgment is upheld in a summary order on appeal without invoking a procedural default, the reviewing federal habeas court is to presume that “no procedural default has been invoked” that would satisfy the doctrine of default by an independent and adequate state ground. Ylst v.

Nunnemaker, *supra*, at 803. In this case, the PCR court's order rested entirely on federal law, and the Supreme Court of South Carolina's subsequent summary dismissal of the Petitioner's appeal did not explicitly invoke a state procedural bar. Consequently, the Report should have assumed that the Supreme Court of South Carolina's decision did not invoke a procedural bar, instead of assuming that it did. In so doing, the Report's finding is directly contrary to the United States Supreme Court's decision in Ylst.

Accordingly, the Petitioner objects to the Report's finding that he procedurally defaulted on the claim presented in his habeas petition. Neither the doctrine of default by exhaustion nor the doctrine of default by an independent and adequate state ground operated to bar the Petitioner's habeas claim in this case. Furthermore, the Report's finding that the Petitioner's claim is procedurally barred is directly contrary to precedent set forth by the United States Supreme Court. The Petitioner respectfully requests that this Court find that his claim is preserved for habeas review.

2. The Federal Habeas Claim Was Preserved for Appellate Review in State Court

Assuming that the Report's interpretation of the default rules is correct, the Petitioner would object to the Report's predicate finding that his claim was not preserved for appellate review to the Supreme Court of South Carolina. In PCR hearings, the PCR judge is to make specific findings of fact and rulings of law as to each issue presented. See S.C. Code Ann. §17-27-80. Only if a PCR judge "fails to specifically address" any particular allegation must a PCR applicant file a Rule 59(e), SCRPC, motion to preserve that allegation for appeal. Marlar v. State, *supra*, at 408. However, if the allegations are specifically addressed in the PCR court's order, then no Rule 59(e) motion is required to preserve the issue for appeal.

At the PCR hearing in this case, the Petitioner proceeded on the claim that he was misadvised regarding a collateral consequence of his plea; namely, how long he would have to serve in prison before he was released. See PCR App. p. 98, line 16-p. 99, line 2 (testimony of Attorney Delgado); p. 126, lines 5-7 (testimony of Attorney Culler); p. 156, line 22-p. 157, line 23; p. 159, lines 11-25 (testimony of Petitioner). The PCR court explicitly denied relief on this claim, finding

[T]hat Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that the Applicant *understood the consequences of a guilty plea*, his Constitutional rights, *and the possible sentences*. ... Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel.

PCR App. p. 183 (emphasis added).

The Petitioner alleged that defense counsel was ineffective for misadvising him of a consequence of his plea. The PCR court explicitly found that "the transcript and counsels' testimony shows that the Applicant understood the consequences of a guilty plea." PCR App. p. 183. It is axiomatic that the PCR court's ruling that the Petitioner understood the consequences of his plea was a direct response to the Petitioner's claim that he did not understand the consequences of his plea. His claim was preserved for appellate review, and the Petitioner would object to the Report's recommendation that summary dismissal be granted because his PCR claim would not have been reviewable on appeal.

C. Merits

As noted above, the Report recommended summary dismissal of the Petitioner's habeas petition on the sole basis that his habeas claim was procedurally barred. The Petitioner would

object to the Report's failure to address his habeas claim on the merits, and would respectfully assert that his habeas petition should be granted by this Court.

For a guilty to be constitutionally valid, a defendant must be made aware of all the "direct," but not the "collateral," consequences of his plea. "Direct" consequences have "a definite, immediate, and largely automatic effect on the range of the defendant's punishment." A consequence is "collateral" when it is uncertain or beyond the direct control of the court.

Meyer v. Branker, 506 F.3d 358, 367-368 (4th Cir. 2007) (internal citations omitted). A criminal defendant must only comprehend the direct consequences of his plea in order for his plea to be made knowingly, voluntarily, and intelligently. Boykin v. Alabama, 395 U.S. 238 (1969). However, several federal courts, including the Fourth Circuit, have held that *misadvice* regarding parole eligibility can give rise to federal habeas relief. See Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) ("though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel"); Sparks v. Sowders, 852 F.2d 822 (6th Cir. 1988); see also Meyers v. Gillis, 93 F.3d 1147, 1153-1154 (3rd Cir. 1996) (discussing various federal decisions on the issue).

In the present case, the issue is not one of parole eligibility; but, rather, the amount of time the Petitioner would have to serve before he was released from prison.³ It is ironic that the

³ In his Reply to the State's Motion for Summary Judgment, the Petitioner made clear that "during the PCR hearing, the term 'parole' was equated with the requirement that any person sentenced to a 'no parole offense' must serve 85% of his sentence pursuant to S.C. Code Ann. §24-13-150 prior to being eligible for early release into South Carolina's community supervision program." Reply at 10-11 (footnote 3). Despite this clarification of the issue at the PCR hearing, the Report still maintained that the Petitioner's issue was one of *misadvice* regarding parole eligibility. See Report at 18 ("Judge Goodstein did not make specific findings of fact or conclusions of law concerning alleged parole *misadvice*"). The Petitioner would again make clear that his allegation has never been *misadvice* regarding parole eligibility; but, rather, *misadvice* regarding how long he would have to serve before he would be released from prison into the community supervision program.

PCR Order cited the credibility of defense counsel as a primary consideration in denying relief. The PCR testimony of lead defense counsel confirmed that at the time of the plea he believed the Petitioner would be released after he served 85% of his sentence. It is telling that defense counsel obviously still held this erroneous understanding of the sentence imposed against the Petitioner. See PCR App. p. 98, line 16-p. 99, line 2. The Petitioner testified that he was advised by lead defense counsel that he would be released after he served 85% of his sentence if he pleaded guilty. See PCR App. p. 159, lines 11-25. Contrary to the assertions in the Order of Dismissal, defense counsel's testimony corroborates, not refutes, this claim. Finally, the Petitioner clearly testified that he relied upon this advice when pleading guilty. See PCR App. p. 156, line 22-p. 157, line 23.

Attorney Delgado's advice was simply incorrect as a matter of law. Under South Carolina law, any individual sentenced to a term of imprisonment for the crime of murder is not eligible for early release. Instead, the criminal defendant must serve *every day* of his sentence before being released from prison. See S.C. Code Ann. §16-3-20 ("No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive ... any ... credits that would reduce the mandatory minimum term of imprisonment"); §24-13-150 ("[A] prisoner convicted of a 'no parole offense' ... is not eligible for early release ... until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. ... Nothing in this section may be construed to allow a prisoner convicted of murder ... to be eligible for ... early release ... or community supervision").

Attorney Delgado informed the Petitioner that he would be eligible for release after he served eighty-five percent of his sentence. This constituted gross misadvice regarding a

collateral consequence of the Petitioner's plea. Attorney Delgado's manifestly incorrect advice resulted in the Petitioner accepting the guilty plea. Accordingly, the Petitioner is entitled to habeas relief, and the Petitioner would object to the Report's recommendation of summary dismissal on this claim.

CONCLUSION

For the reasons stated above and in previous pleadings, which have been incorporated by reference, the Petitioner respectfully submits that summary judgment is not proper in this case. In accordance with 28 U.S.C. §636(b), the Petitioner requests a *de novo* determination of the issues addressed in the Report and Recommendation and objected to herein.

Respectfully submitted,

s/ Tara Dawn Shurling
Tara Dawn Shurling (#6146)
Attorney and Counselor at Law

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tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

This 10th day of March, 2010.

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Levi Bing, Jr.*Petitioner*

v.

Anthony Padula*Respondent*

Civil Action No. 2:09-1759-RBH-RSC

SUMMARY JUDGMENT IN A CIVIL ACTIONThe Court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the
 defendant *(name)* _____ the amount of
 _____ dollars (\$ _____), which includes prejudgment
 interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____
 recover costs from the plaintiff *(name)* _____

☒ other: The Report and Recommendation of Magistrate Judge Robert S. Carr is adopted, Respondent's Motion
for Summary Judgment is granted. The Petitioner shall take nothing on his petition filed pursuant to Title 28: U.S.C.
2254.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has
 rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision
 was reached.

☒ decided by Judge United States District Judge R. Bryan Harwell on a motion for Summary
Judgment.

Date: June 1, 2010

CLERK OF COURT

s/ L. D. Tapscott

Signature of Clerk or Deputy Clerk

CLIENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED

U.S.D.C. CLERK, CHARLESTON, SC

2010 JUN -1 A 11:45

Levi Bing, Jr., #308051,

Petitioner,

v.

Anthony Padula, Warden, Lee
Correctional,

Respondent.

Civil Action No.: 2:09-cv-01759-RBH

ORDER

This matter is before the Court after the issuance of the Report and Recommendation ("R&R") of United States Magistrate Judge Robert S. Carr.¹ In the R&R, the Magistrate Judge recommends that the Court grant the Respondent's Motion for Summary Judgment [Docket #16].

I.**Procedural History and Factual Background**

In the instant *pro se*² Petition for writ of habeas corpus, the Petitioner made the following allegation as to why he is being held in custody unlawfully:

Ground One: I received ineffective assistance of counsel prior to and during my guilty pleas in violation of my Sixth and Fourteenth Amendment rights. My plea was involuntary because of it.

Supporting Facts: My lawyer told me if I plead guilty to murder I would be eligible for parole. I never would have plead to my charges if he hadn't promised me I could have a chance to get parole. I would have gone to trial which is what I really wanted to begin with. He promised me and my family I would have a parole

¹In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 (D.S.C.), this matter was referred to United States Magistrate Judge Robert S. Carr for pretrial handling.

² The Petitioner's attorney noticed her appearance in this matter on July 27, 2009.

date and I did not find out I don't till I got to SCDC. Lawyer admitted he thought I was parole eligible at my PCR hearing.

This matter was initiated on July 1, 2009. On October 8, 2009, the Respondent filed a Motion for Summary Judgment. Subsequently, the Petitioner filed a Response in Opposition. The Magistrate Judge issued an R&R on February 23, 2010, in which he recommends that the Court grant summary judgment in favor of the Respondent. On March 11, 2010, the Petitioner filed timely objections to the R&R.

The following is a summary of the facts giving rise to this matter. The Petitioner was charged with murder and other charges stemming from the death of Randy Bills in Holly Hill, South Carolina, on November 10, 2003. The Petitioner ultimately pleaded guilty to the charges for a negotiated forty-year sentence. *See* PCR App. pp. 1-23. He did not appeal his conviction or sentence. On March 7, 2006, he filed an application for post-conviction relief ("PCR"), alleging (1) ineffective assistance of counsel (no specifications), and (2) involuntary guilty plea (no specifications).

During his PCR hearing, the Petitioner did not raise the parole eligibility issue at all during his initial testimony. Only after direct and cross-examination of his trial counsels did the Petitioner testify for the first time that he had been advised that he would be eligible for parole:

Q: Mr. Bing, what is your sentence for the murder of the gentlemen we've been talking about today? What is your sentence? What did the Court sentence you?

A: Forty years day-for-day, mandatory.

Q: What was your understanding before you received that sentence from your attorneys?

A: That I would have been eligible for a parole date.

Q: And have you been told differently?

A: Yes, ma'am.

Q: What have you been told now?

A: That I will have to do 40 years day-for-day.

Q: Okay. And—

A: One hundred percent.

Q: Had you known that at an earlier time, at the time that you took your plea, would that have made a difference?

A: Yes, ma'am.

Q: Do you feel that your attorneys misled you, as far as that statement's concerned?

A: Yes ma'am.

Q: Okay. And have you been harmed by those statements?

A: Yes, ma'am.

PCR App. pp. 156-57. Further, upon examination by the PCR judge, the Petitioner stated that counsel told him that he would only have to serve 85% of his sentence prior to being released from prison. *Id.* at 159. On September 7, 2007, Judge Goodstein entered a written Order of Dismissal, which provided in pertinent part:

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that the Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel.

PCR App. pp. 181-83 (emphasis added).

On appeal to the South Carolina Supreme Court, the Petitioner's appellate counsel filed a no-merit brief pursuant to *Johnson v. State*, 364 S.E.2d 201 (S.C. 1988), and argued that the Petitioner did not knowingly and voluntarily waive his right to a direct appeal. In accordance with the *Johnson* procedure, the Petitioner filed a *pro se* brief, arguing that plea counsel was ineffective "for advising petitioner with incorrect parole eligibility that induced involuntary plea." *Pro Se Petition*, p.4. The court denied both petitions and dismissed the PCR appeal: "After

careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw." *State v. Bing*, S.C. Sup. Ct. Order (June 10, 2009). This Court now addresses the Petitioner's habeas petition.

II.

Standard of Review

The Magistrate Judge makes only a recommendation to the Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The Court is charged with making a *de novo* determination of those portions of the R&R to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Court is obligated to conduct a *de novo* review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the Court need not conduct a *de novo* review when a party makes only general and conclusory objections that do not direct the Court to a specific error in the Magistrate Judge's proposed findings and recommendations. *Orpiano v. Johnson*, 687 F.2d 44, 47-48 (4th Cir. 1982). In the absence of a timely filed specific objection, the Magistrate Judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

The Antiterrorism and Effective Death Penalty Act of 1996

The Court's review of collateral attacks on state criminal convictions is governed by the parameters set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a federal court may only grant habeas corpus relief under Section 2254(d)

with respect to a claim adjudicated on its merits in a state court proceeding if that state court's adjudication: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Frazer v. South Carolina*, 430 F.3d 696, 703 (4th Cir. 2005).

The proper analysis for establishing whether there exists an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" is framed by Section 2254(e)(1), which provides that the findings of fact by a state court are entitled to a "presumption of correctness," and the petitioner must bear the burden of rebutting that presumption by "clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1). As such, federal courts must accord "considerable deference in their review of state habeas proceedings." *Lovitt v. True*, 403 F.3d 171, 178 (4th Cir. 2005) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)).

III.

Discussion

In his habeas petition, the Petitioner contends that he received ineffective assistance of counsel and entered into an involuntary guilty plea because his counsel misadvised him that he would be eligible for parole. The R&R recommends granting summary judgment in favor of the Respondent on the basis that the Petitioner procedurally defaulted on his claim in state court. Specifically, the Magistrate Judge finds that the claim at issue here was not present in the Petitioner's application for PCR and not included in the PCR court's Order of Dismissal. Thus, the Magistrate Judge finds that the Petitioner was precluded from appealing this issue to the South

Carolina Supreme Court. The Petitioner objects on three grounds: the Petitioner argues that (1) this issue was brought before the PCR court and addressed in the PCR court's Order of Dismissal; (2) even if the issue was not directly addressed in the PCR court's Order of Dismissal, the Magistrate Judge misapplied the law of procedural default in contradiction to clear precedent set forth by the United States Supreme Court; and (3) the Magistrate Judge failed to address his substantive claim of ineffective assistance of counsel.

Fundamentally, there are two types of default in the habeas context: (1) failure to exhaust state remedies ("default by exhaustion"); and (2) dismissal of a habeas claim in state court based on an independent and adequate state ground ("default by an independent and adequate state ground").

Default by Exhaustion

Absent a valid excuse, a state prisoner must exhaust his remedies in state court before seeking federal habeas corpus relief. *See* 28 U.S.C. § 2254(b)(1). "To exhaust state remedies, the petitioner must fairly present the substance of his claim to the state's highest court." *Burket v. Angelone*, 208 F.3d 172, 183 n.11 (4th Cir. 2000). This requirement has two components: (1) presentation of the same claim, and (2) presentation to all appropriate courts. To satisfy the fair presentation requirement, a petitioner must present "the substance of [the] claims" during state proceedings. *George v. Angelone*, 100 F.3d 353, 362 n.10 (4th Cir. 1996); *see Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) ("[B]oth the operative facts and the controlling legal principles must be presented to the state court.") (internal quotation marks omitted). If a claim has been addressed by the state's highest court on either direct or collateral review, it is exhausted, regardless of whether the claim was raised in prior or subsequent state proceedings. *See*

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Moreover, a claim that has been fairly presented to all appropriate state courts is exhausted regardless of whether the state courts actually address the issue. See *Smith v. Digmon*, 434 U.S. 332, 333-34 (1978) (per curiam).

Default by an Independent and Adequate State Ground

A federal court ordinarily will not review a claim that is procedurally defaulted. See *Fisher v. Angelone*, 163 F.3d 835, 844 (4th Cir. 1998). To determine whether a claim that was raised in state court is procedurally defaulted, a federal court must answer three questions: (1) What is the rule of procedure that would potentially bar the claim from consideration by the state court; (2) Is the rule one that may be deemed adequate and independent; and (3) Was the rule actually relied upon by the state court? *Thomas v. Davis*, 192 F.3d 445, 450 (4th Cir. 1999). The doctrine of default by an independent and adequate state ground "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991).

In the instant matter, the state procedural rule that presumably would operate as a bar to the Petitioner's claim is that a "PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented" or appellate review of the issues may be precluded. *Marlar v. State*, 653 S.E.2d 266, 266 (S.C. 2007) (citing S.C. Code Ann. § 17-27-80 (2003)). If the PCR claims are not specifically addressed by the PCR court's order, "a Rule 59(e) motion must be filed . . . in order to preserve the issues for appellate review." *Id.* at 267. It appears as though the Petitioner's claim regarding parole eligibility misinformation is procedurally barred because it was not raised in his initial or amended PCR applications, and also he did not file a Rule 59(e) motion after the PCR judge did not specifically rule on it. The Petitioner argues

that the claim was presented to the PCR court and that the PCR judge did specifically rule on it. However, even assuming, *arguendo*, that this were true, and the claim was exhausted and it is not procedurally barred, the claim still fails on the merits.

IV.

In his habeas petition, the Petitioner claims he received ineffective assistance of counsel and entered into an involuntary guilty plea because his counsel misadvised him that he would be eligible for parole. A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually foreclosed. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *See Edmonds v. Lewis*, 546 F.2d 566 (4th Cir. 1976). A petitioner may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that (1) counsel's representation was below an objective standard of reasonableness and (2) the deficient performance prejudiced the petitioner's case. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (stating to show ineffective assistance of counsel, the petitioner must show that his counsel's performance was both objectively unreasonable and prejudicial to his defense). The "prejudice" requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). As such, the petitioner must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. *Id.*

A petitioner's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *State v. Ray*, 310 S.C. 431, 437 (1993); *see, e.g., Wolfe v. State*, 326 S.C. 158 (1997) (guilty plea not involuntary where the colloquy demonstrated the trial judge asked defendant twice whether he understood there were no promises and that no sentencing recommendations were binding on the judge). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty plea and the evidence presented at the PCR hearing." *Roddy v. State*, 339 S.C. 29, 33-34 (2000).

In the instant matter, the transcript of the guilty plea reveals that the Petitioner's claim is meritless. The record reveals a negotiated plea of forty (40) years on murder, and the charges would run concurrently as a result of the State no longer seeking the death penalty. PCR App. pp.2-3, 8. At the time of the guilty plea, the Petitioner confirmed the State's version of the facts and that he was pleading guilty because he was guilty. *Id.* at 12-13. Significantly, the following exchange occurred between the state judge receiving the plea and the Petitioner:

COURT: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced no one can tell you when, if ever, you will be eligible for parole or under what conditions. *You should assume that you will serve the entire time in jail that you're sentenced to.* Do you understand that?

BING: Yes, sir.

Id. at 8.

Moreover, a review of the Petitioner's application for PCR does not reveal his alleged claim that incorrect advice concerning parole eligibility caused ineffective assistance of counsel

and an involuntary guilty plea. Instead, it merely raises "ineffective assistance of counsel" without indicating what portion of his lawyers' representation he was challenging. Additionally, the Petitioner wrote to his lawyer prior to the PCR hearing and advised her that he wanted to amend his PCR application. That letter was admitted at the PCR hearing as Exhibit 1 without opposition, but even it did not assert that the Petitioner's plea was involuntary as a result of his lawyers' ineffectiveness in allegedly telling him he would be eligible for parole. PCR App. pp.162, 164-77.

In his initial testimony at the PCR hearing, the Petitioner similarly makes no mention or assertion that he was misadvised about parole eligibility by counsel prior to the plea; he merely states that his family advised him *after* his sentence about parole. A review of the initial testimony of the Petitioner reveals that he spoke with his family about an appeal after his guilty plea, and "they (the family) were saying I would have a parole something. It was a parole date somewhere into it and I didn't ... get anything on that." *Id.* at 48.

At the PCR hearing, the Petitioner called counsel John Delgado as a witness. Likewise, counsel Delgado's testimony and the questions by the Petitioner's PCR counsel did not address any parole issue on direct or cross-examination concerning advice prior to the guilty plea. Then, on re-direct examination, counsel Delgado testified that the 40 year sentence was a reasonable resolution of the case. The following exchange then occurred:

Q. Are you aware of the fact that he's not eligible for parole?

A. No, ma'am.

Q. I'm Sorry.

A. I thought 40 years he is eligible for parole, ma'am is he not?

Q. Mr. Bing doesn't think that he's eligible for parole.

A. I think he's eligible for parole if you get a numerical sentence, ma'am. 85% of that 40 years, he is eligible for parole.

PCR App. pp.98-99. Subsequently, co-counsel Michael Culler testified that he worked with counsel Delgado on the plea and felt that there was a good chance if they went to trial the Petitioner would get either life in prison without the possibility of parole or the death penalty. *Id.* at 123-25. Culler further testified that the Petitioner "got 40 years, which is not a great thing, but he does have the opportunity to get out at some point in time." *Id.* at 125-26. Then, the following exchange took place:

Q. Would it surprise you if I said to you my client has been told that he has no possibility of being paroled?

A. We'll be parole after 40 years, is what I meant to say - you know its day for day.

Q. That's correct.

A. As opposed to life without the possibility.

Id. at 126.

In reply testimony, the Petitioner testified that the court sentenced him to "forty years day for day, mandatory." PCR App. p.157. The following exchange then occurred:

Q. What was your understanding before you received that sentence from your attorneys?

A. That I would be eligible for a parole date.

Q. And have you been told differently?

A. Yes, ma'am.

Q. What have you been told now.

A. That I will have to do 40 years day for day.

A. 100 %.

Q. Had you known at an earlier time, at the time that you took your plea, would that have made a difference?

A. Yes, ma'am.

Q. Do you feel that your attorneys misled you, as far as that statement's concerned?

A. Yes, ma'am.

Id. As such, the first time the Petitioner even made the allegation that he was misadvised about parole eligibility came during reply testimony following the direct and cross-examination of his

trial counsels. Significantly, the PCR Court assessing credibility and veracity of the witnesses declared:

The allegation that the Applicant's guilty plea was rendered involuntary as the result of ineffective assistance of counsel is without merit. This Court finds that every aspect of the Applicant's testimony regarding the deficiencies of his counsels' representation was not credible.

This Court finds that Applicant's testimony was not credible. Further, this Court finds that plea counsels' testimony was credible and this Court affords it great weight. This Court finds that the transcript and counsels' testimony shows that the Applicant understood the consequences of a guilty plea, his Constitutional rights, and the possible sentences Therefore, the Applicant's guilty plea was not rendered involuntary as a result of the ineffective assistance of counsel.

The PCR court's assessment must be given deference by this Court. *See Lovitt*, 403 F.3d at 178; *see also* 28 U.S.C. § 2254(e)(1) (protecting state courts' factual judgments unless disproved in federal court by "clear and convincing evidence"). Indeed, "federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983); *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008).

Moreover, the Petitioner's own statements are self-defeating. First, at the guilty plea, the Court told him he had to assume that he would do his entire 40 year sentence if he pleaded guilty, and the Petitioner stated that he understood. This plea statement is given a presumption of truth under *Blackledge*. Second, in his PCR application and the opening testimony at the PCR hearing, the Petitioner makes no mention about parole eligibility inducing his guilty plea, but merely testifies that his family subsequently mentioned something about parole. Third, neither

counsel Delgado nor Culler testified that they ever advised Petitioner that he would be eligible for parole at any time. To the contrary, they were only asked whether they thought now that he would be eligible for parole; Delgado stated that he thought the Petitioner would have to do 85% of his sentence,³ and counsel Culler stated that he would have to do 40 years day for day. As a result, the PCR Court rejected the Petitioner's belated factual assertion of ineffectiveness relating to parole eligibility as generally lacking credibility.

Having thoroughly reviewed the entire record, the Petitioner's objections, and the applicable law, the Court finds that the Petitioner has not shown that the state court proceeding "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Moreover, the Petitioner has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). According great deference to the state court's findings of facts and determinations as to credibility, the Court finds that the Petitioner's guilty plea was made knowingly and voluntarily without any expectation of parole eligibility, and his ineffective assistance of counsel claim fails.

³ Counsel Delgado's statement is consistent with the early release possibility of S.C. Code Ann. § 24-13-150. See S.C. Code Ann. § 16-3-20(A). However, individuals convicted of murder are not eligible for parole.

V.

Conclusion

Based on the foregoing, it is **ORDERED** that the Magistrate Judge's R&R is adopted and incorporated as modified herein, and the Respondent's Motion for Summary Judgment [Docket # 16] is **GRANTED**. It is **FURTHER ORDERED** that a certificate of appealability is **DENIED** because the Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
May 28, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON Division

Civil Action No. 2:09-CV-1759-RBH-RSC

LEVI BING, JR. #308051

PETITIONER,

v.

ANTHONY PADULA, WARDEN,
LEE CORRECTIONAL INSTITUTION,

RESPONDENT.

Notice is hereby given that LEVI BING, JR., #308051

in the above-captioned case, hereby appeal to the United States Court of
Appeals for the Fourth Circuit from the Order/Judgment entered in this action
on the 28 day of June, 2010

Levi Bing, Jr.
(Plaintiff/Defendant)

PRO SE

(Attorney)

4344 Broad. River Rd.
(Address)

Columbia, S.C. 29210

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON Division

Civil Action No. 2:09-CV-1759-RBH-RSC

LEVI BING, JR. #308051

PETITIONER,

V.

ANTHONY PADULA, WARDEN,
LEE CORRECTIONAL INSTITUTION,

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on the 28 day of June, 2010

Levi Bing, Jr.
(Plaintiff/Defendant) # 308051

PRO SE

(Attorney)

4344 Broad River Rd.
(Address)

Columbia, SC 29210

**SIGN
HERE**

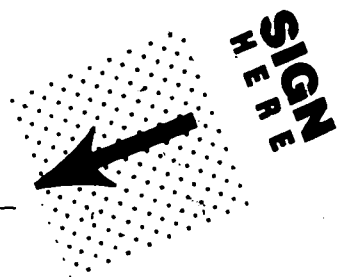
CERTIFICATE OF SERVICE

I, Levi Bing, Jr., Petitioner *Pro Se* certify that I have served the Notice of Appeal by mailing one copy in a stamped envelope properly addressed to:

Donald J. Zelenka, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Levi Bing, Jr., #308051
Petitioner, *Pro Se*

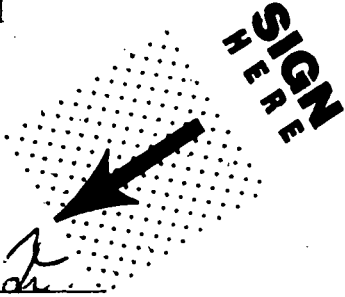


Date: 6/28/2010

CERTIFICATE OF SERVICE

I, Levi Bing, Jr., Petitioner *Pro Se* certify that I have served the Notice of Appeal by mailing one copy in a stamped envelope properly addressed to:

Donald J. Zelenka, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549


Levi Bing, Jr.
Levi Bing, Jr., #308051
Petitioner, *Pro Se*

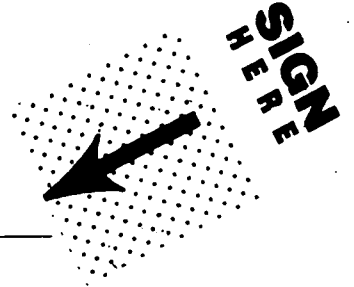
Date: 6/28/2010

CERTIFICATE OF SERVICE

I, Levi Bing, Jr., Petitioner *Pro Se* certify that I have served the Notice of Appeal by mailing one copy in a stamped envelope properly addressed to:

Donald J. Zelenka, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549


Levi Bing, Jr. #308051
Petitioner, *Pro Se*



Date: 6/28/2010

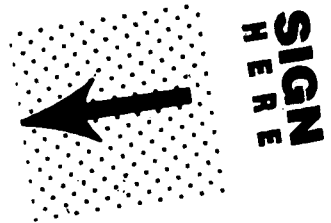
CERTIFICATE OF SERVICE

I, Levi Bing, Jr., Petitioner *Pro Se* certify that I have served the Notice of Appeal by mailing one copy in a stamped envelope properly addressed to:

Donald J. Zelenka, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Levi Bing, Jr., #308051
Petitioner, *Pro Se*



Date: 6/23/2010

FILED: January 13, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUITNo. 10-6925, Levi Bing, Jr. v. Anthony Padula
2:09-cv-01759-RBH

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourtus.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers are sent to counsel appointed or assigned by the Court in a separate transmission at the time judgment is entered. CJA 30 vouchers are sent to counsel in capital cases. CJA 20 vouchers are sent to counsel in criminal, post-judgment, habeas, and § 2255 cases. Assigned counsel vouchers are sent to counsel in civil, civil rights, and agency cases. Vouchers should be completed and returned within 60 days of the later of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari. If counsel appointed or assigned by the Court did not receive a voucher, forms and instructions are available from the Court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition

must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition to identify the cases to which the petition applies and to avoid companion cases proceeding to mandate during the pendency of a petition for rehearing in the lead case. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this Court, or another Court of Appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 15 pages. Copies are not required unless requested by the Court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this Court, there is no mandate. Unless the Court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6925

LEVI BING, JR.,

Petitioner - Appellant,

v.

ANTHONY PADULA, Warden Lee Correctional,

Respondent - Appellee.

Appeal from the United States District Court for the District of
South Carolina, at Charleston. R. Bryan Harwell, District
Judge. (2:09-cv-01759-RBH)

Submitted: November 17, 2010 Decided: January 13, 2011

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Levi Bing, Jr., Appellant Pro Se. Donald John Zelenka, Deputy
Assistant Attorney General, Columbia, South Carolina, for
Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Levi Bing, Jr. seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2006) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. We have independently reviewed the record and conclude that Bing has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials

before the court and argument would not aid the decisional process.

DISMISSED

FILED: January 13, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6925
(2:09-cv-01759-RBH)

LEVI BING, JR.

Petitioner - Appellant

v.

ANTHONY PADULA, Warden Lee Correctional

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No.: 10-6925
2:09-CV-01759

FILED

JAN 31 2011

U.S. Court of Appeals
Fourth Circuit

Levi Bing #308051,

Petitioner-Appellant,

V.

Jon Ozmint, South Carolina Department of Corrections,
Warden, Broad River Correctional Institution,

Respondent-Appellees.

Petition For Rehearing

The Petitioner-Appellant, Levi Bing #308051, respectfully submits this petition for rehearing in the above captioned case.

Date: January 27, 2011



Levi Bing #308051
B.R.C.I. Congaree 244
4460 Broad River Road
Columbia, S.C. 29210

I. Did the Court of Appeals overlook the District Courts use of the incorrect standard of review in its Order and its Conclusion to grant Summary Judgment and deny a Certificate of Appealability because the Petitioner failed to make a substantial showing of the denial of a constitutional right?

An Order from the District Court dated May 28, 2010 granted Summary Judgment to the Respondents, thereby dismissing Appellant-Petition for Habeas relief. In its Order the Court list in section II, "Standard of Review". See: pages 4-5. Within this section, in the last paragraph and before section III. Discussion, the Court states the following incorrect analysis to use in this particular case and this is why.

The Court states: "The proper analysis for establishing whether there exists an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding is framed by **Section 2254(e)(1)**, which provides that the findings of fact by a State Court are entitled to a presumption of correctness, and the Petitioner must bear the burden of rebutting that presumption by clear and convincing evidence."

This analysis is incorrect for these obvious reasons. The first being that the presumption of correctness of State Court findings apply to historical facts only, as to both Trial and Appellant Courts. **28 U.S.C. 2254(d)(1)**. Although the State Court findings as to historical facts are presumed correct in federal habeas proceeding; where the ultimate issue is a mixed question of law and fact, as is the issue of Ineffective Assistance of Counsel, Federal Courts must reach an independant conclusion. Tucker v. Moore, 56 F. Supp.2d 611 (1999), affirmed 221 F.3d 600 (4th Cir. S.C. 2000), cert. denied, 531 U.S. 105, 121 S.Ct. 661, 148 L.Ed.2d 563 (2001). Furthermore, the voluntariness of a guilty plea is a mixed question of law and fact not entitled to a presumption of correctness. Savino v. Murray, 82 F.3d 593, 603 (4th Cir. 1996). As stated on the very front of the District Courts Order, Petitioner alleged a combination of both Ineffective Assistance of Counsel, whom induced his involuntary plea. Therefore, it should have been crystal clear that the State findings should not have been entitled to a presumption of correctness and the District Courts analysis in that regard is incorrect and this Honorable Court overlooked that crucial error.

II. Did the Court of Appeals overlook that the District Court failed to give a necessary evidentiary hearing in which to test Plea Counsels credibility and to determined if the State's inadequate procedures prevented further development of the factual basis to grant relief on Petitioners meritorious constitutional claim?

The issue of Ineffective Assistance of Counsel and the voluntariness of Appellants plea were addressed in the District Courts Order. (pp. 1-2). It stated that Petitioner testify at the PCR hearing that he was advised by his counsel that he would be eligible for parole. Appellants Counsel testified at the hearing that he thought Appellant had a parole eligibility. See, District Courts Order (page 10, colloquy at bottom). This actually tends to support Appellants assertion that Counsel must have believed that Appellant would receive a parolable sentence and advised him to plead guilty in that belief, but this is not totally clear. For Counsel to believe this type of crime would have a parolable sentence is a strong indication that Counsel failed to even research in this area and Counsels performance was indeed ineffective and this misadvice certainly impacted appellants decision making which prejudiced him to plead guilty when he had testified that he would have insisted on proceeded to trial if not for counsels misadvice. (page 11, colloquy).

The District Courts Order also made its assessment and analysis of the credibility upon both of these witnesses. See: (Order of District Court, pages 12, and specifically 13). This was error for the following, legal reasons.

First, it is not clear by the District Court Order or any other document whether Plea Counsel was actually admitting that his misadvice to his Client was part of the inducement to plead guilty to the 40 years confinement or whether Counsel was merely attempting to conceal his ineffectiveness and poor performance to his Client or whether he told Petitioner that he would be eligible for parole or early release as the Respondents previously argued was the Plea Counsels intentions. See, (Respondents Return and Memorandum of Law in Support of Summary Judgment, page 14).

It was argued by both Respondent and the District Court that the Federal Courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the State Trial Court, but not by them. Marshall v. Lonberger, 459 U.S. 422, 434 (1983); Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008); See: (District courts Order, (pg. 12) and Respondants Motion

for Summary Judgment (pg. 10). However, this is exactly what the Respondent did by assessing the credibility of Plea Counsel and Petitioner-Appellant. The District Court should not decide disputed facts or assess credibility on a Summary Motion, when these facts could make a difference in the case, as in this instant case. Therefore, Summary Judgment being granted to the Respondent without a hearing was improper here. Wilson v. Williams, 997 F.2d 348, 350-57 (7th Cir. 1993); Gary v. Spillman, 925 F.2d 90, 95 (4th Cir. 1991). The Respondent did not meet their burden that no material fact did not exist entitling Petitioner-Appellant relief. They failed to an absence of evidentiary support to petitioners Ineffective Assistance of Counsel Claim. The Respondent presented mostly misstatements of what they wanted the District Court to accept as fact as argue by Petitioner in his Opposition to Respondents Motion. Respondent submitted only conclusions or inferences that they wish to be drawn from the facts and the credibility of witnesses should never been assessed in the Courts decision, therefore, Summary Judgment should have been denied. Bennet v. Investor Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (S.C. App. 2006). In Summary Judgment context, it is not reasonable or an issue of fact that is not genuine. Evans v. Stewart, 370 S.C. 522, 636 S.E.2d 632 (2006). The mandated liberal construction afforded Pro-se pleadings means that if the Court can reasonably read the pleadings to state a valid claim on which the Petitioner could prevail, it should do so. Rice v. Lamanna, 451 F.Supp.2d. 755, affirmed 197 Fed. Appx. 259 (D.S.C. 2006). A evidentiary hearing could have determined if the state Attorneys or State Courts that actually failed to develop the essential facts. **28 U.S.C. 2254(e)(2)**; Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. at 1715 (1992). See, also, Williams v. Taylor, 529 U.S. 420, 437 (2000). Petitioner-Appellant did fairly present the substance of his claim to the States highest Court. Burket v. Angelone, 208 F.3d 172, 183 n. 11 (4th Cir. 2000).

Further, the District Courts Order sub section entitled Default by an Independant and Adequate State Ground it addressed that State Rule 59(e), SCRCF and recent ruling in Marlar v. State, 653 S.E.2d 266, 266 (S.C. 2007) would operate as a bar to Petitioners Ineffective Assistance of Counsel Claim. This error was overlooked by this Honorable Court, as well. Let us review further.

Federal Courts may not hear a section 2254 claim if a State Court disposed of the claim on adequate and independent grounds, unless the Petitioner can

show cause and prejudice for, or a fundamental miscarriage of justice resulting from, failure to comply with the applicable rule. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wilson v. Moore, 178 F.3d 266, 272 (4th Cir. 1999). This rule protects the States interest in the finality of its judgments and promotes respect for the State-Court system. Coleman, 501 U.S. at 750. For a state-law ground to be (adequate), though, it must be applied reguarly or consistently. Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Brown v. Lee, 319 F.3d 162, 169 (4th Cir. 2003). Where a procedural rule is in constitutional issues that the adequacy requirement to prevent. Brown, 319 F.3d at 170.

The PCR Judges Order of Dismissal was issued on September 7, 2007. The Supreme Court decision in Marlar v. State, 653 S.E.2d 266 (S.C. 2007) wasn't made until November, 2007. Petitioner-Appellant was totally unaware of this new ruling that the Supreme Court issued in its effort to make compliance and regular use of the 59(e) rule, which was not to be consistently applied. Marlar, 653 S.E.2d at 267. There, Respondent cannot say to have regularly or consistently applied the law at that time nor did the (S.C. Supreme Court) strickly enforce Rule 59(e) months after the PCR Courts Order, therefore, Petitioner should not have been held responsible for not complying with the new ruling of Marlar. See: Brown, 319 F.3d at 169; and See, also, Pearson v. Harrison, 9 F.Appx. 85, 87 (4th Cir. 2001).

For the aforementioned reasons, the Appellant asserts that the United States District Court was in error and that this Honorable Court overlooked these logical and reasonable legal principles that proves that the Appellant has a constitution claim worthy of relief, but may be better determined with a much needed evidentiary hearing, instead of the drastic measure of denial of claim on Summary Judgment, without at a meaningful hearing upon the disputed facts and to see if the state procedures were adequate at the time of Petitioner-Appellants time during PCR and thereafter for proper development of the factual basis to his claim and to determine what plea Counsel actually advised his Counsel about Parole or Early Release in regards to him voluntarily pleading guilty.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Levi Bing #308051,)
 Petitioner-Appellant,)
)
 V.)
)
 Jon Ozmint, S.C. Dept. of Corr.,)
 Warden of Broad River Corr. Inst.,)
 Respondent-Appellees.)

Case No.: 10-6925
 2:09-CV-01759

Certificate of Service

The Petitioner-Appellant, Levi Bing #308051, does hereby certify that a true copy of Petitioner's-Appellant's Petition For Rehearing Brief has been delivered upon the U.S. Court Of Appeals For The Fourth Circuit by mailing a copy of said document in the U.S. Mail, postage pre-paid, via S.C. Department of Corrections mailroom personnel on January 27, 2011, addressed to:

U.S. Court of Appeals, Fourth Circuit
 U.S. Courthouse Annex, 5th Floor
 1100 East Main Street
 Richmond, Va. 23219

Sworn to and Subscribed before me
 this 27 day of January, 2011.

Susan H. Frye (L.S.)
 Notary Public for South Carolina

My Commission Expires: ~~My Commission Expires~~
 March 5, 2018

Levi Bing, Jr.
 Levi Bing #308051

B.R.C.I. Congaree 244
 4460 Broad River Road
 Columbia, S.C. 29210

PART 8B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No.: 10-6925

2:09-CV-01759

Levi Bing, #308051,

Petitioner-Appellant,

v.

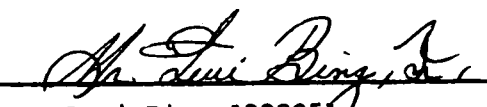
Jon Ozmint, South Carolina Department of Corrections,
Warden, Broad River Correctional Institution,

Respondent-Appellees.

SUPPLEMENT TO PETITION FOR REHEARING

The Petitioner-Appellant, Levi Bing, #308051, respectfully submits this supplement to Petition For Rehearing to clarify his entitlement for rehearing in this case.

Date: February 1, 2011


Levi Bing #308051

B.R.C.I. Congaree 244
4460 Broad River Road
Columbia, S.C. 29210

SUPPLEMENT TO PETITION FOR REHEARING

The U.S. Court of Appeals Fourth Circuit's denial of Appellant's C.O.A. and §2254 petition on procedural grounds is in conflict with the Court of Appeals Fourth Circuit's precedents.

The Appellant is a state inmate in South Carolina seeking federal habeas corpus under AEDPA's §2254. The federal magistrate judge, the federal district court and the U.S. Court of Appeals Fourth Circuit all denied Appellant's federal habeas corpus petition based upon procedural default, specifically the federal courts have ruled that Appellant failure to comply with filing a Rule 59(e) motion constitutes an "adequate" procedural default under State v. Marlar, 653 S.E.2d 266, 266 (S.C. 2007). This judicial determination by the magistrate judge, district judge and the Court of Appeals Fourth Circuit is in direct conflict with the Court of Appeals Fourth Circuit ruling in Bostic v. Stevenson, No: 08-6331, filed December 17, 2009 (4th Cir. (S.C.) 2009).

The Court of Appeals Fourth Circuit ruled that the state of South Carolina has not consistently and evenly applied the Rule 59(e) requirement in its state court and therefore the Rule 59(e) requirement is not an adequate procedural bar to deny a South Carolina federal habeas corpus petitioner's application and State v. Marlar is not applicable to procedurally bar a federal habeas corpus petitioner's application. See, Bostic v. Stevenson, supra.

Because Appellant and the petitioner Bostic are indistinguishable, the Appellant is entitled to the same judicial determination as Bostic in Bostic v. Stevenson in that Rule 59(e) motion and State v. Marlar are not "adequate" procedural bars and Appellant should be allowed to move forward with his §2254 petition and have the merits of his petition judicially determined by this Honorable Court of Appeals Fourth Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Levi Bing, #308051,	)	Case No.: 10-6925
Petitioner-Appellant,	)	2:09-CV-01759
	)	
V.	)	
	)	
Jon Ozmint, S.C. Dept. of Corr.	)	
Warden, Broad River Corr. Inst.	)	
Respondent-Appellees.	)	

CERTIFICATE OF SERVICE

The Petitioner-Appellant, Levi Bing #308051, does hereby certify that a true copy of Petitioner's-Appellant's Supplement To Petition For Rehearing brief has been delivered upon the U.S. Court Of Appeals For The Fourth Circuit by mailing a copy of said document in the U.S. Mail, postage pre-paid, via S.C. Department of Corrections Mail Room personnel on February 1, 2011, addressed to:

U.S. Court of Appeals, Fourth Circuit
1100 East Main Street
Richmond, Virginia 23219

Sworn to and Subscribed before me
this 1 day of Feb, 2011.

Eugene [Signature] (L.S.)
Notary Public for South Carolina
My Commission Expires: 2016

Levi Bing, Jr.
Levi Bing #308051
B.R.C.I. Congaree 244
4460 Broad River Road
Columbia, S.C. 29210

Filed: January 31, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6925
(2:09-cv-01759-RBH)

LEVI BING, JR.

Petitioner - Appellant

v.

ANTHONY PADULA, Warden Lee Correctional

Respondent - Appellee

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d)(1)

This Court's mandate is stayed under Fed. R. App. P. 41(d)(1), which provides that "[t]he timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion."

/s/Patricia S. Connor, Clerk

FILED: February 23, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6925
(2:09-cv-01759-RBH)

LEVI BING, JR.

Petitioner - Appellant

v.

ANTHONY PADULA, Warden Lee Correctional

Respondent - Appellee

O R D E R

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer,
Judge Motz and Judge King.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: March 3, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-6925
(2:09-cv-01759-RBH)

LEVI BING, JR.

Petitioner - Appellant

v.

ANTHONY PADULA, Warden Lee Correctional

Respondent - Appellee

M A N D A T E

The judgment of this Court, entered January 13, 2011, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Levi Bing, Jr., #308051,

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2006-CP-38-0273

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Tricia A. Blanchette, Bar No. 74904

Address:

PO Box 12725

Columbia, SC 29211

phone: 803-988-0008 fax: 8030988-8070

e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:

Mary S. Williams, Bar No.

Address:

PO Box 11549

Columbia, SC 29211

phone: 803-734-3737 fax: 803-734-4113

e-mail: other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)**SECTION I: Hearing Information**

Nature of Motion: Motion Pursuant to Rule 60(b), SCRC

Estimated Time Needed: 1/2 hour Court Reporter Needed: ☒ YES / ☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

February 13, 2012

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT:☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support(check reason) ☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRC)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	DOCKET NO.: 2006-CP-38-0273
	)	
LEVI BING, JR., #308051,	)	
	)	
Applicant,	)	
v.	)	MOTION FOR RELIEF FROM
	)	ORDER OF DISMISSAL WITH
STATE OF SOUTH CAROLINA,	)	PREJUDICE PURSUANT TO
	)	RULE 60(b), SCRCP
Respondent,	)	
	)	

This matter comes before this Court by way of an Application for Post Conviction Relief filed on March 7, 2006. On June 25, 2007, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Diane S. Goodstein.

Applicant was represented by Belinda Davis-Branch, Esquire, and the State was represented by Lance S. Boozer, Esquire. On September 7, 2007, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice. Pursuant to Rule 60(b), SCRCP, Applicant would respectfully move before this Court for relief from the Order of Dismissal with Prejudice.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Orangeburg County Clerk of Court. Applicant was indicted during the March 2004 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412), and Possession of a Weapon during the Commission of a Violent Crime (2003-GS-38-2413). Applicant was represented by John Delgado, Esquire, and Michael R. Culler, Jr., Esquire. On March 14, 2005, Applicant pled guilty and was sentenced by the Honorable Deadra L. Jefferson to concurrent periods of forty (40) years for Murder, ten (10) years for Grand

Larceny and five (5) years for Possession of a Weapon. Applicant did not appeal his conviction or sentence.¹

As detailed above, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice on Application for Post Conviction Relief on September 7, 2007.² A timely appeal was filed and a Johnson Petition for Writ of Certiorari was submitted by Wanda H. Carter, South Carolina Office of Appellate Defense. Applicant submitted a “Initial Pro Se Brief of Petitioner” on January 27, 2009, which raised the following issue: “Whether the PCR judge erred by failing to find defense counsel ineffective for advising petitioner with incorrect parole eligibility that induced involuntary plea”. On June 10, 2009, the South Carolina Supreme Court entered an Order denying Petition for Certiorari. The Remittitur was issued on June 29, 2009.

On July 1, 2009, Applicant filed a Pro Se Petition for Writ of Habeas Corpus and later retained Tara D. Shurling, Esquire. On May 28, 2010, the Honorable R. Bryan Harwell, United States District Judge, issued an Order granting the Respondent’s Motion for Summary Judgment and denying Applicant’s certificate of appealability. In adopting the Magistrates Judge’s Report and Recommendation, the court addressed Applicant’s claim that plea counsel admitted at the evidentiary hearing that he misadvised Applicant on parole eligibility and Applicant’s testimony that was misadvised that he would serve eighty-five percent (85%) and be parole eligible, and the court agreed with the State’s assertion that the issue was not properly preserved or exhausted.

¹ The procedural history of Applicant’s Post Conviction Relief Action is detailed above.

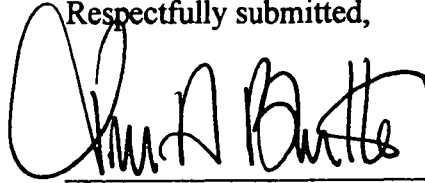
² The Order of Dismissal was issued prior to the South Carolina Supreme Court’s ruling in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding that Applicant did not make a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations; therefore, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge.). Here, Applicant’s PCR counsel did not file a Motion Pursuant to Rule 59(e), SCRCP.

On June 28, 2010, Applicant, pro-se, filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. On January 13, 2011, the United States Court of Appeals issued an Order of Denial. Applicant filed a timely Petition for Rehearing, which was denied on February 23, 2011. On March 3, 2011, the United States Court of Appeals for the Fourth Circuit issued a Mandate by which the Order entered on January 13, 2011 took effect. Applicant is filing the instant Motion pursuant to Rule 60(b), SCRCP, within in one year of the final decision of the federal court on the Order at issue.

In support of the instant Motion and in explanation of the Applicant's claim, a copy of the Applicant's Reply and Memorandum of Law in Opposition to Motion for Summary Judgment submitted by Tara D. Shurling, Esquire, is attached. As is detailed in the attached Memorandum of Law, both John Delgado, Esquire, and Applicant testified that Applicant was misadvised that he would be eligible for parole and serve eighty-five percent of his forty (40) year sentence. Despite this clear testimony, this Court's Order of Dismissal with Prejudice failed to address whether counsel was ineffective when he misadvised Applicant regarding parole eligibility. Therefore, pursuant to Rule 60(b), SCRCP, Applicant respectfully requests that this Court reopen the Order of Dismissal and properly rule upon this issue.

For the above stated reasons and due to said reasons containing mixed questions of law and fact, the Applicant would respectfully request that this Court conduct a motion hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tricia A. Blanchette', written over a horizontal line.

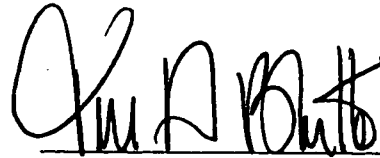
Tricia A. Blanchette
Attorney for Applicant
Post Office Box 12725
Columbia, South Carolina 29211

February 13, 2012
Columbia, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
	)	
Levi Bing, Jr., #308051,	)	2006-CP-38-0273
Applicant,	)	
v.	)	
	)	CERTIFICATE OF SERVICE
State of South Carolina,	)	
<u>Respondent.</u>	)	

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I that I hand delivered this 13th day of February 2012, a copy of a Motion Pursuant to Rule 60(b), SCRCF, with attachments, Mary S. Williams of the Attorney General's Office, at:

Office of the Attorney General
 ATT: Mary S. Williams, Ast. AG
 1000 Assembly Street, Room 519
 Columbia, SC 29201



Tricia A. Blanchette
 PO Box 12725
 Columbia, SC 29211
 (803) 988-0008
 Attorney for Applicant

February 13, 2012

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
	)	
	)	2006-CP-38-00273
Levi Bing, Jr., # 308051,	)	
	)	
Applicant,	)	RETURN TO RULE 60(b) MOTION FOR
	)	RELIEF FROM ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court by way of Petitioner's Motion for Relief From Order of Dismissal With Prejudice Pursuant to Rule 60(b), SCRCF, filed February 13, 2012. Respondent would submit the following:

I.

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Petitioner was indicted during the March 2004 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412) and Possession of a Weapon During the Commission of a Violent Crime (2003-GS-38-2413). Applicant was represented by John Delgado, Esquire and Michael R. Culler, Esquire. On March 15, 2005, Applicant pled guilty to all charges and was sentenced by the Honorable Deadra L. Jefferson to forty years imprisonment for Murder, ten years imprisonment for Grand Larceny, and five years for Possession of a Weapon During the Commission of a Violent Crime, all sentences to run concurrently. Applicant did not appeal his conviction or sentence.

Petitioner filed an application for Post-Conviction Relief on March 7, 2006, citing ineffective assistance of counsel. Respondent made its return on March 29, 2007 and an evidentiary hearing was held before the Honorable Diane S. Goodstein on June 25, 2007. Judge Goodstein dismissed Applicant's post-conviction relief application with prejudice by Order dated September 7, 2007. Applicant did not file a Rule 59(e) Motion to Reconsider. Petitioner filed a timely appeal and the South Carolina Supreme Court issued an Order Denying Applicant's Petition for Certiorari on June 10, 2009. Remittur was issued on June 29, 2009.

On July 1, 2009, Applicant filed a Petition for Writ of Habeas Corpus in United States District Court. On May 28, 2010, United States District Court Judge R. Bryan Harwell issued an Order granting the Respondent's Motion for Summary Judgment and Denying Applicant's certificate of appealability. On June 28, 2010, Applicant filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. On January 13, 2011, The United States Court of Appeals issued an Order of Denial, which took effect on March 3, 2011 by Mandate of the court.

Petitioner filed this Rule 60(b) Motion for Relief from the Order on July 7, 2011.

II.

The movant in a Rule 60(b), SCRPC, motion has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991). Also, relief under Rule 60(b), SCRPC, requires the existence of a meritorious defense. See Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).

III.

As a threshold matter, the State submits that Applicant's motion must be denied because of Applicant's failure to timely file his motion. South Carolina Rules of Civil Procedure Rule 60(b)(5) states: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." Judge Goodstein executed the Order upon which Applicant's current motion is made on September 7, 2007. Applicant made his motion under Rule 60(b), SCRPC, on February 13, 2012, well over four years after the judgment dismissing his application for post-conviction relief had been entered. The State submits that Applicant's motion was not filed within a reasonable time as mandated by Rule 60(b), SCRPC, nor was it filed within one year of the judgment being entered.

In his motion, Applicant asserts that his filing is timely as it is "within one year of the final decision of the federal court on the Order at issue." However, Applicant's argument is without merit. The Order at issue is Judge Goodstein's Order of Dismissal, entered on September 7, 2007; therefore, the time at which the clock begins to run on Applicant's period to file a Motion pursuant to Rule 60(b), SCRPC began on September 7, 2007. Rule 60(b), SCRPC, is a state court rule governing relief from judgments or orders in South Carolina State Courts; federal court proceedings are not mentioned within the rule, nor are any tolling provisions for subsequent federal court proceedings involving the same parties and issues. As Applicant's motion is untimely, it must be denied and dismissed.

IV.

Here, Applicant simply alleges he is entitled to relief from judgment pursuant to Rule 60(b), SCRPC, so that "this Court can reopen the order of Dismissal and properly rule upon th[e] issue [of

whether plea counsel misadvised Applicant of his parole eligibility].” Applicant has not narrowed which of the five grounds under Rule 60(b), SCRPC, he seeks relief from Judge Goodstein’s Order.

In his Motion, Applicant makes no specific allegations of any mistake, inadvertence, surprise, or excusable neglect, which would entitle Petitioner to relief. Second, there are no allegations of any “newly discovered” evidence is or whether the evidence meets the requirements of after-discovered evidence. Third, Applicant makes no specific allegations of fraud, misrepresentation, or other misconduct, which would entitle Petitioner to relief. Fourth, Applicant’s Motion makes no mention of the Order being void. Finally, Applicant makes no allegation that supports relief under Rule 60(b)(5), SCRPC.

Respondent submits Petitioner has failed to present evidence proving the facts essential to entitle him to relief; therefore, this Motion should be denied. Bowers, supra.

V.

Furthermore, Petitioner has repeatedly failed to prove that his application for post-conviction relief has merit. The Order of Dismissal, signed by Judge Goodstein on September 7, 2007, contained the findings of facts and conclusions of law as required by S.C. Code Ann. Sect. 17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). The Court determined that the application for post-conviction relief was without merit, including as to whether Applicant’s plea counsel was effective. While the term “parole” was not mentioned within Judge Goodstein’s Order of Dismissal, this issue was not before the post-conviction relief court, as Applicant asserted this issue for the first time in his pro se “Initial Pro Se Brief of Petitioner,” appealing Judge Goodstein’s Order of Dismissal. It is improper for Applicant to ask the

Court to grant relief under Rule 60(b), SCRCP, to clarify an issue that was not brought before the Court and only raised on appeal.

Furthermore, the transcript of Applicant's guilty plea reveals that his claim is meritless. The record reveals a negotiated plea of forty years on murder, and the charges would run concurrently as a result of the State no longer seeking the death penalty. PCR App. pp. 2-3, 8. At the time of the guilty plea, Applicant confirmed the State's version of the facts and that he was pleading guilty because he was guilty. PCR App. pp. 12-13. Significantly, following exchange occurred between Judge Jefferson and Applicant during the plea:

COURT: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced no one can tell you when, if ever, that you will be eligible for parole or under what conditions. *You should assume that you will serve the entire time in jail that you're sentenced to.* Do you understand that?

BING: Yes, sir.

Therefore, even if plea counsel had mistakenly informed Applicant in regards to parole eligibility, any misconception was cured at the plea hearing. Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000); Moorehead v. State, 329 S.C.329, 333, 496 S.E.2d 415, 416 (1998). Moreover, a review of Applicant's application for post-conviction relief does not reveal his alleged claim that incorrect advice concerning parole eligibility caused ineffective assistance of counsel.

Thus, Petitioner is not entitled to relief under Rule 60(b), SCRCP. See Mitchell Supply Co., supra. Respondent therefore requests that the relief requested by Petitioner be denied and that said Motion be dismissed.

WHEREFORE, having made its Return to the Motion, Respondent requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

BY: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 18, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
	)	2006-CP-38-0273
	)	
LEVI BING, JR., 308051,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Rule 60(b) Motion for Relief from Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

The Honorable Diane S. Goodstein
Administrative Judge, 1st Judicial Circuit
5200 East Jim Bilton Blvd.
Post Office Box 234
St. George, SC 29477

Tricia A. Blanchette, Esquire
Post Office Box 12725
Columbia, SC 29211

DATED this 21st day of May, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

4 LEVI BING, JR.)
5 Applicant/Petitioner)

6 versus) TRANSCRIPT OF RECORD
)
7)
)
8 STATE OF SOUTH CAROLINA)

Orangeburg, South Carolina

September 6, 2012

13 B E F O R E :

14 HONORABLE DIANE S. GOODSTEIN, Presiding Judge

15 (Reporter Present, Harry A. Walker)

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

17 For the Applicant/
Petitioner: TRICIA A. BLANCHETTE, Esq.

18 For the State: MEGAN HARRIGAN, Esq.
19 Assistant Attorney General

HARRIET P. BENNETT
Reporter, S. C. Court Administration
46 Regency Oaks Drive
Summerville, S.C. 29485

Reporter, S. C. Court Administration
46 Regency Oaks Drive
Summerville, S.C. 29485

Summerville, S.C. 29485

1 (The within matter came before the Court for
2 hearing on September 6, 2012)

3 THE COURT: This is the case of Mr. Levi Bing,
4 Junior, versus the State. It's a PCR. The Number
5 is 2006 CP 38 0273.

6 This is a Rule 60 B Motion for relief from an
7 Order of Dismissal filed on behalf of Mr. Levi Bing,
8 Junior, by his attorney, Tricia Blanchette.

9 MS. BLANCHETTE: Thank you, Your Honor.

10 I believe Ms. Harrigan has actually provided a
11 Brief.

12 THE COURT: Do you need to put anything on the
13 record? I've just been over that again.

14 MS. BLANCHETTE: Perfect. I will skip right on
15 ahead then.

16 THE COURT: Very well.

17 MS. HARRIGAN: Then you don't need me?

18 THE COURT: I need you desperately. I just do
19 not need a procedural history.

20 Go ahead.

21 MS. BLANCHETTE: Your Honor, then we will go
22 ahead with the issue before the Court today.

23 THE COURT: Good.

24 MS. BLANCHETTE: In this PCR action and the ap-
25 plication he merely raised the issue of involuntary

1 guilty plea with no factual support given, as per the
2 question number 11 on the PCR application.

3 That was raised at the beginning of the hearing
4 back on 2007 by you. You asked if there was some
5 specific allegations. That would be on page 39 of the
6 appendix.

7 At that time, his appointed counsel did not pro-
8 vide specific allegations but informed Your Honor
9 that those would come out through the testimony in
10 the PCR hearing.

11 One of the State's allegations in the response
12 is that, Mr. Bing, did you specifically allege the issue
13 of being mis-advised from Mr. Delgado concerning his
14 parole eligibility or the fact that he would be serv-
15 ing a day for day sentence?

16 We would like to show that it did come before
17 this Court during the testimony, specifically Mr.
18 Delgado testifying on page 97 of the appendix that
19 it was his understanding that Mr. Bing would be eligi-
20 ble for parole, and then again throughout his testi-
21 mony on pages 98 through 99 of the appendix.

22 He kind of fumbled around a little bit but he
23 essentially said, I think he is eligible for parole;
24 if you get any miracle sentence such as forty years
25 he is eligible for parole.

1 I would turn briefly to the Defendant's testi-
2 mony of how he raised the issue in front of Your Honor.
3 He said it was his understanding -- page 48 of the
4 appendix -- that he would have a parole date.

5 He claimed on page 59 through 60 that he was
6 pushed into the plea. One of the reasons he took it
7 was for the parole date.

8 Then he also stated that he -- pages 157 through
9 158 of the appendix -- that he was advised by his at-
10 torney before he took the plea that he would have a
11 parole date.

12 Now, at the end of the hearing, which I believe
13 is pages 160 through 161 of the appendix, Your Honor
14 specifically actually asked something about this is-
15 sue -- specifically asked Mr. Bing about the issue
16 and asked him about the questions given to him by
17 Judge Sheppard in the Plea Court.

18 There was some discussion between yourself and
19 Mr. Bing as to that.

20 The issue we're in front of you on today is the
21 fact that the Order that was issued back on September
22 7 of 2007 does not specifically address the issue
23 of voluntary guilty plea due to gross mis-advice of Mr.
24 Delgado on this issue.

25 It does address the issue of involuntary guilty

1 plea, subject matter jurisdiction, and the failure to
2 file an appeal, but it does not go into this specific
3 issue in the Order.

4 Now, an appeal was taken and filed by the Office
5 of Appellate Defense. In Mr. Bing's own pro se Johnson
6 Petition he attempted to raise the issue in his pro
7 se Johnson Petition but that was denied.

8 So we would submit to the Court, and I can go into
9 much further detail, that the denial of that Writ of
10 Certiorari was not a ruling on the merits of the issue;
11 that Mr. Bing's attempt to raise it on a pro se manner
12 was not the proper way to raise it.

13 That there either should have been leave taken to
14 file a 60 B by his Appellate Defender, or it should
15 have been properly preserved in a 59 motion by his PCR
16 counsel.

17 He was not successful, as I indicated, on the Peti-
18 tion for Writ of Certiorari. Certiorari was denied.

19 At that time, he pursued federal habeas corpus.
20 He initially filed that on his own but then he retained
21 the services of an attorney, (name not audible).

22 She argued in a memorandum which I have attached
23 to the motion that the issue was properly preserved
24 and should be heard by the Federal Court.

25 Alternately, and I won't go through the Federal

1 Court history, but the Court did find that the issue
2 -- well, the Court did not make a specific ruling as
3 to whether or not the issue was properly preserved,
4 but the State argued over and over again the issue
5 was not preserved.

6 The Federal Court did go into an analysis of it,
7 and our position today is that it would be proper
8 for Your Honor to rule on this. This is an issue that
9 was clearly in the record before Your Honor.

10 Turning to the PCR Code and Pruitt versus State
11 and Marlowe versus State, this is an issue that should
12 have been ruled on by Your Honor, and that is why we
13 are here today.

14 I understand that Rule 60 is very strict and it
15 has to be brought within a reasonable time and within
16 one year, and I understand when you look at this on
17 its face it would appear that we are being very un-
18 timely with our Motion, but there are very specific
19 reasons as to why it is being brought at this time.

20 The first being Mr. Bing was under the opinion
21 that he needed to go through the entire Federal Court
22 System; resolve, you know, all of his remedies. He
23 did not understand this issue could be brought back
24 in front of Your Honor in a timely manner prescribed
25 by Rule 60.

1 Also, he wasn't relying upon -- until the point
2 where he retained counsel, he was never advised that
3 it needed to be brought to your attention.

4 Also, we are petitioning this Court essentially
5 today as a matter of equity for equitable tolling of
6 the one year requirement.

7 In Pelzer versus State, which is a case that is
8 dealing with equitable tolling, it says it has been
9 deemed available where the plaintiff has been unable
10 to obtain vital information bearing on the existence
11 of his or her claim.

12 Before I continue here, I would ask if Your Honor
13 would like to hear from Mr. Bing, but he has explained
14 to me that he did not know this avenue was available on
15 this matter or needed to be addressed with Your Honor
16 as prescribed in Rule 60 B.

17 Also, he has in no way been negligent with this.
18 He has pursued every avenue of relief that he knew was
19 available to him in a timely manner, and I would sub-
20 mit to Your Honor that if he knew he needed to file
21 this in a more timely manner or at any time prior to
22 today that he would have done that.

23 Finally, Your Honor, essentially we are falling
24 at the feet of the Court in an issue of fundamental
25 fairness.

1 Here Mr. Delgado admitted to gross advice to Mr.
2 Bing. He told him essentially that he would not serve
3 this forty year sentence day for day, and that is the
4 reason that he decided to take this plea.

5 I think it is clear from the transcript of the
6 proceedings that a plea was not his first choice. In
7 his own words, he was pushed into it.

8 Looking at Hill versus Lockhart, Coats versus
9 State, and then finally the immigration case that came
10 out in 2010 -- if you look at the reasoning in there as
11 far as ineffective assistance of counsel, we think
12 this falls directly in line with those cases.

13 This is a perfect example of ineffective assist-
14 ance of counsel that rendered a guilty plea involun-
15 tary. Unfortunately, for some reason this was not
16 specifically ruled upon in the Order, and, therefore,
17 we submit that it was improperly before any of the
18 other Courts.

19 So we are here essentially asking the Court today
20 to enter a ruling on the specific issue as it was ad-
21 dressed at the prior PCR proceeding. We are not ask-
22 ing to re-open the record or take further testimony,
23 but that is essentially our argument as concisely as
24 I can put it.

25 I will be happy to answer any questions you may

1 have, and I'd also appreciate, Your Honor, the opportu-
2 nity if Your Honor would like to hear from Mr. Bing him-
3 self.

4 THE COURT: Very well. Do you want me to hear
5 from Mr. Bing on this issue?

6 MS. BLANCHETTE: There are two questions I told
7 him that he had to be prepared to answer for you. Why
8 you should be doing this at this time because of the
9 clear guidelines of Rule 60, and why he is asking you
10 to give him this relief, the things he is asking of you.

11 THE COURT: I'll be happy to hear from him if he
12 wants to tell me, but I've got it, and the reason as
13 I understand it, he doesn't -- it is his position that
14 he needed a specific finding with regards to the parole
15 and it is his position that Mr. Delgado did not explain
16 adequately the failure -- his role in the failure to
17 be eligible for parole; that this was a negotiated
18 forty years with death sentence off the table for the
19 forty years -- to serve forty years.

20 That he believed based on the information that
21 he obtained from Mr. Delgado that he would be eligible
22 for parole, and there is not a specific finding of
23 that -- there was not a specific finding as to the
24 parole or with regard to the parole issue.

25 That he has found himself on appeal, that he has

1 found himself in Federal Court, and would like for the
2 Courts to address the issue.

3 What he is hearing time and again is that that
4 wasn't preserved because there is not any specific find-
5 ing regarding the issue of parole.

6 Is that right?

7 MS. BLANCHETTE: You are absolutely correct, Your
8 Honor.

9 THE COURT: All right, I've got it. I've got it.

10 MS. BLANCHETTE: The only reason I asked that is
11 that I wanted to give him the opportunity to clarify
12 anything I did not bring out, but I believe that . .

13 THE COURT: I got it.

14 MS. BLANCHETTE: Mr. Bing is one of the most well-
15 spoken clients I've ever represented.

16 THE COURT: Absolutely I've got it.

17 He finds himself walking into that wall in the
18 State Court as well as on the federal level. I understand.

19 MS. BLANCHETTE: And one thing I'd like to add is --
20 and I've explained this to Mr. Bing -- that there could
21 have been leave of the Appellate Court to bring to
22 Your Honor's attention -- you know, he is not a negli-
23 gent individual, you know. Why wasn't that done? And
24 that was his immediate question.

25 He doesn't want to be here this late in the game

1 either, Your Honor.

2 THE COURT: I understand completely. I get it.

3 MS. BLANCHETTE: Thank you.

4 THE COURT: Ms. Harrigan?

5 MS. HARRIGAN: May it please the Court?

6 THE COURT: Yes.

7 MS. HARRIGAN: As a threshold matter at this stage
8 of events, this was filed four and a half years after
9 the Order that Your Honor issued in this case.

10 And we know the Applicant is asserting that it's
11 been filed within one year of the federal habeas Order,
12 but there is zero case law to support that proposition,
13 and from a policy standpoint that would allow applicants
14 across the State to increase the burden of the judiciary
15 and the burden of Judges in responding to these plead-
16 ings of applicants after they are out of their time
17 guidelines, whether it be for 60 B or another rule if
18 they could simply file a federal habeas to restart the
19 time line.

20 Following these things up would create a tidal wave
21 of problems, although I understand the Applicant's argu-
22 ment that it is within a year of the federal guideline;
23 but there is no case law on point with that.

24 Rule 60 B clearly says it must be filed within a
25 year, and we are here four and a half years later, and

1 I understand that Mr. Bing had counsel and it's unfor-
2 tunate that they didn't file these things.

3 But it is four and a half years later, and 60 B
4 says it must be filed within a timely fashion.

5 THE COURT: Let me ask a question of both of you.
6 Are you aware of any case law, because obviously -- I
7 just ask this question. Are you aware of any case law
8 where there has been two events that have occurred:

9 One, where counsel has given someone information
10 regarding parole that has not been accurate, yet the
11 Court having specific colloquy with the Defendant re-
12 garding this specific issue, and -- and that that case
13 has -- there has been -- assuming even issue preserva-
14 tion under those circumstances, where a PCR, A, has
15 been granted, and, B, has been upheld?

16 That was a long question, wasn't it?

17 MS. BLANCHETTE: Your Honor, I have looked at that
18 and pulled some of the guilty plea cases to see, and
19 Coats is our State Court case that deals it, but there
20 they decided that that issue needed to be further ad-
21 dressed by a PCR Court . .

22 THE COURT: Yes.

23 MS. BLANCHETTE: . . because they didn't properly
24 address the prejudice part of the claim.

25 THE COURT: Yes.

1 MS. BLANCHETTE: There is no case that follows
2 that which has been published.

3 You can correct me if I'm wrong, but that was the
4 very issue in Hill versus Lockhart and that started the
5 wave of guilty plea cases. I may be wrong about
6 that.

7 MS. HARRIGAN: Your Honor, actually the Court did
8 address this issue . .

9 MS. BLANCHETTE: So it is . .

10 MS. HARRIGAN: . . about possible mis-advice, and
11 I would point out that during the evidentiary hearing
12 Attorney Delgado never said he advised his client on
13 parole eligibility.

14 There is confusion over whether he personally had
15 thought there was parole eligibility and there was some
16 confusion back and forth, but there isn't testimony
17 that Mr. Delgado said, I advised my client he would be
18 parole eligible.

19 I think that is an important distinction to point
20 out.

21 Additionally, the State would argue that Rule 60 B
22 would not be the appropriate remedy for that, but 59 E.
23 would be. There is no fraud, misadventance, mistake or
24 anything that needs to be explored. So 60 B would not
25 be the appropriate avenue for Mr. Bing to follow.

1 Additionally, in regards to the equitable tolling
2 argument, Applicant's counsel is relying on former counsel
3 Tara Shurling's habeas filing. In Ms. Shurling's habeas
4 filing she is arguing that the chief issue has been ad-
5 dressed in your Order.

6 So it is not very equitable for the Applicant to
7 voice a position depending on which counsel he has now, as
8 well as . . .

9 MS. BLANCHETTE: It is our position that was not
10 addressed.

11 MS. HARRIGAN: And, additionally, no prejudice has
12 been shown in this case. Mr. Bing did not testify as to
13 anything that would have occurred if he had gone to a
14 trial. He has just said it would have made a difference
15 to him.

16 It is our position that the Motion should be denied,
17 Your Honor.

18 THE COURT: Thank you. I'm going to -- I am not
19 going to make a ruling today. I am going to ask for
20 proposed Orders, and I am going to ask you to please spe-
21 cifically address any authorities that you might find
22 in South Carolina where indeed the prejudice has been
23 shown, where there has been a colloquy with the Court.

24 MS. HARRIGAN: Your Honor, if I may, just to clar-
25 ify something . . .

1 THE COURT: Yes..

2 MS. HARRIGAN: The V.A. case that came out of the
3 United States Supreme Court, they go into a beautiful
4 analysis and even touch on this issue a little bit,
5 and whether or not a Judge can cure mis-advice regard-
6 ing immigration, may I quote from that? That was in
7 the Fourth Circuit . .

8 THE COURT: Yes, I am well aware of the case.

9 MS. HARRIGAN: Then I won't quote from it.

10 THE COURT: Thank you, and thank you for your pa-
11 tience this morning. Thank you, Mr. Bing.

12 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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CERTIFICATE

1 I, HARRIET P. BENNETT, Official Court Reporter for
2 South Carolina Court Administration, hereby certify
3 that the foregoing Transcript was prepared from the
4 records of Harry A. Walker to the best of my ability,
5 having been heard in the Court of Common Pleas for
6 Orangeburg County on September 6, 2012.

7 FURTHER, I certify that I am neither of kin nor
8 counsel to any party to this action, nor do I have any
9 interest in the outcome thereof.

10 September 3, 2013

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Levi Bing, Jr., # 308051,

Case No. 2006-CP-38-00273

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER DENYING RULE 60(b), SCRPC,
MOTION FOR RELIEF FROM ORDER
OF DISMISSAL WITH PREJUDICE**

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC
NOV 13 PM 1:30

This matter comes before this Court by way of Applicant's "Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRPC," in which he asks this Court to vacate and/or set aside its Order dismissing his application for post-conviction relief.

I.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the March 2004 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412) and Possession of a Weapon during the Commission of a Violent Crime (2003-GS-38-2413). Applicant was represented by John Delgado, Esquire and Michael R. Culler, Esquire. On March 15, 2005, Applicant pled guilty as indicted to all charges before the Honorable Deadra L. Jefferson. Pursuant to negotiations between the Applicant and the State, Judge Jefferson sentenced Applicant to forty years imprisonment for Murder, ten years imprisonment for Grand Larceny, and five years for Possession of a Weapon during the Commission of a Violent Crime, all sentences to be served concurrently. Applicant did not appeal his conviction or sentence.

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Applicant filed an application for Post-Conviction Relief on March 7, 2006, citing ineffective assistance of counsel. Respondent made its Return on March 29, 2007. An evidentiary hearing was held before this Court on June 25, 2007. Applicant was present and represented by Belinda Davis-Branch, Esquire. Respondent was represented by Assistant Attorney General Lance S. Boozer, Esquire. This Court denied and dismissed Applicant's post-conviction relief application with prejudice by Order dated September 7, 2007. Applicant did not file a Motion to Reconsider this Order pursuant to Rule 59(e), SCRPC. However, Applicant did file a timely appeal of this order; the South Carolina Supreme Court denied Applicant's Petition for Certiorari on June 10, 2009. The Remittur was issued on June 29, 2009.

On July 1, 2009, Applicant filed a Petition for Writ of Habeas Corpus in United States District Court. On May 28, 2010, United States District Court Judge R. Bryan Harwell issued an Order granting the Respondent's Motion for Summary Judgment and Denying Applicant's certificate of appealability. On June 28, 2010, Applicant filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. On January 13, 2011, The United States Court of Appeals issued an Order of Denial, which took effect on March 3, 2011 by Mandate of the court.

On February 13, 2012, Applicant filed this "Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRPC," from this Court's Order of Dismissal of September 7, 2007. Respondent made its Return on May 18, 2012, requesting the motion be denied. This motion was heard by this Court on September 6, 2012 at the Orangeburg County Courthouse. Applicant was present at this hearing and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office.

II.

In this Motion, Applicant moves pursuant to Rule 60(b), for Relief from this Court's Order of Dismissal with Prejudice of his application for post-conviction relief, filed September 7, 2007. In this motion, Applicant asserts that he is entitled to relief, as he was "misadvised that he would be eligible for parole and serve eight-five percent of his forty year sentence" and "despite this clear testimony, this Court's Order of Dismissal with prejudice failed to address whether counsel was ineffective when he misadvised Applicant regarding parole eligibility."

III.

The movant in a Rule 60(b), SCRCP, motion has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991). Also, relief under Rule 60(b), SCRCP, requires the existence of a meritorious defense. See Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).

IV.

As a threshold matter, this Court finds that Applicant's motion must be denied because of Applicant's failure to timely file his motion. South Carolina Rules of Civil Procedure Rule 60(b)(5) states: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." This Court executed the Order upon which Applicant's current motion is made on September 7, 2007. Applicant made his motion under Rule 60(b), SCRCP, on February 13, 2012, well over four years after the Order denying and dismissing his application for post-conviction relief was entered. This Court finds that

Applicant's motion was not filed within a reasonable time as mandated by Rule 60(b), SCRCPP, nor was it filed within one year of the judgment being entered.

In his motion, Applicant asserts that his filing is timely as it is "within one year of the final decision of the federal court on the Order at issue." However, Applicant's argument is without merit. The Order at issue is this Court's Order of Dismissal, entered on September 7, 2007; therefore, the time at which the clock began to run for Applicant to file a Motion pursuant to Rule 60(b), SCRCPP was September 7, 2007. Rule 60(b), SCRCPP, is a state court rule governing relief from judgments or orders in South Carolina State Courts; federal court proceedings are not mentioned within the rule, nor are any tolling provisions for subsequent federal court proceedings involving the same parties and issues. This Court find Applicant's motion must be denied and dismissed as it is untimely.

V.

Additionally, this Court finds that Applicant's motion must be denied, as Applicant has failed to identify which of the five grounds he seeks relief under Rule 60(b), SCRCPP, or how any of these grounds are applicable. Applicant simply alleges he is entitled to relief from judgment pursuant to Rule 60(b), SCRCPP, so that "this Court can reopen the order of Dismissal and properly rule upon th[e] issue [of whether plea counsel misadvised Applicant of his parole eligibility]."

In his Motion, Applicant makes no specific allegations of any mistake, inadvertence, surprise, or excusable neglect, which would entitle him to relief. Additionally, Applicant does not raise any allegation of "newly discovered" evidence. Applicant makes no specific allegations of fraud, misrepresentation, or other misconduct which would entitle him to relief. Applicant does not assert

that this Court's Order of Dismissal is void. Finally, Applicant makes no allegation that supports relief under Rule 60(b)(5), SCRCP.

As Applicant has failed to present evidence proving the facts essential to entitle him to relief, this motion must be denied Bowers, supra. Therefore, this Court find this motion must be denied.

VI.

Furthermore, this Court finds that Applicant has repeatedly failed to prove that his application for post-conviction relief has merit. The Order of Dismissal, signed by this Court on September 7, 2007, contained the findings of facts and conclusions of law as required by S.C. Code Ann. Sect. 17-27-80 (1976), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This Court determined that the application for post-conviction relief was without merit, including as to whether Applicant's plea counsel was effective. While the term "parole" was not mentioned within this Court's Order of Dismissal, this issue was not before the post-conviction relief court, as Applicant asserted this issue for the first time in his pro se "Initial Pro Se Brief of Petitioner," appealing this court's Order of Dismissal. It is improper for Applicant to ask this Court to grant relief under Rule 60(b), SCRCP, to clarify an issue that was not brought before the Court and only raised on appeal.

The transcript of Applicant's guilty plea reveals that his claim is without merit. The record reveals a negotiated plea for a sentence of forty years imprisonment for murder, to run concurrently with all other sentences, and that the State would no longer seek the death penalty. PCR App. pp. 2-3, 8. At the time of the guilty plea, Applicant, while under oath, agreed with the State's version of the facts and stated that he was pleading guilty because he was in fact guilty of murder. PCR App. pp. 12-13.

Additionally, the following significant exchange occurred between Judge Jefferson and Applicant during the plea:

COURT: Sir, I want to explain to you that you may have discussed parole or parole eligibility with your lawyer or with other people, but until you're sentenced no one can tell you when, if ever, that you will be eligible for parole or under what conditions. *You should assume that you will serve the entire time in jail that you're sentenced to.* Do you understand that?

BING: Yes, sir.

Therefore, even if plea counsel had mistakenly informed Applicant in regards to parole eligibility, any misconception was cured at the plea hearing. Knox v. State, 340 S.C. 81, 86, 530 S.E.2d 887, 889 (2000) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)¹; Moorehead v. State, 329 S.C.329, 333, 496 S.E.2d 415, 416 (1998). Since any alleged misconception regarding parole advice was cured by the plea court's colloquy, there can be no prejudice to the Applicant; any allegation asserting otherwise must be denied and dismissed. Moreover, a review of Applicant's application for post-conviction relief does not reveal his alleged claim that incorrect advice concerning parole eligibility caused ineffective assistance of counsel. Thus, Applicant is not entitled to relief under Rule 60(b), SCRPC. See Mitchell Supply Co., 297 S.C. 160, 375 S.E.2d 321.

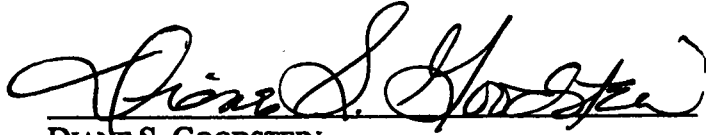
VII.

This Court is unable to discover any material fact or principal of law that either has been overlooked or disregarded in its Order of Dismissal with Prejudice. This Court also finds no error of

¹ holding the issue of whether indictments' failure to allege element "absence from the scene of the crime" deprived trial court of subject matter jurisdiction to hear accessory before the fact charges was not preserved for review on appeal.

law or facts not appropriately considered in its Order. Therefore, the Applicant's "Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRPC," must be **DENIED**.

AND, IT IS SO ORDERED this 6 day of Nov, 2012.



DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

Summerville South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	DOCKET NO.: 2006-CP-38-0273
LEVI BING, JR., 308051,	)	
Applicant,	)	MOTION FOR REHEARING PURSUANT
V.	)	TO RULE 59(a), SCRCP, AND MOTION
STATE OF SOUTH CAROLINA,	)	TO ALTER OR AMEND PURSUANT TO
Respondent,	)	RULE 59(e), SCRCP
	)	

COMES NOW Applicant, through his undersigned attorney, and requests that this Court direct the entry of a new judgment, pursuant to Rule 59(a)(2), and/or amend the findings in the standing Order, pursuant to Rule 59(e), SCRCP. Applicant, through counsel, received written notice of the Order Denying Rule 60(b), SCRCP, Motion for Relief from Order of Dismissal with Prejudice on November 20, 2012.

This matter comes before this Court by way of an Application for Post Conviction Relief filed on March 7, 2006. On June 25, 2007, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Diane S. Goodstein. Applicant was represented by Belinda Davis-Branch, Esquire, and the State was represented by Lance S. Boozer, Esquire. On September 7, 2007, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice.

A timely appeal was filed and a Johnson Petition for Writ of Certiorari was submitted by Wanda H. Carter, South Carolina Office of Appellate Defense. Applicant submitted an "Initial Pro Se Brief of Petitioner" on January 27, 2009, which raised the following issue: "Whether the PCR judge erred by failing to find defense counsel ineffective for advising petitioner with incorrect parole eligibility that induced involuntary plea". On June 10, 2009, the South Carolina Supreme Court entered an Order denying Petition for Certiorari. The Remittitur was issued on June 29, 2009.

On July 1, 2009, Applicant filed a Pro Se Petition for Writ of Habeas Corpus and later retained Tara D. Shurling, Esquire. On May 28, 2010, the Honorable R. Bryan Harwell, United States District Judge, issued an Order granting the Respondent's Motion for Summary Judgment and denying Applicant's certificate of appealability. In adopting the Magistrates Judge's Report and Recommendation, the court addressed Applicant's claim that plea counsel admitted at the evidentiary hearing that he misadvised Applicant on parole eligibility and Applicant's testimony that was misadvised that he would serve eighty-five percent (85%) and be parole eligible, and the court acknowledged the State's assertion that the issue was not properly preserved or exhausted.

On June 28, 2010, Applicant, pro-se, filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. On January 13, 2011, the United States Court of Appeals issued an Order of Denial. Applicant filed a timely Petition for Rehearing, which was denied on February 23, 2011. On March 3, 2011, the United States Court of Appeals for the Fourth Circuit issued a Mandate by which the Order entered on January 13, 2011 took effect.

On February 13, 2012, Applicant filed a Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRPC, in Orangeburg County. On May 21, 2012, the State submitted a Return to Rule 60(b) Motion for Relief from Order of Dismissal. On September 6, 2012, a motion hearing was conducted in front of the Honorable Diane S. Goodstein at the Orangeburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Megan Harrigan, Assistant Attorney General. At the conclusion of the hearing, this

Court requested that both parties submit proposed Orders, from which the Order Denying Rule 60(b), SCRPC, Motion for Relief from Order of Dismissal with Prejudice followed.

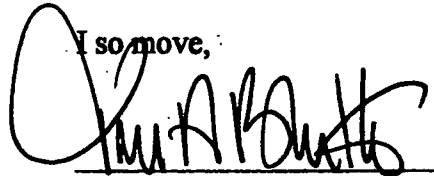
In support of the instant motion, Applicant would respectfully request that this Court consider the following:

1. At the motion hearing and through the proposed Order, a copy of which is attached, Applicant specifically stated the grounds on which he was seeking relief pursuant to Rule 60(b), SCRPC.
2. As was addressed at the motion hearing and is explained in detail in the proposed Order, a copy of which is attached, Applicant did raise the issue of plea counsel's misadvice before this Court at his prior evidentiary hearing. Applicant would submit that the standing Order errantly finds that this issue was first raised on PCR appeal. See Order p. 5.

For the above stated reasons, Applicant would respectfully request that this Court reconsider the Order of Dismissal or alter or amend the findings addressed above.

Applicant would also respectfully request that this Court review and reconsider the attached Order Pursuant to Rule 60(b), SCRPC, Granting Application for Post Conviction Relief. Applicant would specifically move before this Court to direct the entry of a new judgment, pursuant to Rule 59(a)(2), and/or amend the findings of fact and conclusions of law in the standing Order of Dismissal, pursuant to Rule 59(e), SCRPC.

I so move,



Tricia A. Blanchette
Attorney for Applicant
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008

November 28 2012
Columbia, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	DOCKET NO.: 2006-CP-38-0273
	)	
LEVI BING, JR., #308051,	)	
	)	
Applicant,	)	
v.	)	ORDER PURSUANT TO
	)	RULE 60(B), SCRCP, GRANTING
STATE OF SOUTH CAROLINA,	)	APPLICATION FOR POST
	)	CONVICTION RELIEF
Respondent,	)	
_____	)	

PROCEDURAL HISTORY

This matter comes before this Court by way of an Application for Post Conviction Relief filed on March 7, 2006. On June 25, 2007, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Diane S. Goodstein. Applicant was represented by Belinda Davis-Branch, Esquire, and the State was represented by Lance S. Boozer, Esquire. On September 7, 2007, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Orangeburg County Clerk of Court. Applicant was indicted during the March 2004 term of the Orangeburg County Grand Jury for Murder (2003-GS-38-2411), Grand Larceny (2003-GS-38-2412), and Possession of a Weapon during the Commission of a Violent Crime (2003-GS-38-2413). Applicant was represented by John Delgado, Esquire, and Michael R. Culler, Jr., Esquire. On March 14, 2005, Applicant pled guilty and was sentenced by the Honorable Deadra L. Jefferson to concurrent periods of forty (40) years for Murder, ten (10) years for Grand

Larceny and five (5) years for Possession of a Weapon. Applicant did not appeal his conviction or sentence.¹

As detailed above, the Honorable Diane S. Goodstein issued an Order of Dismissal with Prejudice on September 7, 2007.² A timely appeal was filed and a Johnson Petition for Writ of Certiorari was submitted by Wanda H. Carter, South Carolina Office of Appellate Defense. Applicant submitted a “Initial Pro Se Brief of Petitioner” on January 27, 2009, which raised the following issue: “Whether the PCR judge erred by failing to find defense counsel ineffective for advising petitioner with incorrect parole eligibility that induced involuntary plea”. On June 10, 2009, the South Carolina Supreme Court entered an Order denying Petition for Certiorari. The Remittitur was issued on June 29, 2009.

On July 1, 2009, Applicant filed a Pro Se Petition for Writ of Habeas Corpus and later retained Tara D. Shurling, Esquire. On May 28, 2010, the Honorable R. Bryan Harwell, United States District Judge, issued an Order granting the Respondent’s Motion for Summary Judgment and denying Applicant’s certificate of appealability. In adopting the Magistrates Judge’s Report and Recommendation, the court addressed Applicant’s claim that plea counsel admitted at the evidentiary hearing that he misadvised Applicant on parole eligibility and Applicant’s testimony that was misadvised that he would serve eighty-five percent (85%) and be parole eligible, and the court acknowledged the State’s assertion that the issue was not properly preserved or exhausted.

¹ The procedural history of Applicant’s Post Conviction Relief Action is detailed above.

² The Order of Dismissal was issued prior to the South Carolina Supreme Court’s ruling in Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding that Applicant did not make a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law on his allegations; therefore, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge.). Here, Applicant’s PCR counsel did not file a Motion Pursuant to Rule 59(e), SCRCP.

On June 28, 2010, Applicant, pro-se, filed an appeal of the Judgment to the United States Court of Appeals for the Fourth Circuit. On January 13, 2011, the United States Court of Appeals issued an Order of Denial. Applicant filed a timely Petition for Rehearing, which was denied on February 23, 2011. On March 3, 2011, the United States Court of Appeals for the Fourth Circuit issued a Mandate by which the Order entered on January 13, 2011 took effect.

On February 13, 2012, Applicant filed a Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRPC, in Orangeburg County. On May 21, 2012, the State submitted a Return to Rule 60(b) Motion for Relief from Order of Dismissal. On September 6, 2012, a motion hearing was conducted in front of the Honorable Diane S. Goodstein at the Orangeburg County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Megan Harrigan, Assistant Attorney General. At the conclusion of the hearing, this Court requested that both parties submit proposed Orders, from which this Order follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the motion hearing, Applicant appeared with counsel and requested that this Court reopen the Order of Dismissal pursuant to Rule 60(b), SCRPC, and grant relief due to counsel's misadvice regarding parole eligibility and/or service of his sentence. This Court finds pursuant to Rule 60(b)(1)&(2), SCRPC, and as a matter of equity it is necessary to address the issue raised in the instant motion, which was not specifically raised or ruled upon in the standing Order of Dismissal. This Court further finds that Applicant's motion may be considered untimely under a strict reading of Rule 60(b)(1)&(2) SCRPC, but this Court finds the Motion was filed within one year of the

conclusion of Applicant's federal filings on the Order of Dismissal, which Applicant claims is the time when he discovered that the issue needed to be properly addressed by this Court. Additionally, this Court finds that Applicant has proven himself to be a diligent in his filings and as a matter of equity this issue must be addressed. See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (2008) (Finding equitable tolling is available if such tolling is necessary to prevent unfairness to a diligent plaintiff.).

Furthermore, as was argued by Applicant, this Court finds Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), to be instructive. In Pruitt, the South Carolina Supreme Court vacated the Post Conviction Relief court's order and remanded for a ruling on an issue that was properly raised at the evidentiary hearing but not addresses in the order. Id. The Court noted that it was not abandoning the general rule that issues must be raised and ruled on by the lower court to be preserved for appellate review but took the opportunity to remind the lower court, as follows:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. Not only does this deprive the parties of rulings on the issues raised, but it makes review by the appellate court more difficult and ultimately increases the work load of all involved where, as in this case, a new hearing is required to secure the rulings which should have been made initially.

Pruitt, 310 S.C. at 255-6, 423 S.E.2d at 128. As was held in Pruitt, this Court finds that it is necessary to address this issue that was raised at the evidentiary hearing and not addressed in the Order of Dismissal with Prejudice.

As was argued by the State and conceded by Applicant, the federal court ultimately addressed the merits of the issue despite acknowledging the argument that it was procedurally barred. Nevertheless, the federal court was bound by the doubly

deferential standard of review under which an error must reach rare magnitude before the federal courts will grant relief. This standard was addressed by the 4th Circuit in Scanlon v. Harkleroad, 467 Fed.Appx. 164 (4th Cir. 2012), as follows:

In the Strickland context, a federal habeas court "must determine what arguments or theories supported or, [if none were stated], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." Id. Habeas relief is appropriate only if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." Id. The Court reminded lower courts that, even without § 2254's deference, the Strickland standard "is a most deferential one." Id. at 788. Moreover, "[w]hen combined with the extra layer of deference that § 2254 provides, the result is double deference and the question becomes whether 'there is any reasonable argument that counsel satisfied Strickland's deferential standard.'" Johnson v. Sec'y, DOC, 643 F.3d 907, 910-11 (11th Cir. 2011) (quoting Harrington, 131 S.Ct. at 788). "Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." Id. at 911.

If the issue had been addressed in the first instance by this Court, then it would have been examined solely under the Strickland standard of review. Therefore, this Court is persuaded that such review is absolutely necessary since pursuant to the Strickland standard, counsel's misadvice is clear error and prejudicial under established South Carolina precedent.

At the evidentiary hearing held on June 25, 2007, Applicant testified on his own behalf.³ Applicant recalled having a conversation with his family after his plea about his understanding that he would have a parole date but he did not have one. App. p. 48.

³ On page four of the standing Order of Dismissal, this Court found Applicant's testimony on the issues regarding counsel's deficiencies not to be credible. In clarification, this Court finds Applicant's specific testimony regarding counsel's advice regarding parole eligibility and/or service of his sentence to be credible. Specifically, this Court makes this finding due to Mr. Delgado's corroborating testimony and confusion at the hearing regarding Applicant's parole eligibility and service of time.

Applicant explained the advice he received from counsel prior to the entry of his plea, as follows:

- Q: Mr. Bing, what is your sentence for the murder of the gentleman we've been talking about today? What is your sentence? What did the Court sentence you?
- A: Forty years day-for-day, mandatory.
- Q: What was your understanding before you received that sentence from your attorneys?
- A: That I would be eligible for a parole date.
- Q: And have you been told differently?
- A: Yes, ma'am.
- Q: What have you been told now?
- A: That I will have to do 40 years day-for-day.
- Q: Okay. And—
- A: One hundred percent.
- Q: Had you known that at an earlier time, at the time you took your plea, would that have made a difference?
- A: Yes, ma'am.
- Q: Do you feel your attorneys misled you, as far as that statement's concerned.
- A: Yes, ma'am.
- Q: Okay. And have you been harmed by those statements?
- A: Yes, ma'am.

App. pp. 156-157, lns. 22-25, 1-23. After being questioned by this Court, Applicant further explained that Mr. Delgado told him after his plea that he would only have to serve 85% of his sentence. App. p. 159, lns. 17-25. Applicant also made it clear that he

did not voluntarily plead guilty and he was pushed into the plea by his attorneys. App. pp. 59-60.

When John Delgado, Esquire, took the stand, he was asked whether Applicant requested that he file an appeal.⁴ In his response, he stated: "He will be eligible for parole one day and he will walk out of jail on day with that sentence. I thought it would be contrary to his best interest to have appealed." App. p. 97, lns. 7-11. He further testified as follows:

Q: Okay. Are you aware of the fact that he's not eligible for parole?

A: No, ma'am.

Q: I'm sorry?

A: I thought 40 years he is eligible for parole, ma'am. Is he not?

Q: Mr. Bing doesn't think he's eligible for parole?

A: I think he is eligible for parole if you get a numerical sentence, ma'am, 85 percent of that 40 years, he is eligible for parole.

App. pp. 98-99, lns. 16-25, 1-2.

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), the Supreme Court of the United States addressed whether Hill's guilty plea was involuntary as a result of ineffective assistance of counsel when his court appointed attorney supplied him with information about parole eligibility that was erroneous. The Court reasoned:

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970); see Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962). Here petitioner does not contend that his plea was "involuntary" or "unintelligent" simply because the State through its officials failed to

⁴ In the standing Order of Dismissal, this Court found Mr. Delgado's testimony to be credible. By way of the instant Order, this Court does not alter or amend that finding.

supply him with information about his parole eligibility date. We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts. See Fed. Rule Crim. Proc. 11(c); Advisory Committee's Notes on 1974 Amendment to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 22 (federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea). Instead, petitioner relies entirely on the claim that his plea was "involuntary" as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous. Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970). As we explained in Tollett v. Henderson, 411 U.S. 258 (1973), a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." Id., at 267.

Id. at 56, 106 S.Ct. at 369.

As was made clear by the Supreme Court of the United States in Hill, the proper analysis is not whether the State or the plea court furnished Applicant with the proper information regarding his parole eligibility or service of his sentence, but whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. In Hill, the Court reasoned that his claim of ineffective assistance failed for the following reasons: "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." 474 U.S. at 60, 106 S.Ct. at 371.

Here, Petitioner clearly alleged that counsel's misadvice made a difference in his decision to forego trial and that he felt pushed into taking a plea. In South Carolina, A guilty plea is not rendered involuntary if the defendant is not informed of the collateral consequences of his sentence. 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 post conviction relief. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983); See also Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1988) (An inmate was entitled to post conviction relief because he received ineffective assistance of counsel when his attorney misstated the law with regard to his eligibility for parole and the inmate relied on the advice in pleading guilty to murder.); Coats v. State, 352 S.C. 500, 575 S.E.2d 557 (2003) (Denial of claim for post conviction relief was reversed and remanded for evidentiary hearing as inmate was informed by counsel that he was parole eligible.); Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (Application was not successive because inmate could not raise the issue of the voluntariness of his plea based on his ineligibility for parole where respondent recently learned of his ineligibility.).

As the record of the evidentiary hearing reflects, this Court questioned Applicant about the plea court's comments and was concerned with whether the plea court's comments cured any issue of misadvice offered by counsel. App. pp. 160-1. At the plea, the court informed Applicant that she was making no representations about the amount of time he would have to serve and no one could tell him when he would be eligible for

parole prior to sentencing so he needed to assume that he would serve “the entire time in jail that you are sentenced to.” App. pp. 7-8. This Court finds that the questions and comments provided by the plea court do not trump counsel’s incorrect advice nor does it cure the prejudice suffered. Furthermore, this Court finds that basing the analysis upon the plea courts statements would be an erroneous application of the mandated Strickland standard. 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. This Court finds the reasoning set forth in Hill and detailed above to be instructive in establishing that the statements of the plea court did not cure the clear error committed by counsel. See Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (Where a plea judge explains the minimum criteria for parole eligibility as contained in the applicable statute, the fact that the defendant is not actually eligible for parole does not render his guilty plea involuntary or unknowing.). Clearly, it is the advice given by counsel prior to the entry of the plea not the words spoken by the plea court that must be analyzed under Strickland.

Therefore, this Court finds that counsel’s clear error amounted to ineffective assistance of counsel that was not cured by the plea colloquy when he improperly advised Applicant that he would not serve his sentence day for day and he would be eligible for parole. Counsel’s failure to properly advise Applicant on the law regarding the service of his sentence was highly prejudicial in light of Applicant’s testimony that he felt pushed into taking the plea and if he had known that his sentence required day for day service without parole it would have made a difference in his ultimate decision to take the plea.

Furthermore, this Court agrees with Applicant and finds that this issue was not properly addressed in the standing Order of Dismissal with Prejudice and was not properly preserved for appellate review. As a result, this Court finds that the standing Order of Dismissal with Prejudice must be superseded by this Order and this Court finds that Applicant is warranted relief since Applicant was misadvised regarding the service of his sentence and parole eligibility. Therefore, a new trial must be granted.

IT IS THEREFORE ORDERED:

1. That Applicant's Motion for Relief from Order of Dismissal with Prejudice Pursuant to Rule 60(b), SCRCP is granted and said Order is superseded by the findings contained herein;
2. That Applicant has met his burden of proof as to his allegations of ineffective assistance of counsel;
3. That the Application for Post Conviction Relief be granted and his convictions be vacated and granted a new trial;
4. That Applicant be released from the custody of South Carolina Department of Corrections and transferred to the custody of Orangeburg County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDERED this ____ day of _____, 2012

The Honorable Diane S. Goodstein.
Judge, First Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

Levi Bing, Jr., #308051,)
 Applicant,)

2006-CP-38-0273

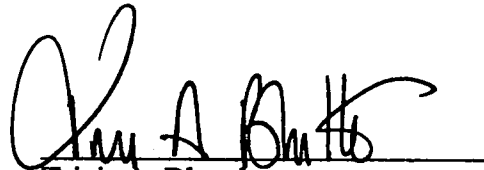
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
 Respondent.)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 29th day of November 2012, a copy of a Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, to Megan Harrigan of the Attorney General's Office, at:

Office of the Attorney General
 Att: Megan Harrigan, Ast. AG
 P.O. Box 11549
 Columbia, SC 29211-1549



Tricia A. Blanchette
 PO Box 12725
 Columbia, SC 29211
 (803) 988-0008
 Attorney for Applicant

November 29, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	FOR THE FIRST JUDICIAL CIRCUIT
Levi Bing, Jr., #308051,	)	Case No. 2006-CP-38-0273
	)	
Applicant,	)	RETURN TO APPLICANT'S MOTION
	)	FOR REHEARING PURSUANT TO
	)	RULE 59(a), SCRPC, AND MOTION TO
v.	)	ALTER OR AMEND PURSUANT TO
	)	RULE 59(e), SCRPC
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before this Court by way of the Applicant's "Motion for Rehearing Pursuant to Rule 59(a), SCRPC, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRPC," filed November 28, 2012, in which Applicant asks this Court to direct the entry of judgment or amend its Order Denying Applicant's Rule 60(b), SCRPC, Motion for Relief from this Court's September 7, 2007 Order of Dismissal, denying Applicant's post-conviction relief application. The Respondent would submit the following:

I.

The Order Denying Rule 60(b) Motion for Relief issued by the Honorable Diane S. Goodstein on November 6, 2012 and filed November 13, 2012, contains the required findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits this Court did not err in its Order denying Applicant's Motion for Relief pursuant to Rule 60(b), SCRPC, as the Order fully addresses all of the Applicant's claims as addressed in Applicant's written Motion and as presented to the Court at the motion hearing on September 6, 2012. Furthermore, this Court correctly determined that Applicant's motion was untimely pursuant to Rule 60(b), SCRPC.

In his Motion for Reconsideration, the Applicant merely reiterates his allegations from his application for post-conviction relief and the arguments he presented during the September 6, 2012, motion hearing. Furthermore, these grounds were all directly and properly addressed by this Court in its Order of Dismissal. Respondent submits that Applicant has not provided sufficient reason why this Court should reconsider his same positions and arguments again and rule in Applicant's favor.

II.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

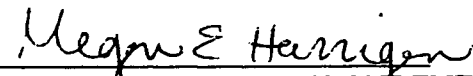
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

January 2, 2013

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT

Levi Bing, Jr., #308051,
Applicant,

) Case No. 2006-CP-38-0273
)

v.)

) **ORDER DISMISSING APPLICANT'S**
) **MOTION FOR REHEARING PURSUANT**
) **TO RULE 59(a), SCRCP, AND MOTION**
) **ALTER OR AMEND PURSUANT TO**
) **RULE 59(e), SCRCP**
)

State of South Carolina,
Respondent.

This matter comes before the Court by way of Applicant's "Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP" in which Applicant asks this Court to direct the entry of judgment or amend its Order Denying Applicant's Rule 60(b), SCRCP, Motion for Relief from this Court's September 7, 2007 Order of Dismissal, denying Applicant's post-conviction relief application. Applicant filed this motion on February 13, 2012. The State made its Return on May 21, 2012.

A hearing into this matter was convened on September 6, 2012, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. After hearing arguments from Respondent and Applicant's counsel regarding this motion, this Court requested that each party submit proposed orders for this Court's consideration.

On November 6, 2012, this Court issued an Order denying Applicant's Motion for Relief pursuant to Rule 60(b), SCRCP. This Order was filed on November 13, 2012 and was received by Applicant, through counsel, on November 20, 2012.

1 of 2

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

On November 28, 2012, Applicant filed a Motion for Rehearing pursuant to Rule 52, SCRPC, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRPC, in which he asks the Court to vacate its Order or in the alternative, grant Applicant another hearing. The State made its Return to this motion on January 2, 2013, asking that the motion be denied.

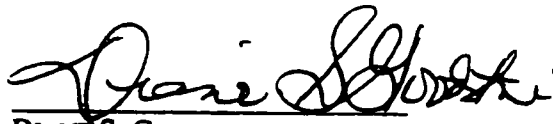
This Court has reviewed Applicant's motion, the State's return and the record in this matter and finds the following:

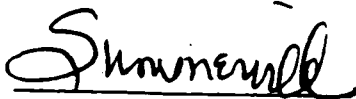
This Court's Order Denying Applicant's Motion for Relief Pursuant to Rule 60(b), SCRPC, dated November 6, 2012 and filed November 13, 2012, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). This Order is consistent with the written motion and return to motion, as well as the arguments presented by both parties at the September 6, 2012 hearing.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of the Applicant's motion and supporting testimony, this Court is not persuaded to vacate its judgment or grant Applicant a new hearing.

IT IS THEREFORE ORDERED that the Applicant's Motion for Rehearing Pursuant to Rule 52(a), SCRPC, and Motion to Alter or Amend Pursuant to Rule 59(e), SCRPC, is **DENIED**.

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


 DIANE S. GOODSTEIN
 Presiding Judge
 First Judicial Circuit

 South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG

STATE VS.

LEVI BING, JR.

AKA:

Race: B Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip

DL# SID#

INDICTMENT/CASE#:

03 -GS- 38 - 2411A/W#: H310758Date of Offense: 11/10/03S.C. Code §: 16-3-10CDR Code #: 0 / 1 / 1 / 1 / 6☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: MURDERin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 / 1 / 1 / 6☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 40 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 03-GS-38-2413 and 2412
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive/weekly/monthly

pmts. of \$ beginning\$ CLERK paid to Public Defender Fund

Other:

ORANGEBURG COUNTY, SC

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)	\$	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ <u>3.25</u>
TOTAL		\$ <u>128.75</u>

Clerk of Court Deputy Clerk

Court Reporter:

PRESIDING JUDGE

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF

ORANGEBURG

STATE

VS.

LEVI BING, JR

AKA:

Race:

B

Sex:

M

Age:

23

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

INDICTMENT/CASE#:

03

-GS-

38

2412

A/W#:

H 310759

Date of Offense:

11-10-03

S.C. Code §:

16-13-30

CDR Code #:

0 / 4 / 7 / 9

☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: GL > \$5000in violation of § 16-13-30 of the S.C. Code of Laws, bearing CDR Code # 0 / 4 / 7 / 9☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$, plus costs and assessments as applicable*, the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 03-65-38-2411 and 2413☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)	\$	
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>160.00</u>
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§ 35.13 (Public Def/Prob)	\$500	\$
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§50-21-114 (BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ <u>3.75</u>
TOTAL		\$ <u>228.25</u>

Marion S. Edgeman Jr
Clerk of Court/ Deputy Clerk

Court Reporter: Daphne Helms

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. Court

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal installments weekly/monthly

pmts. of \$

\$ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

D. L. Jumper
1 / 2 / 11
3/14/05

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG
STATE VS.

INDICTMENT/CASE#:

LEVI BING, JR.03 -GS- 38 - 2413
AW#: H 310757AKA: _____
Race: B Sex: M Age: 23Date of Offense: 11/10/03DOB: [REDACTED] SS#: [REDACTED]S.C. Code §: 16-23-490Address: _____
City, State, Zip _____CDR Code #: 0 / 5 / 4 / 9

DL# _____ SID# _____

☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Poss. Weapon during Conn. Violent crimein violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0 / 5 / 4 / 9☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

[Signature]
Solicitor[Signature]
Defendant[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 03-GS-38-2412 and 2411☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS - _____

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

\$ _____ CLERK OF COURT Public Defender Fund

Other: ORANGEBURG COUNTY, SC

Recipient: _____

*Fine: _____

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114(BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.75TOTAL \$ 128.75Marion L. Edgemon Jr.
Clerk of Court/ Deputy ClerkCourt Reporter: Daphne HelmsPRESIDING JUDGE [Signature]Judge Code: 112Sentence Date: 3/14/05