

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Edward W. Miller, Circuit Court Judge

RECEIVED

MAY 31 2012

S.C. Supreme Court

JAMES CURTIS COBBERT, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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WITNESSES DIRECT CROSS REDIRECT RE CROSS

(There were no witnesses.)



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1 that in Lexington County on or about February 16,
2 2006, you drove a motor vehicle in reckless
3 disregard for the safety of others, proximately
4 causing the death of Michael A. Wilson. That's an
5 indictment for reckless homicide. Upon your
6 arraignment on that charge, it appears that you wish
7 to plead guilty; is that right?

8 **DEFENDANT:** Yes, sir.

9 **THE COURT:** I have another indictment that
10 charges that in Lexington County on or about
11 February 16, 2006, you willfully, knowingly and
12 unlawfully failed to stop a motor vehicle you were
13 driving on a road, street or highway of the state
14 when you were signaled to stop by Deputy Fox, a law
15 enforcement officer with the Aiken County Sheriff's
16 Department, or Officer Crier with the Pelion Police
17 Department who were signaling for you to stop by
18 means of siren or flashing blue light, and that when
19 you were driving, you did perform an act forbidden
20 by law or neglected a duty imposed by law in driving
21 the vehicle that resulted in the death of Michael A.
22 Wilson. That's an indictment for failure to stop
23 for a pursuing law enforcement vehicle resulting in
24 death.

25 Upon your arraignment on that charge, it

1 appears that you wish to plead guilty; is that
2 right?

3 **DEFENDANT:** Yes, sir.

4 **THE COURT:** I have another indictment from
5 Aiken County that charges you with shoplifting. It
6 alleges that in Aiken County on or about February
7 16, 2006, you shoplifted two rings from Johnson
8 Jewelers in North Augusta. Upon your arraignment on
9 that charge, it appears that you wish to waive
10 presentment to the grand jury, waive jurisdiction
11 and venue issues related to Aiken County and plead
12 guilty to this here in Lexington County; is that
13 right?

14 **DEFENDANT:** Yes, sir.

15 **THE COURT:** Ms. Alves, you represent him on the
16 Aiken case?

17 **MS. ALVES:** Yes, sir.

18 **THE COURT:** Ms. Fullwood, you represent him on
19 the two Lexington cases?

20 **MS. FULLWOOD:** That's right.

21 **THE COURT:** Ladies, have you fully explained to
22 your client the nature and elements of the offenses,
23 the possible punishment and his constitutional
24 rights, including trial by jury, Ms. Alves?

25 **MS. ALVES:** Yes, sir.

1 **THE COURT:** Ms. Fullwood?

2 **MS. FULLWOOD:** Yes, sir.

3 **THE COURT:** Are you satisfied there's a factual
4 basis for his plea in Aiken County, Ms. Alves?

5 **MS. ALVES:** Yes, sir.

6 **THE COURT:** And, Ms. Fullwood, the two charges
7 from Lexington, are you so satisfied?

8 **MS. FULLWOOD:** Yes, sir.

9 **THE COURT:** Do you agree with your client's
10 decision to plead guilty, Ms. Alves?

11 **MS. ALVES:** I do.

12 **THE COURT:** And do you, Ms. Fullwood?

13 **MS. FULLWOOD:** Yes, sir.

14 **THE COURT:** Mr. Cobbert, today are you under
15 the influence of any medicine, alcohol, drug or
16 anything that affects your thinking?

17 **DEFENDANT:** No, sir.

18 **THE COURT:** Do you have physical or mental
19 problems that affect your thinking?

20 **DEFENDANT:** No, sir.

21 **THE COURT:** You're clearheaded today? You know
22 what you're doing?

23 **DEFENDANT:** Yes, sir.

24 **THE COURT:** When you plead guilty, you give up
25 very important rights, including your right to

1 remain silent and your right to a jury trial; do you
2 know that?

3 DEFENDANT: Yes, sir.

4 THE COURT: If you wanted a jury trial on any
5 of these cases, you would be presumed to be
6 innocent. The State has the entire burden of proof
7 and has to prove to all 12 jurors that you are
8 guilty beyond a reasonable doubt in order for you to
9 be convicted of anything. Do you understand?

10 DEFENDANT: Yes, sir.

11 THE COURT: If you plead guilty, you give up
12 all of those rights. You give up any defenses you
13 have. You give up any challenges to evidence. You
14 admit the charge is true. Do you understand that?

15 DEFENDANT: Yes, sir.

16 THE COURT: If you had a jury trial, you would
17 have the right to confront the witnesses, meaning
18 see, hear and have your lawyer cross-examine those
19 witnesses. You could remain silent and the trial
20 judge would tell the jury that they could not hold
21 your silence against you in any way at all. Do you
22 understand that?

23 DEFENDANT: Yes, sir.

24 THE COURT: Do you want a jury trial on any of
25 these cases?

1 **DEFENDANT:** No, sir.

2 **THE COURT:** Is that your own decision made of
3 your own free will?

4 **DEFENDANT:** Yes, sir.

5 **THE COURT:** This shoplifting charge is from
6 Aiken County. No one can force you to handle that
7 charge anywhere other than Aiken County. You have
8 an absolute right to have a judge presiding in Aiken
9 County preside over your case. You have a right to
10 have an Aiken County Jury consider your case. You
11 have a right to have the Aiken County Grand Jury to
12 review your indictment. You have a right to have
13 the Clerk of Court in Aiken County witness or attest
14 your signature on any document that requires that.
15 Do you understand?

16 **DEFENDANT:** Yes, sir.

17 **THE COURT:** The only way we can go forward with
18 an Aiken County case in Lexington County is if you
19 tell us to; do you understand that?

20 **DEFENDANT:** Yes, sir.

21 **THE COURT:** Do you want to handle that
22 shoplifting charge in Aiken County or in Lexington?

23 **DEFENDANT:** Lexington.

24 **THE COURT:** Is that your own decision made of
25 your own free will?

1 **DEFENDANT:** Yes, sir.

2 **THE COURT:** All right. Who's got the facts?

3 **MR. GRAHAM:** Thank you, Your Honor.

4 Chronologically, it started at about 10:44 a.m.
5 on February 16th, 2006, in Aiken County at Johnson
6 Jewelers. At that time, Your Honor, the Defendant,
7 who at that time was an unknown black male, went
8 into the store to look at some rings. The store
9 owner, Stan Johnson, became suspicious and he went
10 to take the rings back and put them back in the show
11 case. At that point, Your Honor, the Defendant then
12 grabbed the two rings by force and then ran out of
13 the store. Mr. Johnson pursued him on foot.

14 At some point during the chase outside,
15 Mr. Johnson fell down and was only able to see the
16 Defendant enter a vehicle and he described it as a
17 light blue in color vehicle. And a citizen named
18 James Bouknight saw the store owner chase
19 Mr. Cobbert and he followed him for a while and
20 observed him get into a blue Ford Taurus with
21 license number 341 TYH and he provided that
22 information to the Aiken County Sheriff's
23 Department. The Aiken County Sheriff's Department
24 ran that number and the car was reported stolen out
25 of Richland County.

1 An Aiken County Deputy, Bruce Fox, heard a
2 robbery call come over his dispatch describing the
3 car and the tag number and the last known direction.
4 And he went to I-20 at about the 33 mile marker on
5 onramp and waited. After a period of time, he
6 observed the listed vehicle driven by the suspect
7 come by there. He pulled in behind him. He
8 confirmed the tag number, then he called for backup.

9 At about that time, Your Honor, Mr. Cobbert
10 noticed that he was being followed by the police and
11 began to speed up passing people in the passing
12 lane. At some point after that, the deputy
13 activated his blue lights and sirens and they
14 reached speeds up to about a hundred miles an hour.
15 As they were coming into Lexington County, a Pelion
16 Police Officer, Officer Crier, took over lead
17 pursuit of the vehicle. The Aiken Officer, Deputy
18 Fox, followed in behind him.

19 Members of the sheriff's department set up stop
20 sticks. They tried to put stop sticks in front of
21 him. They got them deployed. He was able to go
22 around them and only put -- I believe, the passenger
23 side of the vehicle ran over the sticks and it did
24 not deflate the tire and the pursuit continued on
25 into the Town of Pelion.

1 Another Lexington Deputy had set up stop sticks
2 about 300 yards farther up in the Town of Pelion.
3 At that point, the Defendant went off on the right
4 side of the road in an attempt to pass some
5 vehicles. He came back on to the roadway and when
6 he came back on, it jerked his car to the left and
7 he overcorrected coming back to the right. At that
8 point, the MAIT team from the highway patrol
9 estimated he was going about 88 miles an hour.

10 When he overcorrected back to the right, his
11 car lost control and he slammed into the back of
12 Michael Wilson, who was driving -- he was actually
13 working for the Department of Transportation driving
14 a Department of Transportation vehicle. As a result
15 of that collision, both of the vehicles lost control
16 and flipped. Mr. Wilson was wearing his seatbelt,
17 but his seat broke and he was ejected from the
18 vehicle suffering injuries on scene that resulted in
19 his death on scene.

20 Mr. Cobbert was also ejected from his vehicle.
21 Officers went over and cuffed him and then the
22 officers went back to check on Mr. Wilson and the
23 other vehicles. At that point, EMS workers came
24 over and told them that Mr. Cobbert was trying to
25 get away, so they went over and reapprehended him

1 and brought him back.

2 There are some photographs which had previously
3 been provided to the defense, Your Honor, of the
4 vehicles. I'm going to hand up to the Court at this
5 time.

6 (Pause.)

7 **MR. GRAHAM:** I'm sorry, Your Honor. It's a
8 Ford Focus.

9 The State is dismissing some related charges in
10 Lexington County. There's a possession of a stolen
11 motor vehicle, an unlawful possession of a pistol,
12 and he was also arrested for leaving the scene of an
13 accident. And those charges are being dismissed as
14 a result of this plea.

15 When you are ready, Your Honor, there are some
16 victim impact, as well as the Defendant's prior
17 record.

18 **MS. ALVES:** Your Honor, if I may, on the Aiken
19 charges, he actually has -- he's never actually been
20 served with an Aiken County warrant. He's actually
21 got a warrant pending for common law robbery in
22 Aiken, but in exchange for this plea, the
23 Solicitor's allowing him to plead to the shoplifting
24 charge and the common law robbery warrant is going
25 to be withdrawn.

1 **MR. GRAHAM:** And that is my understanding as
2 well, Your Honor.

3 **THE COURT:** Mr. Cobbert, do you admit you're
4 guilty of these three charges?

5 **DEFENDANT:** Yes, sir.

6 **THE COURT:** Has anybody forced you, threatened
7 you, coerced you in any way to get you to plead
8 against your will?

9 **DEFENDANT:** No, sir.

10 **THE COURT:** Any plea bargains the State made
11 with you, they have to tell me about on the record
12 in open court or you lose what they don't tell me
13 about; do you understand?

14 **DEFENDANT:** (Defendant nodded head.)

15 **THE COURT:** Sir?

16 **DEFENDANT:** Yes, sir.

17 **THE COURT:** Are there any plea agreements here
18 other than what's been put on the record, Ms. Alves?

19 **MS. ALVES:** Yes, sir. The Solicitor in Aiken
20 has agreed to negotiate a sentence of -- a
21 concurrent sentence with any sentence that he gets
22 on the Lexington County charges. And as I stated
23 previously, they're withdrawing the warrant on the
24 common law robbery. And we've negotiated a
25 concurrent sentence for anything that he gets here

1 in Lexington.

2 **THE COURT:** Ms. Fullwood?

3 **MS. FULLWOOD:** Yes, sir, it's on the record.

4 **THE COURT:** So other than what's on the record,
5 Mr. Cobbert, has anybody promised you anything or
6 offered you any hope of reward to get you to plead
7 guilty?

8 **DEFENDANT:** No, sir.

9 **THE COURT:** Are you fully satisfied with your
10 attorneys?

11 **DEFENDANT:** Yes, sir.

12 **THE COURT:** Is there anything that you want
13 either of these attorneys to do on your cases that
14 they have not done for you?

15 **DEFENDANT:** No, sir.

16 **THE COURT:** Have you had enough time to meet
17 with your attorneys and discuss things with them so
18 that they can represent you properly?

19 **DEFENDANT:** Yes, sir.

20 **THE COURT:** Have you had enough time to make up
21 your own mind about all of this?

22 **DEFENDANT:** Yes, sir.

23 **THE COURT:** Your Aiken County case has not been
24 to the grand jury. If you want the grand jury to
25 review it, at least 12 out of the 18 grand jurors

1 would have to agree you're probably guilty or the
2 case stops there; do you understand?

3 **DEFENDANT:** Yes, sir.

4 **THE COURT:** The papers indicate you're giving
5 up that right. Is that your own decision made of
6 your own free will?

7 **DEFENDANT:** Yes, sir.

8 **THE COURT:** Mr. Cobbert, shoplifting greater
9 than 1,000 less than \$5,000 is a felony, that
10 carries up to five years in prison. Do you
11 understand that?

12 **DEFENDANT:** Yes, sir.

13 **THE COURT:** It's a property offense. If you
14 violate property laws again, you face higher
15 punishment. Do you understand?

16 **DEFENDANT:** Yes, sir.

17 **THE COURT:** Reckless homicide is a felony that
18 carries up to ten years in prison and a 5,000 dollar
19 fine. Do you understand that?

20 **DEFENDANT:** Yes, sir.

21 **THE COURT:** You'll lose your driver's license
22 for at least five years. Do you understand that?

23 **DEFENDANT:** Yes, sir.

24 **THE COURT:** Failure to stop for a pursuing law
25 enforcement vehicle which results in death is a

1 felony that carries up to 25 years in prison as a
2 possible punishment. Do you understand?

3 DEFENDANT: Yes, sir.

4 THE COURT: That has a provision that you'll
5 lose your driver's license for at least three years
6 after you are released from incarceration. Do you
7 understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: Now, in South Carolina, anything
10 that carries a possibility of 20 years or more is
11 classified as a no parole offense. What a no parole
12 offense is commonly called is truth in sentencing.
13 And truth in sentencing means that you have to serve
14 at least 85 percent of the time day-for-day before
15 you can be possibly released from prison. Do you
16 understand that?

17 DEFENDANT: Yes, sir.

18 THE COURT: When you come out, you'll
19 automatically come out on a period of community
20 supervision. You have to successfully complete the
21 period of community supervision or you can be
22 punished separately for violating community
23 supervision. Do you understand?

24 DEFENDANT: Yes, sir.

25 THE COURT: All right. Have you understood

1 everything we've been over so far?

2 **DEFENDANT:** Yes, sir.

3 **THE COURT:** Are you sure you want to give up
4 your rights and plead guilty?

5 **DEFENDANT:** Yes, sir.

6 **THE COURT:** Mr. Cobbert has made a free,
7 knowing, voluntary and intelligent decision to waive
8 his rights, including presentment to the grand jury
9 in Aiken County, his rights related to jurisdiction,
10 venue and attestation in Aiken County, and enter his
11 pleas of guilty here in Lexington County to these
12 three offenses. He's made his decisions upon the
13 advice of counsel with whom he's fully satisfied.
14 There's a factual basis for each of his pleas.

15 Did you tell me -- I mean, it's obvious from
16 the indictments, but did you tell me that
17 Mr. Wilson, Michael Wilson, died as a result of
18 the --

19 **MR. GRAHAM:** Yes, Your Honor. When he was
20 ejected, he died on scene.

21 **THE COURT:** And you said you had some victims
22 who wish to be heard from?

23 **MR. GRAHAM:** I do, Your Honor.

24 His rap sheet, 2002, Your Honor, he was
25 convicted of burglary third, received a five year

1 sentence suspended with probation for three years.
2 At the same time, he pled to a grand larceny one to
3 \$5,000.

4 June of 2003, he pled to possession of less
5 than one gram of ice or crack cocaine. He received
6 a youthful offender sentence not to exceed five
7 years. At the same time, Your Honor, he pled guilty
8 to possession of a scheduled four -- excuse me -- a
9 scheduled five, one to five controlled substance,
10 received a youthful offender sentence, provided upon
11 time served to 90 days.

12 June 2nd of 2003, at the same time as the drug
13 charges, Your Honor, he pled to a burglary second
14 degree, was also given a youthful offender sentence.
15 He also pled at the same time to possession, sell or
16 disposing of a stolen vehicle one to 5,000 and
17 received a youthful offender sentence. July 2005,
18 he was convicted of entering a premises after
19 warning.

20 There is the -- apparently, the rings were
21 never recovered from the jewelry store, Your Honor,
22 so on the shoplifting, there is \$2,000 of
23 restitution requested by Johnson Jewelers.

24 As far as Mr. Wilson's case, Your Honor,
25 present in the courtroom on behalf of their

1 relative, Michael Wilson, are his parents, Mr. and
2 Ms. James Wilson; his son, Jamie Wilson; a sister
3 Cheryl Sipes; another sister, Sharon Wilson; his
4 brothers, Chris Wilson and Ronald Wilson; and his
5 ex-wife, Peggy Wilson, is also present.

6 Sharon Wilson, Your Honor, wrote an impact
7 letter that she wanted me to provide to the Court.
8 I'm going to hand that up, and provide a copy to
9 defense counsel.

10 (Pause.)

11 **THE COURT:** Mark that as a court's exhibit.

12 (Court's Exhibit Number 1, victim statement,
13 marked for identification.)

14 **THE COURT:** Go ahead, Mr. Graham.

15 **MR. GRAHAM:** Thank you, Your Honor. Cheryl
16 Sipes, Michael Wilson's other sister, Your Honor,
17 would like to address the Court.

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

19 **MS. SIPES:** February 16th, 2006, was the worst
20 day of my life. I arrived to work around 12:00 on
21 that day to find a message from someone at Mike's
22 work asking me to call. I was told that Mike was at
23 the hospital and I needed to get in touch with them.
24 All the hospital told me was that I needed to come
25 there.

1 My mother and I arrived at the hospital only to
2 be told that there had been a wreck in Pelion and
3 that a male around 50 had been brought in. They
4 needed someone to identify him.

5 There we had to see my brother. He had been
6 hurt so bad, no one else needed to see him like
7 that. I will never forget. I still see it
8 everyday. No one should have to go through what my
9 mother and I saw.

10 We had to go home to tell my father that Mike
11 was killed. He had just come home an hour before
12 that from the hospital after having a cancerous lung
13 removed. We had to tell our family. And Jamie,
14 Mike's son, already trying to cope with the loss of
15 his older brother in 2004, Jamie was now left to
16 deal with more pain.

17 I lost my oldest brother that day. Mike was a
18 son, a brother to another sister and two brothers.
19 He was a good father to two sons. He loved his
20 family and we loved him. Mike was a strong part of
21 our family. We all relied on him. Words cannot
22 express the pain and anguish our family has endured.

23 There isn't a day and an hour that doesn't go
24 by that I don't think about Mike. I want to
25 remember all the good times we had, but all I can

1 see is how he was hurt and all alone. I wake up
2 everyday and go to sleep every night living this
3 nightmare.

4 Our family will never be the same. There is
5 someone missing. Holidays and family get-togethers
6 are no longer happy occasions. Mike's life was
7 taken away and a part of me died with him. The
8 affect on me has been devastating. His life was
9 worth so much more. I didn't get to say goodbye and
10 that I loved him.

11 Mike cared enough about other people's lives.
12 Just to steal two rings, it's just wrong. And it
13 leaves a long hard effect on families and it's not
14 something that you can take back. For this reason,
15 I'm asking you to please sentence this man to the
16 maximum penalty of the law so that no other family
17 has to endure this pain.

18 **THE COURT:** Thank you, ma'am.

19 Anything else from the State?

20 **MR. GRAHAM:** No, Your Honor.

21 **THE COURT:** Ms. Fullwood, are you ready or do
22 you need some time?

23 **MS. FULLWOOD:** I'm ready, Your Honor.

24 Your Honor, Mr. Cobbert is before the Court
25 this afternoon with his mother, Lori Cobbert, who

1 lives out in the Hopkins area.

2 Judge, this is just such a -- it's a terrible
3 tragedy all the way around. There's just no way
4 around that. What happened that day is just
5 heartbreaking.

6 James is almost 24 years old. He is the son of
7 a career Army man. I believe he was born in Germany
8 and he's lived all over in New Jersey, Panama,
9 Georgia. I think it was when his dad came to be
10 stationed at Fort Jackson that the family settled
11 down here.

12 Right now his father is retired military and he
13 is an RN at a V.A. Hospital in Atlanta. He simply
14 could not get off work today to come. His parents
15 are divorced. They divorced when he was about 14,
16 15. And, of course, his mom, who works at, I think,
17 Polo Road Elementary, is here today. She took off
18 work so that she could be here with her son.

19 He has a GED. And he has worked, I think,
20 almost all of his life. He started mowing lawns for
21 the neighbors when he was just a little kid. When
22 he was in high school, he worked for a number of
23 fast food restaurants, Burger King, Golden Corral,
24 Bojangles', Hardees. He learned welding at
25 Production Metals and did that work a little bit.

1 He didn't like it so much. And at the time that
2 this offense was committed, he was working at the
3 Fort Jackson Commissary.

4 I know there's nothing I can say to make these
5 people feel any better. What I can say is just to
6 explain what happened. He did not set off that day
7 with the idea in mind that he was going to go steal
8 some property. He had been a customer of that
9 jewelry store over in Aiken County and he took back
10 something he'd purchased and wanted them to let him
11 take it back and give him a refund. The owner would
12 not allow him to return the merchandise and it upset
13 him. And he got angry and he snatched a piece of
14 jewelry and ran off.

15 The police started chasing him. And when I
16 asked him, Why didn't you just stop, why did you
17 keep running, he said that the adrenaline just
18 surged in him. And he said he had a hard time -- he
19 just couldn't control himself. Between the fear and
20 the adrenaline, he was just sort of driven by
21 instinct during that chase, just the instinct to get
22 away from something chasing you.

23 I know it's small consolation to anybody, but
24 that's just what happened. It's not like it was
25 some premeditated situation that he ever thought he

1 would get himself into that day.

2 He was 21 when it happened. He was young. I
3 will tell Your Honor this, that in the more than two
4 years that I've been representing him, I really have
5 seen a change in this man. You know, when I first
6 met him, he struck me as kind of an immature, young
7 man just coming into adulthood and really didn't
8 have his thinking quite straight. I think he has
9 matured into somebody who is a lot more aware of the
10 consequences of his conduct, has a lot more
11 compassion for other people and who just, in
12 general, has a more mature outlook on the world and
13 his role in it.

14 I know that he's sorry. I know that he's
15 remorseful. I know that he would do anything he
16 possibly could to take it back, but he can't.

17 He's coming in here today, Judge, he is
18 stepping up. He is accepting responsibility. He's
19 so young and he's pleading guilty to such serious
20 crimes. We hope that you will extend to him as much
21 mercy as you can under the circumstances of this
22 case.

23 I know that he wants to speak to you briefly.
24 He's kind of emotional right now so he's not sure
25 how much he can say.

1 I know his mama had wanted to talk to you a
2 little bit, too, but as you can see, she's feeling
3 very, very bad. I don't know if she'll be able to
4 speak to you or not, but I'd ask you to give her the
5 opportunity.

6 **THE COURT:** Thank you.

7 Ms. Alves.

8 **MS. ALVES:** Your Honor, I would just say as to
9 the situation in Aiken, based on my investigation
10 and talking to Mr. Cobbert, it is as Mr. Fullwood
11 said. I did have one of my investigators go out and
12 talk to the victim in that case and the Solicitor
13 also talked to him. What he says happened is that
14 he did have one ring in his hand. He was showing
15 Mr. Cobbert the rings and he had another in his open
16 palm and that's when he snatched it out of his open
17 palm.

18 He said there weren't any cross words. There
19 weren't any threats made. There wasn't any type of
20 fighting with him or any type of force, but there's
21 no question that the rings were taken.

22 And I don't tell you that to mitigate anything
23 that he did because he was wrong in stealing the
24 rings out of the store and as -- as he has pleaded
25 to the shoplifting, but that's why the Solicitor

1 reduced that charge down because there was some
2 question about the man actually had his hand open,
3 was showing him the ring and giving him the ring
4 when it was taken and he ran out of the store.

5 Your Honor, I would just say in addition to
6 what Ms. Fullwood said, Mr. Cobbert does -- he does
7 understand the consequences and he does understand
8 there are consequences for what happened, for what
9 he did both in Aiken and here in Lexington. But his
10 mother -- his mother tells me that, and as Ms.
11 Fullwood said, I don't know if she'll be able to
12 speak, but she did want to address the Court and
13 tell what she knew about her son.

14 She says that he was a good son. He went to
15 Richland Northeast. She said he played sports in
16 school, that he was -- everything seemed to be
17 pretty good with him up until the time of the
18 divorce when he started having some problems,
19 started hanging out with the wrong people and that's
20 probably what led to at least some of what -- some
21 of what his record has, not that he doesn't have any
22 -- didn't have any blame in what he's done in the
23 past.

24 But, Your Honor, she says that this is not the
25 son that she knows, that she doesn't -- knows that

1 he wouldn't have done this -- that he would not have
2 intentionally gone out that day and planned to do
3 this. And, clearly, that's not what happened here.
4 But he made a bad choice in Aiken and,
5 unfortunately, led to tragic results here in
6 Lexington.

7 During the past two years -- two plus years
8 that this has happened, Mr. Cobbert has had some
9 reason to gain some maturity. He did have a child
10 who was born while he was in jail and that child,
11 he's not visited with that child because that child
12 was too young to visit. So he knows that he has --
13 he has a child who he's not played any material part
14 in his life. His mother does have a relationship
15 with that child and hopefully some day he can, too,
16 but that is one of the consequences he has faced as
17 a result of his actions on the day that we're here
18 for.

19 I would just ask that you take into
20 consideration his age, the fact that he is
21 remorseful.

22 I know he does want to address the Court and I
23 hope he can adequately express the remorse that he
24 has expressed to me to the Court and to the victims
25 -- the Wilson family.

1 However, Your Honor, I would ask you to take
2 all of that into consideration in your sentencing of
3 him and I would ask you to be as -- to extend to him
4 as much mercy as possible as you can. I would ask
5 you to consider concurrent sentences for
6 Mr. Cobbert. And I would ask you to accept the
7 negotiation for the Aiken charge to allow that to
8 run concurrent with the Lexington charges as well.

9 And I would ask his mother, Ms. Cobbert, if
10 she's able to speak.

11 **THE COURT:** Do you want to say anything, ma'am?

12 **MS. COBBERT:** Yes, sir.

13 **THE COURT:** What's your name?

14 **MS. COBBERT:** Lori Ann Cobbert.

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

16 **MS. COBBERT:** I would like to, first of all,
17 say that I'm very sorry to the family members and
18 this is not the son that I raised. I don't know
19 what happened, but I have really hurt -- hurting
20 right now. And I understand what the family's going
21 through. And only God knows.

22 And my son, I love him dearly. And I hope that
23 whatever decision you make changes him because like
24 I said, I don't know what happened. It was bad how
25 I found out about the incident.

1 **THE COURT:** Thank you very much, ma'am.

2 Do you want to say anything, Mr. Cobbert?

3 **DEFENDANT:** Yes, sir. Your Honor, everything
4 that happened was an accident. You know, I tried to
5 exchange some jewelry that I had bought from the man
6 and we had got into a negotiated argument. I never
7 took nothing around his store. I just left. I was
8 mad, you know, and I got scared and I was running.
9 I just got scared and I just -- I ran.

10 **THE COURT:** What do you mean you didn't take
11 anything and run --

12 **DEFENDANT:** I didn't run, you know, it was I --
13 he made me mad. I was trying to get my money back
14 for the jewelry that I had purchased from him and he
15 would not give me a refund and so we had an
16 argument.

17 I came to the store two times, two different
18 times, and then we had an argument and then I had
19 left out. I said, well, I kept the jewelry he gave
20 me. But, no, I didn't take it and run. I didn't
21 hit him, I didn't do none of that. I just put it in
22 my pocket and walked out the store and I left. And
23 the police got behind me and I was just so -- the
24 adrenaline kicked in and I was just running.

25 And I didn't mean for none of this to happen.

1 I don't know this man. I'm sorry. I didn't mean
2 for this to happen. I didn't mean for it to happen.
3 It just happened. I did not set out that day to
4 hurt nobody. All I did was try to exchange some
5 jewelry and made a bad decision, that's all I did.
6 I didn't -- I never try to hurt nobody.

7 I don't know this man. I don't know his
8 family. I know they're hurting because I would be
9 mad, too, if I lost my father, but it was an
10 accident. I didn't try to do this. I didn't try to
11 hurt nobody.

12 **THE COURT:** Where is the jewelry store?

13 **DEFENDANT:** It's in Aiken.

14 **THE COURT:** What part of Aiken?

15 **DEFENDANT:** Like North Augusta. I used to go
16 back and forth there. I know some people in Augusta
17 and Valentine's day was coming up, so I purchased
18 the ring.

19 **THE COURT:** Where did the wreck happen?

20 **DEFENDANT:** In Pelion.

21 **THE COURT:** How far is it from North Augusta to
22 Pelion?

23 **DEFENDANT:** I really don't know nothing about
24 Lexington. I just was running. I just running. I
25 just ran. That's where my accident happened at in

1 Pelion.

2 I don't really know how -- I come from the
3 highway from Columbia to Augusta and I stopped at
4 the store and I purchased the ring. I've been
5 paying on it for like three weeks and I paid for it.
6 Then when I didn't give the ring to the person on
7 Valentine's day, I tried to take it back to him two
8 days after that and he wouldn't give me a refund on
9 the ring and that's how everything started.

10 THE COURT: When did the cops get in behind
11 you? In North Augusta?

12 DEFENDANT: No, sir. It was further down the
13 road.

14 THE COURT: Did you go down the interstate?

15 DEFENDANT: Yes, sir.

16 THE COURT: So they got in behind you somewhere
17 on I-20?

18 DEFENDANT: Yes, sir.

19 THE COURT: Do you think that was in Aiken
20 County?

21 DEFENDANT: I can't say whether or not it was.

22 THE COURT: But they chased you into Lexington
23 County with blue lights going?

24 DEFENDANT: Yes, they chased me. I did commit
25 that crime. I panicked and I ran. I just panicked.

1 It wasn't that I was running from the crime or the
2 nature of what happened, it scared me and I panicked
3 and ran, that's what happened.

4 MR. GRAHAM: Your Honor, to answer your
5 question, the highway patrol estimated that the
6 chase was about 21 miles.

7 THE COURT: You got arrested on February the
8 16th?

9 DEFENDANT: Yes, sir.

10 THE COURT: Please don't anyone misunderstand
11 this. I'm not trying to be crass. This is part of
12 my job.

13 Did you have insurance on the car?

14 DEFENDANT: No, sir.

15 THE COURT: He was working?

16 MR. GRAHAM: I'm sorry?

17 THE COURT: The victim was working?

18 MR. GRAHAM: To my understanding, he was
19 work --

20 THE COURT: So he drew worker's comp death
21 benefit, the family did?

22 MR. GRAHAM: Yes, Your Honor.

23 THE COURT: Again, please don't misunderstand,
24 I'm not trying to be insensitive in asking those
25 questions. It deals with part of what I have to do.

1 (Pause.)

2 THE COURT: All right. If there's nothing
3 further, the Court renews the findings previously
4 made. Mr. Cobbert's made a free, knowing, voluntary
5 and intelligent decision to waive his rights and
6 plead guilty. He's done so upon the advice of
7 counsel with whom he's fully satisfied. There's a
8 factual basis for each plea.

9 He's also made a free, knowing, voluntary and
10 intelligent decision to waive presentment, waive
11 grand jury presentment on the Aiken charge and waive
12 jurisdiction and venue related to Aiken.

13 Folks, it's always a temptation for me to sit
14 up here and try to make a speech. I'm not going to
15 do that. The best thing for me to do is just
16 announce the sentence.

17 The sentence of the Court on indictment
18 2006-GS-32-1445, reckless homicide resulting in
19 death, is that you be committed to the South
20 Carolina Department of Corrections for ten years
21 plus costs and assessments. You're given credit for
22 jail time served under section 24-13-40, that will
23 be calculated and applied by the department of
24 corrections. I've written on your sentence sheet to
25 give you credit for jail time from February the

1 16th, 2006. Restitution is deferred. For other
2 conditions, you are to refer to indictment 1447
3 sentence sheet.

4 On the Aiken charge, 2008-GS-02-1678,
5 shoplifting, the sentence is five years plus costs
6 and assessments concurrent, credit for jail time
7 served under section 24-13-40. You're given credit
8 for time from February the 16th, 2006. You have to
9 pay \$2,000 in restitution plus a 20 percent handling
10 fee at a rate set by probation, parole and pardon
11 services for Stan Johnson Jewelers.

12 Failure to stop for a blue light resulting in
13 death, the sentence is 25 years consecutive plus
14 costs and assessments. Restitution is deferred.
15 Pay your court costs at a rate set by probation,
16 parole and pardon services while on community
17 supervision.

18 Any appeal from any of this has to be filed in
19 writing promptly. If you want to file an appeal,
20 you have to tell your lawyers. Do you understand
21 all of that, Mr. Cobbert?

22 **DEFENDANT:** (Defendant shook head.)

23 **THE COURT:** Sir?

24 **DEFENDANT:** No, sir.

25 **THE COURT:** You don't understand what part?

1 (Defense attorneys conferring with
2 Defendant.)

3 **THE COURT:** You have a ten year sentence that
4 you're currently serving. You get credit for your
5 jail time on that. When you finish that sentence,
6 you start a 25 year no parole offender sentence -- a
7 no parole sentence. The five year sentence is
8 running concurrent with your ten year period. It
9 will be over before the ten years does. Do you
10 understand?

11 **DEFENDANT:** (Defendant nodded head.)

12 **THE COURT:** He understands. He understands his
13 right to appeal. Good luck.

14

15 END OF PROCEEDINGS

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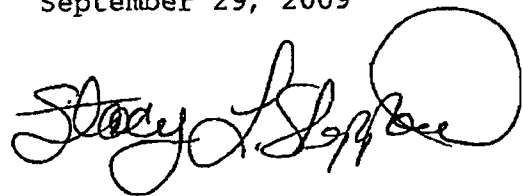
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Stacy L. Sheppard, Circuit 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 the evidence introduced in the guilty plea of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 16th of October, 2008.

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

September 29, 2009



Stacy L. Sheppard, RPR
Circuit Court Reporter

FILED

STATE OF SOUTH CAROLINA

County of Lexington

2009 JAN -9 A 9 13
In the Court of Common Pleas

James Curtis Cobbert III

Full name and prison number (if any) of Applicant

293798

vs.

STATE OF SOUTH CAROLINA

Name of Respondent

APPLICATION FOR
POST-CONVICTION RELIEF

Henry D. McMaster, Atty. General

2009CP3200127

INSTRUCTIONS - READ CAREFULLY

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

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

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

1 Place of detention.

LFE Correctional Institute 990 Wisacky
Hwy Bishopville, Sc 29010

2 Name and location of Court which imposed sentence

Lexington County Judicial Center
205 E. Main St Lexington Sc 29072

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

- (a) _____
- (b) _____
- (c) _____

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

- (a) failure to stop for Law Enforcement Vehicle (Death involved) 56-5-750(a)
- (b) Reckless Homicide 56-5-2910, 25 yrs and 10 yrs
- X ~~_____~~ respectfully.

5 Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

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

(yes) I sent letter to my lawyer both Fullwood to put in Appeal but

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

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

- i. Lexington County Judicial Center
- ii. (N/A)
- iii. _____

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

- i. Haven't received notice of anything.
- ii. (N/A)
- iii. _____

(c) the date of each such result:

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

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

- i. _____
- ii. (N/A)
- iii. _____

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

- (a) _____
- (b) (N/A)
- (c) _____

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

- (a) Double Jeopardy
- (b) Cruel and unusually punishment
- (c) Involuntary Guilty Plea

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

- (a) Sentenced twice for same offense (crime)!
- (b) Harsh lengthy sentence which is uncommon for crime!
- (c) Plea was entered under duress pretense!

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

- (a) any petition in the State Court under South Carolina Law? NO
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO

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

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

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

(a) the specific nature thereof:

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

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

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

(c) the disposition thereof.

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

(d) the date of each such disposition:

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

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

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

N/A

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

NO

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

(a) which grounds have been presented:

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

N/A

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

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

N/A

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

- (a) First opportunity since guilty plea!
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? N/A
- (c) your sentencing? YES

(c) your appeal, if any, from the judgement of conviction or the imposition of sentence? _____

N/A

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____ N/A

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

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

i. Debb Gullwood Attorney At Law.

ii. _____

iii. _____

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

i. Guilty Plea & Sentencing.

ii. _____

iii. _____

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

Plea vacated & Sentence vacated!

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

NO

STATE OF SOUTH CAROLINA)

County of LEXINGTON)

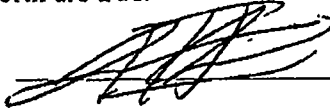
James C. Cobb III,

FILED

VERIFICATION

2009 JAN -9 A 9:13

I, A, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this _____
day of _____, 2_____.

Notary Public (L.S.)

My Commission Expires: _____

2009CP3200127

FILED

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

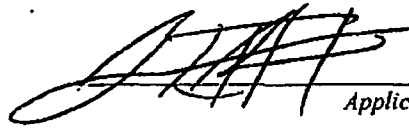
2009 JAN -9 A 9:13

BETH A. CARRIGG
CLERK OF COURT
LEWIS & CLARK COUNTY, SC

JAMES C. COBBEEL III,

I, A 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.



Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
CITIZEN JUDICIAL CIRCUIT
COUNTY OF [REDACTED]

1147
WL

APPLICANT,
V.
STATE OF SOUTH CAROLINA,
RESPONDENT.

DOCKET NO: 2009_cp-32-127
(POST CONVICTION RELIEF)
AMENDMENTS TO ORIGINAL
APPLICATION

COMES NOW THE APPLICANT, JAMES CORBERT, WHO AMENDS HIS ORIGINAL APPLICATION FOR POST-CONVICTION RELIEF, AND IN THE HONORABLE COURT ON JANUARY 18, 2011 TO WIT THE ORIGINAL APPLICATION ADD.

AMENDMENT NO.1

APPLICANTS ATTORNEY WAS DEFICIENT IN HER PERFORMANCE BY FAILING TO REQUIRE THE COURT TO STRICTLY AND CONSCIENTIOUSLY OBSERVE THE RULES OF PROCEDURE AND EVIDENCE (7) SO AS TO AVOID THE MALEVOLENT DIATRIBE ADVANCED BY THE VICTIM-WITNESS (UNDER THE GUISE OF VICTIM-IMPACT STATEMENTS) AT APPLICANTS SENTENCING, THUS, FATALLY PREJUDICING THE APPLICANT BY THE RECEIPT OF A CONSECUTIVE SENTENCE.

AMENDMENT NO.2

THE COURT'S DECISION WAS INHERENTLY DEFICIENT IN THAT IT MADE NO COMMENT MADE BY SOLICITOR IN REGARDS TO AN FIRE ARM CHARGE THAT WAS FALSELY BROUGHT UPON APPLICANT. SOLICITOR STATED THAT IN RESULTS OF THIS PLEA THE CHARGE WAS BEING DISMISSED. THUS MAKING APPLICANT RECEIVE FULL CREDIT FOR CONVICTION. THE COURT MADE BY SOLICITOR CONSEQUENTLY PREJUDICING APPLICANTS CHARACTER AND RIGHT TO A FAIR TRIAL.

AMENDMENT NO.3

CONFLICT OF INTEREST

AMENDMENT NO.4

INDICTMENT CONSIST OF 1 WITNESS, WHO ALSO IS THE OFFICER THAT PLAINTIFF ON GUARD AND THE ONLY WITNESS OF THE CRIME. THE WITNESS IS THE ONLY WITNESS.

State of South Carolina)
 County of Lexington)
)
 James Cobbert #293798)
)
 VS.)
)
 State of South Carolina)
 Respondent)

IN THE COURT OF COMMON
 PLEAS

MOTION TO ADDRESS
 ALL ISSUES

The applicant, James Cobbert #293798. By and through his court appointed attorney, DAVID N. TRUITT. Ask this honorable court to require the attorneys involved in this action to be meticulous in the preparation of any order in this matter.

SPECIFICALLY, the applicant request that each and every issue raised in the record and/or raised at the hearing of be addressed in the order of the court to be issued in this matter.

This motion is requested pursuant to S.C CODE, SEC.17-27-80. And citing Pruitt v. state 423 S.E.2d 127 (1992) Bryson v. state.

WHEREFORE THE MOTION SHOULD BE GRANTED AS REQUIRED BY SOUTH CAROLINA LAW

RESPECTFULLY SUBMITTED
 JAMES COBBERT

SWORN TO BEFORE ME THIS
 DAY OF

NOTARY PUBLIC FOR SOUTH
 CAROLINA
 MY COMMISSION EXPIRES.



ORIGINAL 9/2/09
William Salley 49

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
)
)
James C. Cobbert, III, #293798,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2009-CP-32-0127

BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON

2009 DEC 16 A 11:53

FILED

RETURN AND REQUEST FOR
APPOINTMENT OF COUNSEL

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 9, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the May 2006 term of the Lexington County Grand Jury for Failure to Stop for Law Enforcement Vehicle, Blue Light Resulting in Death (2006-GS-32-1447), and Reckless Homicide (2006-GS-32-1445). Applicant thereafter waived presentment on an Aiken Shoplifting charge (2008-GS-02-1678), and also waived jurisdiction. He was represented by Elizabeth Fullwood, Esquire, and Wallis Alves, Esquire. On October 16, 2008, the Applicant pled guilty as charged. He was sentenced by the Honorable William P. Keesley to confinement for a period of ten (10) years for the reckless homicide charge, a concurrent period of five (5) years on the shoplifting charge, and a consecutive period of twenty-five (25) years on the failure to stop for a blue light resulting in death charge. The Applicant states that he sent a letter to his lawyer to put in an appeal, but 'hasn't heard

anything on that yet ' The State notes that there is no appeal presently pending within the Office of the Attorney General.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

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

1. Involuntary Guilty Plea
 - a. "Plea was entered under false pretense."
2. Double Jeopardy
 - a. "Sentenced twice for same offense (crime)"
3. Cruel and Unusual Punishment
 - a. "Harsh lengthy sentence which is uncommon for crime."

III.

In a post-conviction relief action, the 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, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant 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 defendant 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 defendant 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 defendant 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). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant 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).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

Respondent submits that the Applicant's second and third allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss these allegations.

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 an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

December 11, 2009.

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APPLICANT'S EXHIBITS

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1 (The following proceedings are reported on
2 November 29, 2011.)

3 THE COURT: Yes, ma'am.

4 MS. MAY: The next case we would like to call
5 is James Cobbert versus State. It's Case
6 Number 2009-CP-32-0127. This case comes from the P.C.R.
7 application filed by Mr. Cobbert on January 9, 2009.

8 He was charged with reckless homicide and
9 failure to stop for a blue light resulting in death. On
10 October 16, 2008, he came before Judge Keesley and
11 entered a guilty plea to reckless homicide and failure
12 to stop for a blue light.

13 He was sentenced to ten years for reckless
14 homicide and 25 years consecutive for the failure to
15 stop for a blue light. There was no appeal and Mr. Hall
16 is representing Mr. Cobbert today.

17 THE COURT: Okay.

18 MR. HALL: Your Honor, if it please the Court.
19 I believe he was sentenced to 25 years concurrent.

20 THE COURT: All right.

21 MR. HALL: For failure to stop, not
22 consecutive.

23 THE COURT: Okay. You are the moving party.

24 MR. HALL: Yes, sir.

25 JAMES CURTIS COBBERT, III,

1 being first duly sworn, testified as follows:

2 CLERK: State your full name for us when you
3 are comfortably seated.

4 THE WITNESS: My full name is James Curtis
5 Cobbert, III.

6 DIRECT EXAMINATION

7 BY MR. HALL:

8 Q Mr. Cobbert, are you comfortable up there?

9 A I'm all right.

10 Q You can pull that microphone toward you if you want
11 to.

12 A Give me just a second.

13 THE WITNESS: Can I?

14 THE COURT: Yes, go ahead.

15 A Before I get started, I would like the request of
16 the Court that this Court take judicial notice to
17 the issues alleged within my P.C.R. application. I
18 would also like for the record to reflect --

19 COURT REPORTER: You will have to slow down a
20 little bit now. "I would also like for the record to
21 reflect..."

22 A That I request counsel review the order as the
23 Supreme Court has state (verbatim), "That counsel
24 have to review the order and file 59(e), S.C. Code
25 17-27-80. If counsel fail in this matter --

1 COURT REPORTER: Wait a minute. If you could
2 speak up and slow down, please. "If counsel," what?

3 A If counsel fail in this matter, it would deny me my
4 due process and my full bite at the apple. His
5 failure would also prejudice my substantial
6 rights --

7 COURT REPORTER: Wait a minute, "prejudice my
8 substantial rights," and then what?

9 A "And all my remedies. My first allegation being
10 brought before the Court today is ineffective
11 assistance of counsel. My plea was involuntary.
12 If it wasn't for counsel's advice --

13 COURT REPORTER: Wait a minute. "If it wasn't
14 for counsel's advice," what?

15 A "Counsel's advice, I would not have pled guilty but
16 insisted on going to trial."

17 Q Mr. Cobbert, we are going to cover all that on the
18 questions.

19 A Okay. You are going to question?

20 Q Yes. All right?

21 A Yes.

22 Q You appeared before this Court on October 16, 2008,
23 and you pled guilty to reckless homicide and
24 failure to stop for a blue light?

25 A Yes, sir.

1 Q You also agreed through a plea agreement to include
2 some Aiken County -- an Aiken County charge?

3 A Yes, sir.

4 Q With the Lexington County charge?

5 A Yes, sir.

6 Q And your attorney at that hearing -- you actually
7 had two hearings -- was Elizabeth Fullwood?

8 A Uh-huh. (Indicating affirmative response.)

9 Q And then a Ms. Alves?

10 A I can't pronounce her name, sir.

11 Q A-L-V-E-S.

12 MS. MAY: It's Alves.

13 BY MR. HALL:

14 Q And you waived -- you understand and, of course,
15 the judge asked you -- you waived your right to a
16 jury trial?

17 A Yes, sir.

18 Q You decided to plead guilty?

19 A Yes, sir.

20 Q Can you explain to the Court, what was the basis
21 for you waiving your right for a jury trial and
22 deciding to plead guilty?

23 A Well...

24 Q How was that decision reached?

25 A Well, I pled guilty because I was looking for a

1 favorable lesser sentence offering to plead guilty.
2 That's why I plead guilty. I was under the
3 impression I would receive no more than 12 years if
4 I pled guilty.

5 Q And where did that impression come from?

6 A My attorney.

7 Q Your attorney?

8 A Yes, sir.

9 Q Ms. Fullwood?

10 A Ms. Fullwood.

11 Q Okay. And did you know at the time or prior to
12 your pleading guilty in 2008 that there would be
13 members of the family of the deceased party
14 testifying?

15 A No, sir, she never made me aware of that.

16 Q Did you discuss with Ms. Fullwood prior to coming
17 to court on October 16, 2008, about the possibility
18 of the issue of double jeopardy?

19 A No, sir, I never -- she never discussed that.

20 Q She never discussed that with you?

21 A Never, sir.

22 Q And did Ms. Fullwood explain -- did Ms. Fullwood
23 explain to you what a Brady motion is?

24 A I think she told me about it one time before. I'm
25 not sure but I know what a Brady motion is.

1 Q Do you know whether or not Ms. Fullwood undertook
2 any kind of discovery prior to you pleading guilty?

3 A No, sir.

4 Q And you did not know that the relatives of the
5 victim would be testifying in court that day?

6 A No, sir, I did not know that.

7 Q And, of course, you responded to Judge Keesley's
8 questioning October 16, 2008?

9 A Yes, sir.

10 Q But your responses to those questions were based on
11 what, on your prior discussions with Ms. Fullwood?

12 A Yes, sir. I responded to the best of my ability at
13 the time. I was not really prepared. After the
14 fact that the family spoke against me, I wasn't
15 prepared to respond to it. I just responded the
16 best I know now.

17 After she made her statement, it pretty
18 much -- you know what I'm saying -- shift the whole
19 courtroom. Everybody was crying. It kind of
20 messed up the courtroom. I couldn't respond
21 properly to it.

22 Q I understand. After the sentencing hearing --

23 A Uh-huh. (Indicating affirmative response.)

24 Q -- you made a request of Ms. Fullwood?

25 A Yeah. After sentence I actually asked her in the

1 courtroom -- she actually left but someone went and
2 got her -- to file a direct appeal. Then I wrote
3 to the Clerk of Court asking about the direct
4 appeal, and they said they was going to forward a
5 copy to it, and I never heard anything else about
6 it.

7 Q You never heard anything else about this?

8 A No, sir.

9 Q How many times did you meet with Ms. Fullwood prior
10 to your sentencing hearing?

11 A Probably about three or four.

12 Q Three or four?

13 A Uh-huh. (Indicating affirmative response.)

14 Q And she went over the details of the crime and what
15 the elements were and what you were being charged
16 with?

17 A She didn't go over the details for discussion, but
18 she told me what I was charged with. We never went
19 over exactly no details. The only thing she
20 basically would explain to me is we would try to
21 get a good plea in front of a good judge and get a
22 good plea.

23 Q I didn't catch that. And get a what?

24 A A good plea, like a favorable plea.

25 Q And you also understood that -- or at least your

1 impression was that the solicitor would make what
2 kind of recommendation?

3 A From what she told me I, would go in and plead,
4 and there would be no recommendation from the
5 State. I went up there pleading thinking that I
6 would get no recommendation. No sentence would be
7 opposed.

8 Q So what happened at the hearing on October 16,
9 2008, that was a total surprise to you?

10 A Well, after the solicitor read off the facts of the
11 case, he said, "Your Honor, his sister would like
12 to speak, but first let me pass around the victim
13 impact statement."

14 So they passed a statement around and asked
15 everybody to read it. So we read it. That's the
16 first time I knew exactly how they felt about me.
17 I didn't know they felt that way. So when I read
18 it, it sent shock waves through me. You know what
19 I'm saying?

20 It really like shocked me. So then this other
21 sister came up, and she started crying and
22 saying -- she was speaking her grief. She was
23 explaining herself and I understood it, but still I
24 wasn't prepared to answer to that.

25 I didn't know nothing about it. I wasn't

1 prepared. So the thing about it -- and also the
2 fact that she also asked that I receive the maximum
3 sentence. Both sisters did. I actually have
4 the -- if you would, sir, make this an exhibit.

5 Q What is it?

6 A This is the victim impact testimony right here.

7 Q That's a matter of record, Mr. Cobbert.

8 A It's a matter of record. Right here she is asking
9 for me to receive the maximum sentence. The other
10 sister also stated verbally in court that she was
11 asking for me to receive the maximum sentence.

12 Under Ms. Fullwood she told me that I would
13 not receive -- nobody would tell me I would
14 receive --

15 COURT REPORTER: I'm sorry. I didn't
16 understand you. "Nobody would tell me I would receive"
17 what?

18 A Basically what I'm saying is she told me I would
19 never receive a sentence from the solicitor, from
20 the State. I would only go in there and plead.
21 She never told me I would go in there and somebody
22 would be asking for the maximum sentence.

23 I wouldn't have pled guilty if I am going in
24 the courtroom and somebody is asking for the
25 maximum sentence. That is a breach of my plea

1 agreement.

2 My plea was no recommendation, but I got two
3 people from the State saying they want me to get
4 the maximum sentence. That is violating my Eight
5 Amendment, my due process right.

6 Q Mr. Cobbert, all of this took place after the judge
7 asked you a series of questions. He asked you a
8 series of questions: If you understood why you
9 were in court and if your plea was voluntary?

10 A I think so.

11 Q He asked you a series of those questions. Then
12 this impact statement and all this other took
13 place?

14 A Yes, sir.

15 Q So you didn't have any idea that that was going to
16 come into the record or in the court until after
17 you had acknowledged to the Court that your plea
18 was voluntary?

19 A Uh-huh. (Indicating affirmative response.)

20 Q And that you understood you were waiving a right to
21 a jury trial?

22 A Yes, sir.

23 Q Then all of that other came in?

24 A Yes, that's when they sprung it on me.

25 Q Okay. Just to reiterate, you did ask Ms. Fullwood

1 to take a direct appeal?

2 A Yes, sir, I wrote to her and I asked in the
3 courtroom. I asked somebody to tell her in the
4 courtroom to do it, but she -- I don't know what
5 the situation was, why she didn't do it, but she
6 didn't do it.

7 Q Answer any questions the State has for you.

8 **CROSS EXAMINATION**

9 BY MS. MAY:

10 Q Mr. Cobbert, is it Cobbert (phonetic)?

11 A Cobbert.

12 Q Cobbert, I'm sorry.

13 A It's okay.

14 Q Excuse me. You stated that after the plea hearing,
15 somebody went to go get Ms. Fullwood?

16 A I think my attorney, I believe it was. I don't
17 want to say it was, but I believe it was, went to
18 go get her and tell her to come back to the
19 courtroom and file a direct appeal.

20 Q Did you ask Ms. Alves to go --

21 A Yes, I talked to her. I actually went in the back
22 and talked to her too after everything took place.

23 Q After the plea hearing. What did you say to her?

24 A I really can't recall.

25 Q You don't remember?

1 A "I can't recall.

2 Q I believe you testified that the understanding was
3 the solicitor would not make or the State would not
4 make any recommendations?

5 A Yes, that was my plea agreement.

6 Q And that's what happened; correct? The solicitor
7 did not make any recommendations?

8 A He did not make a recommendation, but the family
9 did make a recommendation.

10 Q But the solicitor didn't; correct?

11 A No, he did not make a recommendation.

12 Q And I believe -- just for clarity -- it appears
13 that the Court on page -- do you have your
14 transcript, a copy of your transcript?

15 A Not the whole thing, just basically the things I am
16 going to be using. I am familiar with it.

17 Q It appears prior to the victim impact statement
18 coming in, the Court did find that you had made a
19 voluntary and intelligent plea?

20 A Yes, ma'am.

21 Q If the transcript reflects that, would you dispute
22 it?

23 A I made a voluntary plea based on the fact that I
24 was receiving no plea recommendation, no sentence.
25 That's the plea I entered, you know.

1 Q So are you saying today that had you received
2 different advice, you would go to trial instead of
3 pleading?

4 A Had I known that somebody was going to be in the
5 courtroom asking for the maximum sentencing, I
6 would have gone to trial. Who would plead for the
7 maximum sentence?

8 Q I believe after the victims made their statement,
9 Ms. Fullwood made a mitigation response; is that
10 correct?

11 A Yeah, she spoke up and she tried to speak on my
12 behalf.

13 Q It appears it's about three or four pages in the
14 transcript. Then after that Ms. Alves discussed
15 mitigation on your behalf as well?

16 A Yes, ma'am.

17 Q And then it appears that you as well responded and
18 apologized to the Court?

19 A Yeah, I tried to respond.

20 Q It appears you did that twice, two different times;
21 correct?

22 A I don't know.

23 Q It might have been broken up.

24 A I don't know.

25 Q Did you say anything to either of your attorneys

1 during the plea when the victims were reading their
2 statements?

3 A Yeah, I asked Ms. Fullwood to withdraw the plea.

4 Q You did?

5 A Oh, yeah.

6 MS. MAY: Beg the Court's indulgence.

7 THE COURT: Yes, ma'am.

8 (Pause.)

9 MS. MAY: I have no further questions. Thank
10 you.

11 THE COURT: Any redirect?

12 MR. HALL: No redirect.

13 THE COURT: Thank you, sir. You may step
14 down.

15 THE WITNESS: Sir, I also have a double
16 jeopardy issue I did not discuss. We just went into
17 victim impact. I did not talk about double jeopardy.

18 THE COURT: Tell me about double jeopardy.

19 THE WITNESS: My probable with double jeopardy
20 is the State prosecuted me for the same set of facts. I
21 have my transcript page 10 through 12. If you want to,
22 you can look at it and see that it's the original. It's
23 the original transcript pages.

24 THE COURT: I have got a copy of the
25 transcript.

1 THE WITNESS: If you will follow me to page
2 11. It's the beginning of the actual crime. "About
3 that time, Your Honor, Mr. Cobbert noticed that he was
4 being followed by the police and began to speed up --

5 COURT REPORTER: Wait a minute, "began to
6 speed up." Go ahead.

7 THE WITNESS: "About that time, Your Honor,
8 Mr. Cobbert noticed that he was being followed by the
9 police and began to speed up in the passing lane --
10 began to speed up past people in the passing line.

11 "At some point after that, the deputy
12 activated his blue lights and siren and reached up to
13 speeds of about 100 miles an hour. As they were coming
14 through the Town of Lexington --

15 COURT REPORTER: Wait a minute. "As they were
16 coming through the Town of Lexington..."

17 THE WITNESS: "The Town of Lexington -- excuse
18 me -- into the County of Lexington, a Pelion police
19 officer, Officer Carey --

20 THE COURT: Officer Crier?

21 THE WITNESS: Crier, excuse me. Thank you.
22 "Took over the lead pursuit of the vehicle in Aiken
23 County. The Aiken officer, Deputy Fox, followed in
24 behind him --

25 COURT REPORTER: I'm sorry, Judge.

1 THE COURT: You are just reading the
2 transcript, right?

3 THE WITNESS: Yeah, I'm going through it.

4 THE COURT: Do you want me to do it?

5 THE WITNESS: Okay. You can.

6 THE COURT: "Members of the Sheriff's
7 Department set up stop sticks and tried to put stop
8 sticks in front of him. They got them deployed. He was
9 able to go around them and only put -- I believe the
10 passenger side of the vehicle ran over the sticks, and
11 it did not deflate the fire. The pursuit continued on
12 into the Town of Pelion.

13 "Another Lexington deputy had set up stop
14 sticks about 300-yards farther up in the Town of Pelion.
15 At that point the defendant went off on the right side
16 of the road in an attempt to pass some vehicles, came
17 back on the roadway.

18 "When he came back on, it jerked his car to
19 the left, and he overcorrected, coming back to the
20 right. At that point the M.A.I.T. team from the Highway
21 Patrol estimated he was going about 88 miles an hour.

22 "When he overcorrected back to the right, his
23 car lost control and he slammed into the back of Michael
24 Wilson who was driving. He was actually working for the
25 Department of Transportation driving a Department of

1 Transportation vehicle.

2 "As a result of that collision, both
3 vehicles -- both of the vehicles lost control and
4 flipped. Mr. Wilson was wearing his seat belt, but his
5 seat broke and he was ejected from the vehicle suffering
6 injuries on the scene that resulted in his death on
7 scene."

8 THE WITNESS: That's correct, Your Honor.

9 THE COURT: Is that all you want to read?

10 THE WITNESS: Yes, sir. My problem is the
11 judge gave me ten years for the reckless homicide
12 initially at first. So the problem is the reckless act
13 -- once they charge you with reckless homicide, what
14 they are punishing you for is the reckless act.

15 THE COURT: Okay.

16 THE WITNESS: My reckless act is on page 12,
17 lines 3 through 12.

18 THE COURT: Okay.

19 THE WITNESS: Traveling at a high rate of
20 speed, attempting to pass a vehicle on the right, and
21 lost control and collided with another Chevy Blazer.
22 The problem is the judge gave me ten years for this
23 reckless act right there.

24 THE COURT: Okay.

25 THE WITNESS: Basically this is a separate and

1 distinctive act from everything else that happened. He
2 separated it.

3 THE COURT: Okay.

4 THE WITNESS: So my problem is how can they
5 try me for failure to stop for a blue light resulting in
6 death without punishing me for the reckless act twice
7 according to the facts.

8 Basically what I'm saying is it's one
9 continuous act from the beginning to the end resulting
10 in death. What I'm saying is it's one continuous act.
11 By the State charging me with reckless homicide, they
12 are saying it's a separate and distinctive act.

13 My problem is according to these facts, now
14 that you punish me for ten years, how can you punish me
15 for this when I am being punished for this twice? You
16 see what I'm saying?

17 THE COURT: Yes, I got you.

18 THE WITNESS: I got a foundation case right
19 here. My foundation case is Illinois versus --

20 COURT REPORTER: Illinois versus who?

21 THE WITNESS: Battle. Battle, I believe.

22 THE COURT: Let me take a look and help you
23 out with that. Illinois versus Vitale, V-I-T-A-L-E.

24 THE WITNESS: Vitale. Thank you.

25 THE COURT: This is 447 U.S. 410, 100 S.Ct.

1 2260; is that right?

2 THE WITNESS: Yes, sir.

3 THE COURT: And decided in 1980. That's the
4 case you are relying on?

5 THE WITNESS: Yes, sir, that's it right there.
6 That's my foundation case.

7 THE COURT: All right.

8 THE WITNESS: I also dispute under the
9 Blockburger test that these two charges will constitute
10 the same offense.

11 THE COURT: The two charges are characterized
12 as one --

13 THE WITNESS: Characterized as one offense.

14 THE COURT: Characterized as one offense.

15 Okay.

16 THE WITNESS: I submit to the courtroom that
17 driving in a reckless disregard, that's the reckless
18 homicide. Running from the police is driving the
19 automobile in a reckless disregard. The elements are
20 the same.

21 THE COURT: Okay.

22 THE WITNESS: So basically the State used
23 artful phrasing --

24 COURT REPORTER: I didn't get it.

25 THE COURT: Awkward phrasing of the elements?

1 THE WITNESS: Artful, artful.

2 THE COURT: Inartful?

3 THE WITNESS: No, artful.

4 THE COURT: Artful?

5 THE WITNESS: Artful, like draw art, artful
6 phrasing of the evidence to convict me of both
7 charges --

8 THE COURT: Okay.

9 THE WITNESS: -- when purely different
10 offenses are properly characterized as one offense. By
11 them charging me with failure to stop resulting in
12 death, they are saying it's one offense.

13 THE COURT: I got you. Let's see. Do you
14 have any questions you want to ask him counsel?

15 MR. HALL: No, sir.

16 THE COURT: Any cross on that?

17 MS. MAY: No, Your Honor.

18 THE COURT: Anything else you need to tell me
19 on that, Mr. Cobbert? I think I've got the essence of
20 your argument.

21 THE WITNESS: I also would like to submit
22 summary judgment on that issue.

23 THE COURT: Summary judgment?

24 THE WITNESS: Yes, sir. I would like to move
25 for summary judgment on that issue. I already got it

1 typed up.

2 THE COURT: Oh, you've got a motion?

3 THE WITNESS: Yes, sir.

4 (Hands to Court.)

5 THE COURT: Summary judgment motion. You want
6 to submit this as -- this is one document?

7 THE WITNESS: Yes, sir.

8 THE COURT: Can I staple it for you?

9 THE WITNESS: Yes, sir.

10 THE COURT: You want to submit it as an
11 exhibit?

12 THE WITNESS: I actually have a brief too. I
13 actually move for summary judgment on the issue. I want
14 the issue addressed, the double jeopardy issue
15 addressed. I also have a brief right here too.

16 THE COURT: What I'm asking is do you want me
17 to make this part of the record?

18 THE WITNESS: Yes, sir, I would love for you
19 to make it part of the record.

20 MS. MAY: Your Honor?

21 THE COURT: Would you like to view it?

22 MS. MAY: I do have a copy of that.

23 Mr. Cobbert --

24 THE WITNESS: It's actually a different one.
25 That right there is a different one.

1 MS. MAY: No, I have not seen it. Mr. Cobbert
2 tried to file a summary judgment motion previously
3 without his attorney undersigning. And when Mr. Hall
4 learned of that, he wouldn't undersign it.

5 THE COURT: He is introducing this. While
6 this is -- this document which Mr. Cobbert handed to me
7 is unsigned and undated -- I am going to admit it as an
8 exhibit in the hearing.

9 (Applicant's Exhibit Number 1 is received into
10 evidence.)

11 THE COURT: I have done that without showing
12 it to counsel. Would y'all like to look at it?

13 MS. MAY: Just briefly.

14 MR. HALL: No, sir.

15 (Pause.)

16 THE COURT: Okay. Anything else, Mr. Cobbert?

17 THE WITNESS: I think I covered everything. I
18 would also like to say that it's a double jeopardy
19 issue. Under Blockburger these two would constitute the
20 same offense.

21 The characterization of the elements are the
22 same. Failure to stop for a blue light is operating an
23 automobile in a reckless disregard for the safety of
24 others.

25 THE COURT: Okay.

1 THE WITNESS: Also, under proof of facts, the
2 State relied on and used the record that they did to
3 establish reckless homicide also to convict me of
4 failure to stop for a blue light resulting in death.

5 The State sought to establish the essential
6 elements of the second crime by using the conduct I was
7 already convicted for in the first crime, which would be
8 double jeopardy.

9 THE COURT: Okay.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Thank you very much. Can y'all
12 help him get his stuff together here?

13 THE WITNESS: Sir, can I submit in the record
14 what I wrote down to expand the record?

15 THE COURT: Any objection?

16 MR. HALL: No, sir.

17 THE COURT: You just read that stuff?

18 THE WITNESS: I didn't get to go through it
19 all.

20 THE COURT: You summarized it?

21 THE WITNESS: Yeah, I tried to summarize it,
22 but I would like to submit it in.

23 THE COURT: Show me what it is you want to do.

24 THE WITNESS: Right here.

25 (Hands to Court.)

1 THE COURT: This document is stapled and
2 handwritten.

3 THE WITNESS: Yes, sir.

4 THE COURT: This is also your opening
5 comments; right?

6 THE WITNESS: Yes, sir.

7 THE COURT: Why don't y'all take a look at it.

8 MR. HALL: I have seen it, Judge.

9 THE COURT: Okay.

10 MS. MAY: This was in the record. It's word
11 for word?

12 THE COURT: It's pretty close to what he
13 testified to.

14 THE WITNESS: I'm really not comfortable with
15 my testimony because of the fact I was shaken up a
16 little bit.

17 THE COURT: Sure.

18 THE WITNESS: So if you would admit that in to
19 further my ability.

20 THE COURT: We will put it in as your second
21 exhibit without objection.

22 (Applicant's Exhibit Number 2 is received into
23 evidence.)

24 THE COURT: We will get a copy made for you
25 and get it back to you. Is that it?

1 THE WITNESS: That basically sums it up.

2 THE COURT: Thank you very much.

3 (Witness leaves the witness stand.)

4 THE COURT: Mr. Hall, anything else?

5 MR. HALL: Nothing, no, sir.

6 THE COURT: Mr. Cobbert, I would tell you at
7 this time I am going to decline to grant your summary
8 judgment motion. I guess it's sort of presented in the
9 same manner as a directed verdict motion. I will let
10 the State put up their case at this time.

11 MS. MAY: Your Honor, we'd like to call
12 Ms. Fullwood.

13 THE COURT: All right. Come around, Lawyer
14 Fullwood.

15 ELIZABETH FULLWOOD, being
16 first duly sworn, testified as follows:

17 CLERK: When you are comfortably seated, state
18 your full name for us, please.

19 THE WITNESS: Elizabeth Fullwood.

20 MS. MAY: May it please the Court, Your Honor.

21 THE COURT: Yes, ma'am.

22 **DIRECT EXAMINATION**

23 BY MS. MAY:

24 Q Ms. Fullwood, how long have you been practicing
25 law?

1 A Since 1979.

2 Q And how much of that has been in criminal law?

3 A In the high 90 percents.

4 Q And were you appointed to represent Mr. Cobbert?

5 A I was.

6 Q And where were you employed or I guess still
7 employed during Mr. Cobbert's representation?

8 A At the Lexington Public Defender's Office.

9 Q And were you able to meet with Mr. Cobbert to
10 discuss the charges?

11 A I was.

12 Q Do you recall how many times that you were able to
13 meet with him?

14 A From my time records, it looks like I met with him
15 March 6, 2006; November 7, 2006; September 17,
16 2007; July 1, 2008; August 6, 2008; October 9,
17 2008.

18 Q Okay. And did y'all discuss the indictments and
19 the elements of the offenses?

20 A Yes, we discussed the nature and elements of the
21 offenses and the potential penalties for each one.

22 Q And I believe that Mr. Cobbert was also charged
23 with...

24 THE COURT: Shoplifting?

25 Q Shoplifting, as well as possession of a weapon

1 and...

2 A Leaving the scene of an accident.

3 Q Yes. Those were eventually dropped or dismissed?

4 A Well, he pled to the Aiken County larceny type
5 charge, but the other two charges were dismissed.

6 Q And did you review the possible punishments for the
7 charges with Mr. Cobbert?

8 A Yes.

9 Q Did you, in discussing the possible punishment,
10 explain to him the minimum and the maximum, that it
11 could be concurrent or consecutive?

12 A That's right.

13 Q And did you discuss his version of the events?

14 A I did.

15 Q Do you recall what he told you?

16 A Well, he was running from the police. He was of
17 the belief that the victim, being a Highway
18 Department employee, somehow had access to the
19 police broadcasts and had heard that a chase was
20 coming in the direction he was at and had pulled
21 his work vehicle in front to block the road and
22 that the vehicle was stopped when the collision
23 occurred.

24 Based on that I hired Woody Poplin, who is an
25 engineer, to look at the M.A.I.T. report and the

1 raw data that had been collected by the Highway
2 Department and run his own numbers.

3 Mr. Poplin said that that vehicle was not
4 stationary. It was moving at the time that the
5 collision occurred. So it was -- I'm not sure that
6 that would have been a defense in any event, but we
7 were able to rule out that type of activity had
8 taken place.

9 Q Did you discuss Mr. Poplin's -- I guess if he had a
10 report or his findings with Mr. Cobbert?

11 A He did not write me a report at my request, but we
12 did have a long telephone conversation. I went
13 over with Mr. Cobbert what Mr. Poplin told me.

14 Q And did you file a discovery motion?

15 A Yes, I filed a Rule 5 and a Brady motion.

16 Q And do you recall the items that you received in
17 the discovery materials?

18 A I know I got a M.A.I.T. report. There were
19 photographs, statements, C.A.D. reports, copies of
20 everything, collision report forms. Mr. Cobbert
21 received a copy of every piece of discovery
22 material that we got.

23 Q Did you have a chance to review most of the
24 discovery with Mr. Cobbert?

25 A Yes.

1 Q Based on your meetings with Mr. Cobbert and y'all's
2 review of the discovery, did y'all discuss any
3 possible defenses?

4 A To the extent they existed, yes.

5 Q And did he -- had Mr. Cobbert given any statements
6 to the police? Do you recall?

7 A I don't recall. I don't think he had though. Now,
8 I don't know about as far as the Aiken County case.
9 I don't know about that.

10 Q And did you feel you had enough or sufficient time
11 to prepare Mr. Cobbert's case?

12 A I do, I do. In reviewing my notes, it looks like
13 he had always wanted to work out some type of plea
14 arrangement.

15 Q Okay.

16 A He was hoping to get a guarantee that he would not
17 get much, if any time at all, as a result of all of
18 this, but we never could get the prosecution to
19 agree on a cap or a recommendation or anything like
20 that.

21 Q So you did try to engage in plea negotiations with
22 the State?

23 A That's right.

24 Q Did you discuss those negotiations --

25 A That's right.

1 Q -- with Mr. Cobbert. Okay. Did you also
2 discuss -- although he informed you he did want to
3 plead -- did you discuss the pros and cons of a
4 trial versus pleading guilty?

5 A I'm sure that would have been the nature of what we
6 would have discussed, yes.

7 Q Did you feel that a plea was in his best interest?

8 A Yes, because I felt that he would undoubtedly be
9 convicted at a trial. His only chance of receiving
10 some consideration in sentencing would be to plead.

11 Q Did you ever at any point promise him that he
12 wouldn't receive the maximum or he would receive a
13 certain sentence?

14 A Absolutely not.

15 Q And was it Mr. Cobbert's decision alone to plead
16 guilty?

17 A Yes.

18 Q Going back, in your review of the indictments and
19 the elements of the offenses, specifically the
20 reckless homicide and failure to stop for a blue
21 light resulting in death, did you find any double
22 jeopardy issues?

23 A No, no. If you would like me to elaborate, I will.

24 Q Please.

25 A The argument Mr. Cobbert is making in my opinion --

1 and I really haven't brushed up recently on double
2 jeopardy -- is an argument that might have gotten
3 him somewhere in the '80s.

4 Because the Courts had moved away from a
5 strict Blockburger view to sort of looking at an
6 entire transaction. Very closely related offenses
7 may have been, you know, considered multiple
8 punishments for the same offense. It was the
9 conduct rather than the straight Blockburger
10 elements test.

11 However, in the past 20 some-odd years, we
12 have moved back to the Blockburger analysis and
13 certainly that is the analysis the Courts were
14 using at the time that this case went to court.
15 Under a Blockburger analysis, these are clearly
16 separate offenses, and he can be prosecuted for
17 both crimes.

18 Q So Mr. Cobbert was not sentenced twice for the same
19 offense?

20 A Not in my opinion.

21 Q At the guilty plea, you had the opportunity to
22 present mitigation in response to -- or after the
23 victims' statements to the Court? That's correct?

24 A Right.

25 Q And did you and Mr. Cobbert discuss what you would

1 say during mitigation or how that part of the
2 hearing would proceed?

3 A I normally don't discuss every word I am going to
4 say. I have notes here about his background, about
5 his work history, about what it had been like for
6 him at the jail, getting names of family members
7 who might come and stand with him and support him
8 during the plea.

9 Q I believe I touched on this earlier, but one of
10 Mr. Cobbert's claims concerns a firearm charge and
11 that it was falsely brought. However, that charge
12 was later dismissed?

13 A That's right.

14 Q And Mr. Cobbert has also alleged a conflict of
15 interest in his application due to Rob Madsen's
16 move to the Public Defender's Office?

17 A Right.

18 Q How does your office typically handle a situation
19 where a solicitor moves from the Solicitor's Office
20 to the Public Defender's Office?

21 A Well, it doesn't often happen. In this particular
22 case, Mr. Madsen had originally been the solicitor
23 on this case. Then he came over to our office, and
24 it would seem like any complaint would be going
25 from the other way.

1 Mr. Cobbert never really complained to me
2 directly about that, but he complained about it in
3 a letter he wrote to the Supreme Court. As a
4 result, I e-mailed Dayton Riddle and asked for a
5 hearing and to "Let's get this case resolved
6 anyway," because he had been in jail a couple of
7 years.

8 Between Mr. Madsen changing his employment and
9 the next solicitor down the line had been on
10 extended maternity leave, the case had just kind of
11 stagnated.

12 Mr. Cobbert just never raised it again. I
13 think he just seemed to be wanting more attention
14 to get something done with his case rather than
15 making a genuine complaint.

16 Q Upon Mr. Madsen's move to the Public Defender's
17 Office, did he have any involvement in
18 Mr. Cobbert's case?

19 A No, he did not.

20 Q And do you recall Mr. Cobbert asking you to file an
21 appeal on his behalf?

22 A No. If he had I would have.

23 Q Going back to Mr. Cobbert's claim regarding the
24 victim impact statement, did you have an
25 opportunity to view the written statement that was

1 provided to the Court?

2 A Yes, and I believe he testified earlier that we had
3 a chance to read it.

4 Q And did Mr. Cobbert ever ask you during the plea
5 to -- I guess specifically after the victims made
6 their statement to withdraw, that he wanted to
7 withdraw his plea?

8 A No.

9 Q And if he had indicated to you that he did want to
10 withdraw, would you have withdrawn it?

11 A Well, I would have made the motion, but the plea
12 had already been accepted. It would certainly have
13 been difficult to withdraw it at that stage.

14 MS. MAY: I have no further questions.

15 THE COURT: Cross.

16 **CROSS EXAMINATION**

17 BY MR. HALL:

18 Q Ms. Fullwood, you say you don't recall or your
19 notes don't reflect Mr. Cobbert asking you about an
20 appeal?

21 A No, sir. If a client asks me to appeal, even after
22 a guilty plea, I always do because it's just a
23 form. All I have do is mail the form to the Court
24 of Appeals and to Appellate Defense. It's not like
25 it's some sort of burdensome thing for me to do.

1 To protect anybody's rights whenever they ask, I
2 will file an appeal.

3 Q Okay. Now, during the sentencing Judge Keesley --
4 reading from page 17 of the transcript of record,
5 line 9 -- Judge Keesley is saying, "Now, in South
6 Carolina anything that carries a possibility of
7 20 years or more is classified as a no-parole
8 offense.

9 "What a not parole offense is commonly called
10 is truth in sentencing. Truth in sentencing means
11 that you have to serve at least 85 percent of the
12 time day for day before you can be possibly
13 released from prison."

14 Did you discuss that with Mr. Cobbert? That
15 by pleading guilty he might receive that maximum
16 sentence, and that would be a no-parole offense?

17 A Every time I discuss the sentencing possibilities a
18 client is facing, whether it's classified as
19 violent or nonviolent, whether it's a no-parole
20 crime, whether it's a strike, classified as serious
21 or most serious, and whether there are other
22 collateral consequences, like child abuse registry,
23 sex offender registry, I always discuss that, those
24 types of items --

25 Q Elements?

1 A -- yeah, as part of my sentencing discussions with
2 clients.

3 Q So in your mind you feel that he was prepared for
4 that statement from the Court?

5 A Yes, sir. Yes, sir, he was.

6 Q And in your mind the reason the issue of double
7 jeopardy didn't come up is you felt it was a
8 non-meritorious claim?

9 A That's right.

10 (Pause.)

11 MR. HALL: No further questions.

12 THE COURT: Anything else?

13 MS. MAY: Nothing further.

14 THE COURT: Ms. Fullwood, as a defense lawyer,
15 if you had known beforehand that your client was going
16 to get the maximum sentence on a plea, if you had a
17 crystal ball, you wouldn't have allowed him to plead;
18 would you? You would have gone to trial?

19 THE WITNESS: Of course not. There would be
20 nothing to lose at that point.

21 THE COURT: Just for Mr. Cobbert's benefit, it
22 was your professional opinion that the most likely
23 opportunity for him to receive a lower sentence would be
24 to acknowledge his guilt and enter a guilty plea; is
25 that right?

1 THE WITNESS: That's right, and hope that he
2 would get some consideration in sentencing by coming
3 forward, accepting responsibility, and expressing his
4 remorse for his conduct.

5 THE COURT: Anything else from anybody?

6 MR. COBBERT: Yeah, I got some questions.

7 THE COURT: Tell your lawyer.

8 (Pause.)

9 **REXCROSS EXAMINATION**

10 BY MR. HALL:

11 Q Ms. Fullwood, at the request of the applicant, do
12 you feel that -- I mean, you have already stated
13 you didn't feel that there was a double jeopardy
14 issue -- but do you feel that he was prosecuted
15 based on the same set of facts for each sentence?

16 A Well, he was prosecuted for his conduct on that
17 day. My understanding of the law is that the
18 General Assembly can make certain discreet elements
19 of your conduct punishable as separate crimes, and
20 that's what occurred in this case. So, no, I do
21 not think he was -- under the Blockburger test --
22 he was not punished --

23 Q Twice for the same set of facts?

24 A Twice for the same set of facts, that's right.

25 (Pause.)

1 BY MR. HALL:

2 Q Mr. Cobbert is a bit confused. He feels that he
3 was punished twice for the same set of facts.

4 A Well, I think that I have said the reason I did not
5 think he was being subjected to double jeopardy and
6 multiple punishments. He believes the law is
7 different, and he has set forth his position on the
8 record. You know, I could be wrong. It's all on
9 the record, and our appellate courts can review it
10 and let us all know one way or the another.

11 Q Thank you, ma'am.

12 MR. HALL: No further questions.

13 THE COURT: Anything?

14 MS. MAY: No, Your Honor.

15 THE WITNESS: Thank you, Your Honor.

16 (Witness leaves the witness stand.)

17 THE COURT: Anything else from the State?

18 MS. MAY: No, Your Honor.

19 THE COURT: Anything else from the applicant?

20 MR. HALL: No, sir.

21 THE COURT: Well, Mr. Cobbert, clearly you
22 have done -- you have worked hard, done a lot of
23 research, and have put a lot of thought into your
24 position. However, at this time I'm going to deny your
25 application.

1 I find that counsel, Ms. Fullwood, as you
2 probably know, in order to get relief under the Post
3 Conviction Relief Act, you've got to show that the
4 conduct of your lawyer fell below an objective standard
5 of reasonableness and also that there is prejudice.

6 I don't think that Ms. Fullwood's conduct fell
7 below an objective standard of reasonableness. Your
8 argument about the double jeopardy clause is
9 interesting, and obviously you have given it a lot of
10 thought, but I disagree with you.

11 It's the same -- I guess you could say that a
12 similar analogous situation would be somebody who was
13 charged with armed robbery and possession of a weapon
14 during a violent offense.

15 You have to have some kind of weapon to commit
16 the armed robbery. It's the same -- this is very
17 similar to that, analogous as you might say. As
18 Ms. Fullwood has pointed out, I think, the State of the
19 law is that this is not a violation of the double
20 jeopardy clause.

21 But perhaps on appeal an appellate court might
22 disagree with that ruling. I am going to deny your
23 motion for summary judgment and your application, and I
24 hope you are doing well.

25 MR. COBBERT: Is he going to file a 59(e)?

1 THE COURT: You will have to talk to your
2 lawyer about what he is going to do. I will ask the
3 State to prepare an order, and we take it from there.

4 MR. HALL: Thank you, sir.

5 THE COURT: Good luck to you.

6 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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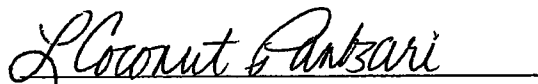
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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official 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 the evidence introduced in the trial of the captioned cause, relative to appeal, in the Civil Court for Lexington County, South Carolina on the 29th day of November, 2011.

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

March 28, 2012



Court Reporter

HONORABLE JUDGE WILLIAM P. KEESLEY TO CONFINEMENT FOR A PERIOD OF TEN (10) YEARS FOR THE RECKLESS HOMICIDE CHARGE, A CONCURRENT PERIOD OF FIVE (5) YEARS ON THE SHOPLIFTING CHARGE, AND A CONSECUTIVE PERIOD OF TWENTY-FIVE (25) YEARS ON THE FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE.

ARGUMENT

THE CONSTITUTIONAL PROHIBITION OF DOUBLE JEOPARDY HAS BEEN HELD TO CONSIST OF THREE SEPARATE GUARANTEES.

- 1) IT PROTECTS AGAINST A SECOND PROSECUTION FOR THE SAME OFFENSE AFTER ACQUITTAL.
- 2) IT PROTECTS AGAINST SECOND PROSECUTION FOR THE SAME OFFENSE AFTER CONVICTION.
- 3) IT PROTECTS AGAINST MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

APPLICANT SUBMITS THAT STATE VIOLATED HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY IN ACCORDANCE WITH THE CONSTITUTIONAL PROHIBITION GUARANTEES TWO AND THREE. APPLICANT CLAIM THAT UNDER THE BLOCKBURGER TEST THE TWO CHARGES WOULD CONSTITUTE THE SAME OFFENSE. AND ALSO CONTENDS THAT STATE ALSO PROSECUTED HIM FOR THE SAME SET OF FACTS.

THE QUESTION IN DEBATE IS WHETHER THE CHARGE OF RECKLESS HOMICIDE REQUIRES ANY PROOF BEYOND THOSE THAT IS NEEDED FOR THE CHARGE OF FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE. BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 52 S. CT. 180, 76 L. ED. 306. UNDER THE BLOCKBURGER TEST COURT WILL SEEK TO RELY ON THE STATUTORY ELEMENTS OF OFFENSE TO DETERMINE WHETHER THE TWO CHARGES WOULD CONSTITUTE THE "SAME OFFENSE". WHEN REVIEWING THE STATUTORY ELEMENTS FOR THE TWO CHARGES COURT SHOULD CONCLUDE THAT, THE CHARGE OF RECKLESS HOMICIDE, IS BY DEFINITION THE SAME AS THE FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE. THE CHARACTERIZATION OF THE STATUTORY ELEMENTS ARE IDENTICAL. WHEN IN DEFINING AN ACT SUCH AS FAILING TO STOP FOR LAW-ENFORCEMENT VEHICLE, YOU ARE SUBSEQUENTLY SAYING THAT THE ACTOR IS OPERATING AN AUTOMOBILE IN AN RECKLESS DISREGARD. BY PROVING SUCH AN ACT, STATE NEED NOT CONVICT OF BOTH OFFENSE BECAUSE THE FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE IS AN RECKLESS HOMICIDE CHARGE INCLUDED WITHIN IT. WHEN PROVING A FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE, STATE WILL ALWAYS BE PROVING AN RECKLESS HOMICIDE CHARGE ALSO. THE ARTFUL PHRASING OF THE ELEMENTS CANNOT FRUSTRATE THE PROTECTION OF THE DOUBLE JEOPARDY CLAUSE WHEN THE PUTATIVELY "DIFFERENT OFFENSES" ARE PROPERLY CHARACTERIZED AS A SINGLE ACT.

AS MUST, THE STATE SHOULD ACCEPT THE IDENTIFICATION OF THE ELEMENTS OF THE OFFENSES INVOLVED HERE. UNDER SOUTH CAROLINA LAW, RECKLESS HOMICIDE INVOLVES, A OPERATION OF AN AUTOMOBILE, IN A RECKLESS DISREGARD FOR THE SAFETY OF OTHERS. ACTIONS APPROXIMATELY CAUSED INJURY TO VICTIM, AND WITHIN ONE YEAR VICTIM DIED AS RESULT OF INJURIES. STATE V. WATSON (S.C. 2002) 349 S.C. 372,563 S.ED.2D 336. THE CHARGE OF FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH REQUIRES THAT THE ACTOR OPERATED A MOTOR VEHICLE, ON A ROAD STREET OF HIGHWAY OF THIS STATE. WAS SIGNALLED TO STOP BY LAW-ENFORCEMENT VEHICLE BY MEANS OF SIREN OR FLASHING LIGHT, AND DID NOT STOP, RESULTING IN A DEATH. STATE V. HOFFMAN (S.C. 1972) 257 S.C. 461,186 S.E.2D 421. WHEN PROVING THE FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE, THE STATE WOULD AGAIN BE PROVING THE RECKLESS HOMICIDE CHARGE. THERE IS NO WAY TO DISTINGUISH THE TWO IN A SINGLE PROCEEDING. THE BLACK LAW DICTIONARY DESCRIBE'S AN RECKLESS DISREGARD AS THE INTENTIONAL COMMISSION OF A HARMFUL ACT OR FAILURE TO DO A REQUIRED ACT WHEN THE ACTOR KNOWS OR HAS REASON TO KNOW THAT THE FACTS WOULD LEAD REASONABLE PERSON TO REALIZE THAT THE ACTOR'S CONDUCT BOTH CREATES AN UNREASONABLE RISK OF HARM TO SOMEONE AND INVOLVES A HIGH DEGREE OF PROBABILITY THAT SUBSTANTIAL HARM WILL RESULT.

DISOBEYING THE POLICE SIREN DOES NOT JUST ENDANGER THE ACTOR AND THE LAW-ENFORCEMENT OFFICERS, IT ALSO ENDANGERS EVERYBODY ON THE ROAD. SUCH AN ACT WOULD BE PARALLEL TO THE BLACKS LAW DESCRIPTION OF AN RECKLESS DISREGARD. RECKLESS HOMICIDE SIGNIFIES AN INDIFFERENCE TO THE CONSEQUENCES OF ONES ACTS; IT DENOTES CONSCIOUS FAILURE TO EXERCISE DUE CARE OR ORDINARY CARE OR CONSCIOUS INDIFFERENCE TO THE RIGHTS AND SAFETY OF OTHERS. STATE V. ROWELL (S.C. 1997) 326 S.C. 313,487 S.E.2d 185, REHEARING DENIED, CERTIORI DENIED 118 S.C.T. 319, 522 U.S. 923,139 L.ED.2d 146.

WHEN REVIEWING THE PARTICULAR FACTS OF THE CASE, IT SHOULD BE UNDISPUTABLE THAT STATE WAS RELYING ON THE RECKLESS ACT NEEDED TO ESTABLISH RECKLESS HOMICIDE, ALSO TO CONVICT OF FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH. NOT ONLY THAT, IT BACKS THE CLAIM UNDER THE BLOCKBUGER TEST, THAT THE HAPPENING WAS ONE CONTINUOUS ACT.

WHEN REVIEWING THE TRANSCRIPT, PG'S 10-12. YOU WOULD NOTICE THAT ON PG.12, LINES 3-12, SOLICITOR WAS ESTABLISHING THE RECKLESS ACT THAT WAS NEEDED FOR THE CONVICTION FOR RECKLESS HOMICIDE. THE PROBLEM DOES NOT INVOLVE THE RECKLESS HOMICIDE CONVICTION, BUT ON THE FACT THAT, STATE WOULD NOT BE ABLE TO

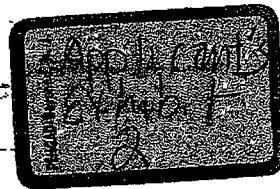
CONVICT OF FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH WITHOUT AGAIN SUBJECTING THE APPLICANT TO ANSWER FOR THE RECKLESS ACT TWICE. THIS IS ONE CONTINUOUS ACT, BUT STATE, BY CHARGING APPLICANT WITH RECKLESS HOMICIDE, SEPARATED THE ACT AND MADE IT CONSIST OF TWO DIFFERENT CHARGES. HOWEVER THE TWO CHARGES THAT THE APPLICANT WAS SUPPOSE TO RECEIVE WAS, RECKLESS HOMICIDE AND FAILURE TO STOP FOR BLUE LIGHTS. BUT BY CHARGING THE APPLICANT WITH FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH, STATE WAS SAYING THAT THE HAPPENING WAS ONE CONTINUOUS ACT. WHICH WOULD BE IN CONFLICT WITH THE RECKLESS HOMICIDE CHARGE. UPON THIS DISCOVERY, THE APPLICANT WAS BEING PUNISHED FOR THE RECKLESS ACT NEEDED TO ESTABLISH THE RECKLESS HOMICIDE THEN AGAIN BEING PUNISHED FOR IT IN THE FAILURE TO STOP FOR BLUE LIGHTS RESULTING IN DEATH CHARGE. STATE SOUGHT TO ESTABLISH AN ESSENTIAL ELEMENT OF THE SECOND CHARGE (FAILURE TO STOP FOR BLUE LIGHTS RESULT IN DEATH) BY USING THE CONDUCT INWHICH THE APPLICANT WAS CONVICTED FOR IN THE FIRST CHARGE (RECKLESS HOMICIDE).

CONCLUSION

AS A MATTER OF LAW FOR DOUBLE JEOPARDY PURPOSES, UNDER THE BLOCKBURGER TEST, THE TWO CHARGES WOULD CONSTITUTE THE SAME OFFENSE. AND UNDER THE PARTICULAR SET OF FACTS, SECOND CHARGE

WOULD BE BARRED BECAUSE STATE SOUGHT TO ESTABLISH AN ESSENTIAL
ELEMENT OF THE SECOND CHARGE BY USING THE RECKLESS ACT THE
APPLICANT WAS ALREADY CONVICTED FOR IN THE FIRST CONVICTION.
IF IT PLEASES THE COURT, THE APPLICANT WOULD LIKE FOR THE COURT
TO REVIEW THE FINDINGS, AND MAKE AN CLEAR DETERMINATION REGARDING
THE ISSUE.

Before I get started, I would like to request to the court that, This Court take judicial notice to the issue's alleged within my application. Also, I would like ^{for} the record to reflect and for this court to address all issue's alleged today. I also want the record to reflect that I request counsel to review the order (as according to the Supreme Court of this state) That counsel has an duty to review the ~~order~~ order and File a 59(E) S.C. Code § 17-27-80 (200 IP counsel fail in this matter, It would deny me procedural due process and my full bite at the applic. This failure would also prejudice me my substantial right to exhaust ^{all} my remedies.



1) My first allegation being brought before the court today is under ineffective assistance of counsel. My plea was involuntarily, and if it wasn't for counsel advice I would have pleaded guilty. But insisted on going to trial. My lawyer never informed me that the charges Backless homicide and failure to stop for blue lights resulting in death. Where infer in conflict with each other to the more possibility of Double jeopardy. Under Mrs. Fullwoods presumption I pleaded to two charges that would violate my rights to be free from double jeopardy. Which violate's the U.S. Constitutional Amendment 5 (Federal) and 14th amendment (State) And based on her ~~ineffectiveness~~ ^{ineffectiveness}, it prejudiced me to the consuercc's of consecutive sentence's.

2) ^{to the court} § The first think I would like to state is the U.S constitutional prohibition for double Jeopardy.

§ Its says, The constitutional prohibition of Double Jeopardy has been held to consist of three separate guarantces.)

① It protects against a second prosecution for the same offense after acquittal

② It protects against second prosecution for the same offense after conviction

③ And it protects against multiple punishments for the same offense

3) As applied to me, I would like for the court to look at the second and third constitutional prohibition of double Jeopardy guarantees.

4) And I would like for the court to apply both guarantees to the blockburger test ^{declining with} the two charges. And also apply both guarantees to according to the proof of facts that was used to sustain conviction for ~~the two~~ charges.

1) For the above matter, I contend that stated violates my right to be free from double jeopardy in accordance with the blockburger Test. I submit to the court that the two charges would by Definition constitute the same offense. The Characterization of the statutory elements are the same And the Actful Phases of the elements cannot frustrate the protection of the double jeopardy clause when the putatively "Different Offenses" Are PROPERLY CHARACTERIZED as an single act.

2) I also contend that state violated my right to be free from double jeopardy by prosecuting me for the same set of facts. I submit that state relied on and used the reckless act that was used to ~~establish~~ convict of reckless homicide also to establish failure to stop for blue lights resulting in death

MAKE

Exhibits - Case And brief

Now supporting my issue, I base my foundation on supreme court ruling in Illinois v. Vitale

And as applied in this case, I would first like to dispute the blockburger test. In the blockburger test we would be comparing the statutory element to see if whether the offense 'Backless homicide' is the "same offense" for double jeopardy purposes as the failure to stop for blue lights resulting in death charge. This critical answer depends on whether each statute in question requires a proof of a fact which the other does not. The dispute in distinguishing the statutory elements for blockburger purposes, is that the test focuses on the proof necessary to prove the statutory elements of each offense rather than the actual evidence.

As must, the state should accept the identification of the elements of the offense's involved here. Under South Carolina law, Reckless homicide involves, an operation of an automobile, in a reckless disregard for the safety of others, Actions approximated cause injury to victim, and within one year victim died as of result of injuries. State v. Watson

The charge of failure to stop for blue lights resulting in death, requires that the defendant operated a motor vehicle, on a road street or highway of this state, was signaled to stop by law-enforcement vehicle by means of siren and flashing light, and did not stop. Supplement (C) (2) where death results. State v. Hoffman

1) I submit that even though the two charge's provided different degrees. The Characterization of the elements are the same, failing to stop an motor vehicle when being signaled by law enforcement is operating an automobile in a reckless disregard failing to stop for blue lights is recklessness in it self. When proving that I was failing to render aid to police siren state was also proving that I ~~was~~ failed to exercise due care or ordinary care or conscious indifference to the right and safety of others. State v. Rowell, which in all would be defining an reckless Act.

The black law dictionary describes an reckless disregard as the intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know or has reason to know that the facts would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result.

This is an common sense theory, this issue should not frustrate the double jeopardy clause. Reckless homicide is the same as failure to stop for blue lights resulting in death. Failure to stop for blue lights resulting in death is a reckless homicide charge included within it. Harris v. Oklahoma. There is no way of distinguishing the two in a single proceeding because when proving that I failed to stop for law-enforcement state was also proving that I was ~~reckless~~ operating an automobile in a reckless disregard. This act characterizes one offense. One continuous act. I submit that failure to stop for blue lights resulting in death will always prove a reckless homicide. When saying that somebody is running from the police you are automatically saying that the person is reckless.

Finally, Accord to the blockburger test I submit that the two charge's would constitute the same offense and the latter should be barred.

(2)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS)
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT)

ORIGINAL

2009-CP-32-0127

James C. Cobbert, III, #293798,
Applicant.

ORDER OF DISMISSAL

v.

State of South Carolina,
Respondent.

FILED
2012
JAN 21

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 9, 2009. Respondent made its Return on December 11, 2009. An evidentiary hearing into the matter was convened on November 29, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Ronald Hall, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Elizabeth Fullwood, Esquire (Ms. Fullwood) Applicant's plea counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the May 2006 term of the Lexington County Grand Jury for Failure to Stop for Law Enforcement Vehicle, Blue Light Resulting in Death (2006-GS-32-1447), and Reckless Homicide

~~(2006-GS-32-1445) Applicant thereafter waived presentment on an Aiken Shoplifting charge~~

(2008-GS-02-1678), and also waived jurisdiction. He was represented by Elizabeth Fullwood, Esquire, and Wallis Alves, Esquire. On October 16, 2008, the Applicant pled guilty as charged. He was sentenced by the Honorable William P. Keesley to confinement for a period of ten (10) years for the reckless homicide charge, a concurrent period of five (5) years on the shoplifting charge, and a consecutive period of twenty-five (25) years on the failure to stop for a blue light resulting in death charge. The Applicant did not appeal his guilty plea or sentence.

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

1. Involuntary Guilty Plea
 - a. "Plea was entered under false pretense."
2. Double Jeopardy
 - a. "Sentenced twice for same offense (crime)"
3. Cruel and Unusual Punishment
 - a. "Harsh lengthy sentence which is uncommon for crime"

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On September 2, 2011, Applicant filed an Amendment to his Application which included the following claims:

4. Ineffective Assistance of Counsel
 - a. Failure to ensure court adhered to §16-3-1550(f) and allowed response to victim's statement
 - b. Failure to file appeal
 - c. Failure to object to sentence based on double jeopardy;
 - d. Failure to object to solicitor's comment of a firearm charge
5. Conflict of Interest
 - a. Solicitor Rob Madsen transferred to the public defender's office where Applicant's attorney was currently working on Applicant's case.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR**EVIDENTIARY HEARING****Applicant's Testimony**

At the PCR hearing Applicant testified that he waived his right to a jury trial and pled guilty because Applicant was looking for a lesser sentence. Applicant testified that plea counsel informed Applicant that he would receive a lesser sentence if Applicant pled guilty instead of proceeding to trial. Applicant testified that he was not aware that the victims would be present during his guilty plea; that plea counsel never discussed double jeopardy with Applicant; and that plea counsel informed Applicant about a Brady motion one time. Applicant testified that plea counsel did not undertake any discovery; that Applicant's responses to the plea judge were based on plea counsel's advice; and that after Applicant's plea hearing someone asked plea counsel to file an appeal for Applicant. Applicant testified that he wrote a letter to the clerk of court inquiring about his appeal; that Applicant met with plea counsel three to four times prior to the plea; and that plea counsel explained to Applicant what he was charged with.

Applicant testified that plea counsel informed Applicant that in order to receive a good plea that Applicant needed to plea in front of a good judge. Applicant testified that it was his understanding that the solicitor would make no recommendation or oppose the sentence. Applicant testified that the solicitor provided the facts of the case to the plea judge and then provided the victim impact statement for Applicant to review. Applicant testified that the victims requested that Applicant receive the maximum sentence at the plea hearing. Applicant testified that he was not prepared to properly respond after the victims provided statements to the plea court. Applicant

~~testified that had he known the victims were going to testify at his guilty plea he would have~~
proceeded to trial instead. Applicant testified that his guilty plea and sentence resulted in a doubt jeopardy issue. Applicant testified that the plea judge sentenced Applicant to ten years for the 'reckless act;' that the incident was one continuous act; and that Applicant is being punished for reckless homicide twice. Applicant testified that the charges he pled to qualify as the same offense under the Blockburger test and that the state used artful phrasing of the evidence. Applicant offered into evidence a Motion for Summary Judgment as well a prepared memorandum of his arguments as exhibits.

Applicant testified that the solicitor did not make a recommendation at his guilty plea hearing but that the victims made a recommendation by asking the plea judge to sentence Applicant to the maximum. Applicant testified that he would admit prior to the victim's impact statement the plea judge determined that Applicant's guilty plea was entered voluntarily. Applicant testified that he asked plea counsel to withdraw his plea after hearing the victim impact statement.

Ms. Fullwood's Testimony

At the PCR hearing plea counsel testified that she has been practicing law since 1979 and that ninety percent of her practice is in criminal law. Counsel testified that she was appointed to represent the Applicant and that her notes reflected she met with Applicant six times prior to Applicant's plea. Counsel testified that she discussed Applicant's version of the facts. Counsel testified that she hired an engineer, Mr. Woody Poplin, to review Applicant's case including the MAIT report and whether the vehicle was stationary. Counsel testified that Mr. Poplin was able to rule out that the vehicle was stationary. Counsel testified that she informed Applicant of Mr. Poplin's review and findings of Applicant's case. Counsel testified that she filed Rule 2 and Brady motions and received the state's

discovery which included but was not limited to the MAIT report, photographs, statements, and copies of the collision report form.

Counsel testified that she and Applicant discussed possible defenses to the extent that they existed and that Applicant always wanted to enter a plea rather than proceed to trial. Counsel testified that she and the Applicant discussed the pros and cons of pleading guilty versus proceeding to trial, and that counsel never promised Applicant a specific sentence. Counsel testified that in her review of the Applicant's indictments and the elements of the offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. Counsel testified that the Applicant was given the opportunity to present mitigation in response to the victim's statement to the plea court and that counsel discussed mitigation with Applicant.

Counsel testified that with regard to the firearm charge, the charge was dismissed as a part of the plea deal and that Applicant did not enter a plea to the firearm charge. Counsel testified that in regards to Applicant's claim that a conflict of interest existed due to Mr. Rob Madsen's move from the solicitor's office to the public defender's office, that Mr. Madsen was the original solicitor handling Applicant's case but that Mr. Madsen did not have any involvement in Applicant's case upon his move to the public defender's office. Counsel testified that Applicant did not ask her to file an appeal and that if Applicant had requested that counsel file an appeal, counsel would have filed an appeal. Counsel testified that she and Applicant were able to view the victim impact statement at the plea hearing and that Applicant never asked counsel to withdraw his plea upon viewing the victim



impact statement. Counsel testified that if Applicant indicated that he wanted to withdraw his plea then counsel would have moved for the plea to be withdrawn. Counsel testified that if she had known the plea judge was going to sentence Applicant to the maximum then they would have proceeded to trial instead. Counsel testified that she felt it was best for Applicant to enter a plea and accept responsibility in order to try to get the lowest sentence as possible.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 289 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed 2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 100 S.Ct. at 117-18, 586 S.E.2d at 62. With respect to guilty plea counsel, the Applicant must show the 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).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, 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, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Involuntary Guilty Plea

Applicant asserts that his guilty plea was involuntary because he entered into the plea under false pretenses. This Court finds that this allegation is without merit. At the plea hearing counsel indicated to the plea judge that she fully explained to Applicant the nature and elements of the offenses, the possible punishments, and his constitutional rights (Tr p 6, line 21 – p. 7, line 2). The plea judge asked Applicant if Applicant understood and knew about his right to a jury trial, and Applicant indicated that he did not want a jury trial (Tr p 8-9). Applicant informed the plea judge

that he had not been threatened or coerced into pleading guilty by anyone. (Tr. p. 14, lines 6-9).

Applicant indicated to the plea judge that he understood the possible penalties of the charges to which he was pleading guilty (Tr. p. 17-18). Additionally, Applicant indicated to the plea judge that he was satisfied with counsel's representation and that counsel had done everything Applicant asked. (Tr. p. 15, lines 9-15). Applicant told the plea judge that he wanted to plead guilty to reckless homicide and failure to stop for a blue light resulting in death because Applicant was guilty of the two charges (Tr. p. 5-6; p. 14, line 3-5). Applicant informed the plea judge that he was pleading guilty of his own free will and accord. (Tr. p. 9, line 2-4). This Court finds the overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykitt v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that this allegation is denied and dismissed.

2. Ineffective Assistance of Counsel

a. Failure to Ensure Court Adhered to §16-3-1550(f)

Applicant asserts that plea counsel was ineffective for failing to ensure that the plea court adhered to S.C. Code Ann. §16-3-1550(f) and allow Applicant to make a response to the victim's statement. Section 16-3-1550(f) requires that "[w]ithin a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement." Applicant, by his own testimony admitted that he and plea counsel were provided the victim impact statement to review prior to being sentenced by the plea judge. Plea counsel testified and the record reflects that plea counsel was given the opportunity allow the victim's statements to the court to

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present mitigation, which plea counsel did present. (Tr. p. 22-26). Additionally, Applicant addressed the plea court presenting his own mitigation (Tr. p. 30-32). The Court finds and the record clearly demonstrates that Applicant and plea counsel were given the opportunity to respond to the victim's statement and did so in person. Applicant has failed to show that counsel's performance was deficient and any resulting prejudice.

Applicant further claims that had he known what the victim's statement was going to be or that the victims were going to request that Applicant be sentenced to the maximum that Applicant would not have pled and proceeded to trial. This Court finds plea counsel's testimony credible. This Court does not find Applicant's testimony credible. Plea counsel testified that she and Applicant discussed presenting mitigation and that she did not promise a certain sentence to Applicant. There were no recommendations made by the solicitor at the Applicant's plea and the victims are entitled to speak at a guilty plea. This Court finds that Applicant was fully aware of the potential sentence he could receive and was not misadvised by plea counsel. Plea Counsel testified that if Applicant had requested that she withdraw his plea upon hearing the victim impact statement she would have done so. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore these allegations are denied and dismissed.

b. Failure to File Appeal

This Court finds that Applicant's claim that plea counsel was ineffective for failing to file an appeal is without merit. Applicant testified that after his plea hearing someone asked plea counsel to file an appeal for Applicant. Applicant did not state whether he requested counsel to file an appeal; however, plea counsel testified that Applicant did not request her to file an appeal. Counsel further explained that she would have filed an appeal if Applicant requested her to do so. When the question

is whether counsel was ineffective in failing to file a direct appeal from the conviction and sentence, the United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Reed v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). The plea transcript reflects that Applicant was informed of his right to appeal by the plea court. (Tr. p.35-36). This Court finds that counsel's testimony that Applicant did not express interest in an appeal to be credible. Under these circumstances, counsel's failure to file an appeal was not unreasonable. Applicant has failed to show any resulting prejudice. This Court finds that counsel was not ineffective in failing to an appeal, therefore, this allegation is denied and dismissed.

c. Failure to Object to Sentence Based on Double Jeopardy

Applicant asserts that plea counsel was ineffective for failing to object to Applicant's sentence because Applicant's plea to Reckless Homicide and Failure to Stop for a Blue Light resulted in Double Jeopardy. This Court finds that this allegation is without merit. Counsel testified that in her review of the Applicant's indictments and the elements of offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. This Court agrees with plea counsel. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 358 S.Ct. 136, 519 S.Ct. 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under



the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), Stevenson v. State, 33 S.C. 195, 316 S.E.2d 434 (1979). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two distinct offenses. State v. Mead, 327 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996). This Court has reviewed the entire record and does not find that Applicant's plea to the charges placed Applicant in double jeopardy. This Court finds Applicant has failed to show plea counsel's performance was deficient or any resulting prejudice; therefore counsel was not ineffective for failing to object to Applicant's sentence based on double jeopardy. This Court finds that this allegation is denied and dismissed.

d. Failure to Object to Solicitor's comment of a Firearm Charge

Applicant asserts that plea counsel was ineffective for failing to object to the solicitor's ~~comment concerning a firearm charge that was falsely brought against the Applicant. This Court~~ finds that Applicant has failed to meet his burden of proof. The solicitor informed the plea court that the state was dismissing some related charges in Lexington County as a result of Applicant's plea and that one of the dismissed charges was unlawful possession of a pistol. Counsel testified that with regard to the firearm charge, the charge was dismissed as a part of the plea deal and that Applicant did not enter a plea to the firearm charge. The record reflects Applicant did not enter a plea to any firearm charge and that the firearm charge was in fact dismissed. Applicant has failed to provide what objection to the solicitor's information regarding the charges being dismissed plea counsel failed to make. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

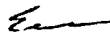


3. Conflict of Interest

Applicant asserts that a conflict of interest existed when solicitor Pab Madsen transferred to the public defender's office where plea counsel was currently working on Applicant's case, when Mr. Madsen was the original officer in Applicant's case. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id.; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). Plea counsel testified that Mr. Madsen did not have any involvement in Applicant's case upon his move to the public defender's office. This Court finds that counsel's testimony regarding Mr. Madsen to be credible. Applicant has failed to demonstrate that an actual conflict of interest adversely affected plea counsel's performance. This Court finds that Applicant has failed to meet his burden of proof, therefore, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Jarasik v. Fairway Oaks Villas Horizontal Property Regime, 107 S.C. 359, 413 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intention of relinquishment of a right is reasonably inferable." Lyles v. BMI,



~~Inc., 292 S.C. 153, 158-59, 355 S.E.2d 287 (S.C. App. 1987). The Applicant's failure to address these~~

issue at the hearing indicates a lack of due and intentional relinquishment of his right to do so.

Therefore, any and all remaining allegations are denied and dismissed.

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Fellwood

WITNESSES

SCMP
hallman

DOCKET NO. 2006-GS-32-1445

The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

May TERM 2006

THE STATE
vs.
James C Cobbert

A-2006-32-00559

4/13/2006 10.27 AM

ARREST WARRANT NUMBER

K083291

TRUE BILL

ACTION OF GRAND JURY

Ardene M. Addy

Foreperson of Grand Jury

Date:

5-15-06

VERDICT

CDR# 0135

Indictment for
Reckless Homicide ✓

§56-5-2910

DONALD V. MYERS, SOLICITOR

Foreperson of Petit Jury

Date:

*05 10 years
as charged
w/10 recommendation
or
negotiation*

A TRUE COPY
[Signature]
Lex. Co. C.C.C.P. G.S. & F.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

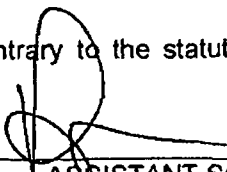
INDICTMENT FOR
Reckless Homicide

§56-5-2910

At a Court of General Sessions, convened on May, 2006, the Grand Jurors of Lexington County present upon their oath:

That James C Cobbert did in Lexington County on or about February 16, 2006, drive a motor vehicle in reckless disregard of the safety of others, proximately causing the death of Michael A Wilson, in violation of § 56-5-2910, 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.



ASSISTANT SOLICITOR

Beth Fullwood

WITNESSES

SCHP
hallman

DOCKET NO. 2006-GS-32-1447

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

May TERM 2006

THE STATE

vs.

James C Cobbert

A-2006-32-00559

4/13/2006 10:12 AM

ARREST WARRANT NUMBER

K083295

TRUE BILL

ACTION OF GRAND JURY

Charles M. Addy

Foreperson of Grand Jury

Date:

5-15-06

VERDICT

Foreperson of Petit Jury

Date:

CDR# 2398

Indictment for

Failure to Stop for Law Enforcement Vehicle,
Blue Light resulting in Death ✓

§56-5-750(C)(2)

DONALD V. MYERS, SOLICITOR

0+ 20 years
- as charged
- no parole
- w/o recommendation
on
Negotiations

LEX. CO. D.C.C.P. G.S. & E.C.

A TRUE COPY

STATE OF SOUTH CAROLINA)	INDICTMENT FOR
)	Failure to Stop for Law Enforcement Vehicle, Blue Light
COUNTY OF LEXINGTON)	resulting in Death
		§56-5-750(C)(2)

At a Court of General Sessions, convened on May, 2006, the Grand Jurors of Lexington County present upon their oath:

That James C Cobbert did in Lexington County on or about February 16, 2006, willfully, knowingly and unlawfully failed to stop a motor vehicle, while driving said motor vehicle on a road, street or highway of this State when Deputy Fox, a law enforcement officer with the Aiken County Sheriffs Department and/or Officer Crider, a law enforcement officer with the Pelion Police Department, signaled and sounded their sirens and/or turned on their flashing blue lights, and when driving he did perform an act forbidden by law or neglected a duty imposed by law in the driving of the vehicle that resulted to the death of Michael A Wilson, In violation of § 56-5-750 (C) (2), 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.


 ASSISTANT SOLICITOR