

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

R. Markley Dennis, Jr., Circuit Court Judge

RECEIVED

JAN 10 2014

S.C. Supreme Court

DARREN A. SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

A P P E N D I X

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1 MR. SAVAGE: One of the defendants has
2 already pled guilty, Jessica Kelly. That was done in
3 front of Judge Jefferson. I did talk to her about 1:15
4 today, and she had no problem relinquishing jurisdiction
5 to you to finish up the plea.

6 THE COURT: Let's see what we got. All
7 right. Ms. Kelly, you are here today, you are charged
8 with burglary second, violent, zero to fifteen years.
9 You want to plead guilty to that?

10 DEFENDANT KELLY: Yes, sir.

11 THE COURT: You already have pled guilty.

12 MR. SAVAGE: We held off on sentencing.

13 THE COURT: Judge Jefferson took your plea,
14 so we're just going to sentence you today. All right.
15 Lamar Jones?

16 DEFENDANT JONES: Yes, sir.

17 THE COURT: All right. Mr. Jones, you got
18 charged with burglary second, violent, zero to fifteen
19 years, and possession of tools of crime, zero to five
20 years. You want to plead guilty to those charges?

21 DEFENDANT JONES: Yes, sir.

22 THE COURT: All right. Now, the burg
23 second -- is he pleading nonviolent or violent?

24 MR. SAVAGE: Violent, Your Honor. They're
25 all pleading to violent.

1 THE COURT: It says nonviolent on the
2 sentencing sheet, but then you got violent marked
3 underneath it. Is it violent?

4 MR. SAVAGE: Yes, all three.

5 THE COURT: And that is a strike?

6 MR. SAVAGE: Yes, Your Honor. I believe
7 Darren Simmons should be up there as well.

8 THE COURT: That's what it says on there. It
9 was just that you had nonviolent on there. You
10 understand that burglary second is -- you're pleading to
11 burg second violent?

12 DEFENDANT JONES: Yes, sir.

13 THE COURT: You still get up to 15 years
14 violent, versus nonviolent affects your parole
15 eligibility. Strike offense means if you get enough
16 strikes, you go to jail for the rest of your life without
17 the possibility of parole. Did you talk about that with
18 your lawyer?

19 DEFENDANT JONES: Yes, sir.

20 THE COURT: So you understand after pleading
21 guilty to this today you'll have a strike against, and if
22 you ever get two more strikes, you'll go to jail for the
23 rest of your life without the possibility of ever getting
24 out?

25 DEFENDANT JONES: Yes, sir.

1 THE COURT: And you still want to plead
2 guilty?

3 DEFENDANT JONES: Yes, sir.

4 THE COURT: All right. Now, Darren Simmons,
5 you're charged also with burglary second, violent.
6 Again, this says nonviolent on the sentencing sheet. Is
7 it going to be violent?

8 MR. SAVAGE: It's violent, Your Honor. I
9 apologize.

10 THE COURT: That is also a strike offense,
11 and the violent means you have to serve a little bit
12 longer before you're eligible for parole. You want to
13 plead guilty to burglary second violent?

14 DEFENDANT SIMMONS: Yes, sir.

15 THE COURT: You're also charged with
16 possession of tools of a crime, zero to five years. You
17 want to plead guilty to that?

18 DEFENDANT SIMMONS: Yes, sir.

19 THE COURT: And you also got charged with
20 possession of a weapon, zero to one year. You want to
21 plead guilty to that?

22 DEFENDANT SIMMONS: Yes, sir.

23 THE COURT: All right. Now, Mr. Simmons and
24 Mr. Jones, I'm going to ask you some questions. Judge
25 Jefferson already went over this with Ms. Kelly, so I

1 don't need to ask her these questions. All right.

2 Now, Mr. Jones and Mr. Simmons, you have the
3 right to a jury trial. You waive your right to a jury
4 trial when you plead guilty. If you want a trial, you
5 stop me. We'll arrange that for you. The state then has
6 to present enough evidence to convince 12 jurors that
7 you're guilty beyond a reasonable doubt. All 12 would
8 have to agree you're guilty in order to convict you, and,
9 if convicted, you have the right to appeal.

10 You can challenge the state's evidence, put
11 up evidence of your own, testify, if you want, and if you
12 don't want to testify, the judge will tell you they're
13 not to hold that against you while they're deliberating.

14 Do you understand that, Mr. Jones?

15 DEFENDANT JONES: Yes, sir.

16 THE COURT: Do you understand that, Mr.
17 Simmons?

18 DEFENDANT SIMMONS: Yes, sir.

19 THE COURT: Understanding that, you want to
20 waive those rights, Mr. Jones?

21 DEFENDANT JONES: Yes, sir.

22 THE COURT: And you want to waive those
23 rights, Mr. Simmons?

24 DEFENDANT SIMMONS: Yes, sir.

25 THE COURT: All right. Mr. Jones, are you

1 pleading guilty because you're guilty?

2 DEFENDANT JONES: Yes, sir.

3 THE COURT: How about you, Mr. Simmons? Are
4 you pleading guilty because you're guilty?

5 DEFENDANT SIMMONS: Yes, sir.

6 THE COURT: Are you under the influence of
7 drugs or alcohol today, Mr. Jones?

8 DEFENDANT JONES: No, sir.

9 THE COURT: How about you, Mr. Simmons?

10 DEFENDANT SIMMONS: No, sir.

11 THE COURT: Mr. Jones, you're standing next
12 to your lawyer. Are you satisfied with his
13 representation?

14 DEFENDANT JONES: Yes, sir.

15 THE COURT: Do you need to spend any more
16 time with him?

17 DEFENDANT JONES: No, sir.

18 THE COURT: All right. Mr. Simmons, how
19 about you? Are you under the influence of drugs or
20 alcohol?

21 DEFENDANT SIMMONS: No, sir.

22 THE COURT: Are you satisfied with your
23 lawyer?

24 DEFENDANT SIMMONS: Yes, sir.

25 THE COURT: Do you need to spend any more

1 time with her?

2 DEFENDANT SIMMONS: No, sir.

3 THE COURT: Has anyone promised you anything
4 or threatened you in any way to get you to plead guilty,
5 Mr. Jones?

6 DEFENDANT JONES: No, sir.

7 THE COURT: How about you, Mr. Simmons?

8 DEFENDANT SIMMONS: No, sir.

9 THE COURT: Mr. Jones, how old are you?

10 DEFENDANT JONES: I'm 19 years old, sir.

11 THE COURT: How far did you get in school?

12 DEFENDANT JONES: Tenth grade, sir.

13 THE COURT: Do you have a job before you got
14 arrested?

15 DEFENDANT JONES: No, sir. I was at the
16 vocational rehab trying to find a job and trying to
17 accomplish my GED.

18 THE COURT: Are you married?

19 DEFENDANT JONES: No, sir.

20 THE COURT: Children?

21 DEFENDANT JONES: No, sir.

22 THE COURT: Mr. Simmons, how old are you?

23 DEFENDANT SIMMONS: Twenty-five.

24 THE COURT: How far did you get in school?

25 DEFENDANT SIMMONS: I'm in college right now.

1 THE COURT: Where at?

2 DEFENDANT SIMMONS: ECPI.

3 THE COURT: Do you have a job?

4 DEFENDANT SIMMONS: Yes, sir.

5 THE COURT: What do you do?

6 DEFENDANT SIMMONS: I work as a crew member
7 at Taco Bell.

8 THE COURT: Are you married?

9 DEFENDANT SIMMONS: No, sir.

10 THE COURT: Do you have children?

11 DEFENDANT SIMMONS: Yes, sir.

12 THE COURT: All right. Mr. Lewis, does
13 Mr. Jones understand what he's doing waiving his right to
14 a jury trial and pleading guilty today?

15 MR. LEWIS: Yes, Your Honor.

16 THE COURT: Do you agree with his decision?

17 MR. LEWIS: Yes, Your Honor.

18 THE COURT: Ms. Mullaney, does Mr. Simmons
19 understand what he's doing waiving his right to a jury
20 trial and pleading guilty?

21 MS. MULLANEY: Yes, sir.

22 THE COURT: Do you go along with that
23 decision?

24 MS. MULLANEY: Yes.

25 THE COURT: I find the plea is freely,

1 voluntarily and intelligently made. What would the state
2 like to tell me?

3 MR. SAVAGE: Thank you, Your Honor. May it
4 please the Court: This incident occurred back on
5 December 15, 2009 at Savannah Highway in Charleston
6 County. That location is the store of the Carolina Rod
7 and Gun store. At about 4 a.m., there are actually four
8 defendants in a vehicle. The driver of the vehicle was a
9 juvenile. That's why he is not here today.

10 They decided to come down to the area to rob
11 this specific store to get guns. They came down here.
12 They parked. They drove to the back of the store.
13 Jessica Kelly and Lamar Jones got out of the vehicle, had
14 bolt cutters. They started breaking the locks off a
15 container at the back of the store. The other two
16 defendants, the juvenile and Darren Simmons, they then
17 went back in the vehicle out onto Savannah Highway and
18 parked the vehicle there.

19 The reason why the vehicle was parked there
20 is because the juvenile was to act as a lookout if the
21 police came. He had a walkie-talkie in the vehicle and
22 Darren Simmons also had a walkie-talkie on his person.
23 Darren Simmons then left that vehicle, came over to the
24 back of the store. He broke into the other container as
25 mentioned by one of the codefendants in a recorded.

1 statement.

2 While breaking into the containers out in the
3 back, they got into two of them. As they were doing
4 that, the police -- it set off the alarm to the store.
5 The police arrived. As they saw the vehicle's lights
6 coming back there, they all took off and fled. What we
7 believe happened was that the juvenile in the car fall
8 asleep and didn't see them and didn't warn them that he
9 was coming.

10 All three of them took off and ran that
11 night. They were able to catch all four of them that
12 night, including the juvenile in the vehicle. Two of
13 them gave audio recorded statements, that was Darren
14 Simmons and Ms. Kelly, Jessica Kelly. Lamar Jones did
15 not.

16 In that recorded statement -- let me talk
17 about what the police found first. In the vehicle with
18 the juvenile they found a pistol and a 12 gauge shotgun.
19 At the scene at the back of the gun store, they found ski
20 masks, bolt cutters, a machete. The defendant James
21 Darren Simmons also had a pocket knife in his pocket.
22 The walkie-talkie was also back there, and so when they
23 started talking to them back at the police station,
24 Darren Simmons admitted that the guns were his, that he
25 bought the guns there to go get more guns. The whole

1 plan was to get guns. Jessica Kelly also admitted they
2 were going to break into that store to get guns, and that
3 is basically the nuts and bolts of the case.

4 Our concern about this one is that I've had
5 countless pleas in front of older judges in this circuit.
6 We got a gun case, a lot of times a judge asks where did
7 you get the guns from, and the standard response is, Off
8 the street.

9 Today you get an answer to that. I'm very
10 concerned about this case in the sense they're not break
11 in and steal a TV, an X box, throw a trash can through
12 the front. They go in and they get guns to put guns back
13 out on the street. They turned up with firearms, a
14 number of firearms, a machete, and a ski mask.

15 The victim, store owner, is present in the
16 courtroom today and would like to speak at the
17 appropriate time. If he turned up, I don't know what
18 would have happened, but luckily he wasn't the first one
19 to show up, the police were. Because of what they came
20 with and what they were trying to do, the state wants
21 active time on each of these defendants.

22 Having said that, I will say that Jessica
23 Kelly pled. She did agree to go forward as a testifying
24 witness, if need be, at trial against the other two.
25 Lamar Jones said he was going to. Then we got to the

1 plea and he didn't.

2 After the plea, later on that day, his
3 defense attorney approached me and told me he would
4 plead. I never spoke to him. We never got in further
5 negotiations because we ended up working it out, but that
6 is kind of how it stands. And, again, just the victim,
7 or store owner is here.

8 THE WITNESS: My name is Neil Stack. I am
9 the owner proprietor of Carolina Rod and Gun. I just
10 wanted to speak to the seriousness of this crime. I have
11 operated Carolina Rod and Gun for 31 years, and I have
12 had many attempted break-ins, some have been successful.
13 One thing that struck me as very serious was this was the
14 first occasion where any of the defendants have ever some
15 so heavily armed.

16 It struck me as what if police had intervened
17 during the event of the crime or perhaps while I was
18 there? The juvenile observed me for about 30 minutes
19 after the crime. He was about 200 yards away in a
20 vehicle, and frankly I thought it was a policeman working
21 on paperwork, so due to some good detective work, the
22 lieutenant went down, grabbed this guy. I went up to him
23 afterward. He had a sawed-off shotgun. They had a stun
24 gun. That is not the sort of thing you usually take to a
25 break-in, so, again, when guns end up the on the street,

1 they're either stolen from people's houses. They don't
2 come in and buy them from a shop. They can't stand the
3 scrutiny of the federal background check. This is how
4 guns get on the street.

5 About six months ago, I'll try to be brief,
6 Mayor Reilly and Chief Mullen and also Solicitor Wilson
7 spoke out about getting serious about gun crime, and I'm
8 here to plead with the Court to take this serious. This
9 is what you read in the paper. These are where the guns
10 come from. This is what causes deaths. Thank you.

11 THE COURT: All right. Thank you. Anything
12 further from the state?

13 MR. SAVAGE: No, Your Honor.

14 THE COURT: Mr. King?

15 MR. KING: Thank you, Your Honor. I am here
16 with Jessica Kelly today. She was dating Darren Simmons
17 at the time. She was 17. She's 18 now, so at the time
18 this happened, she was 17 years old. She was dating a
19 24-year-old man. She has absolutely no prior record,
20 Your Honor. This is the first time she was ever arrested
21 for anything.

22 She confessed and cooperated on videotape
23 when she was arrested, and she did spend 52 days in jail,
24 Your Honor. We're asking if you would consider a
25 probationary sentence. I understand what the solicitor

1 has asked for. Considering her age and the fact that she
2 was willing to cooperate, if you would consider a
3 probationary sentence for her. After she spent her 52
4 days in jail, her mother got her out of jail. Her mother
5 and grandfather are here today in court. Her mother is
6 standing over here in the corner. I believe she may want
7 to address you.

8 They took her to Lexington, where she lives,
9 and since then, she was baby sitting until she got a
10 full-time job at the Dairy Queen, so she's working at the
11 Dairy Queen now, 40 hours a week. She's attending a GED
12 program, a one stop in Lexington, so she's been over 60
13 hours in classes, and she's working on her practice exam.
14 She's having a little trouble with math but is hoping to
15 take that soon. As I said, she has family support. Her
16 mother and grandfather are here. Her mother says she's
17 been in no trouble since this and has seen a change in
18 her.

19 Also, she helps take care of three children.
20 Her mother has come into custody of three family children
21 who were in DSS custody, and Ms. Kelly has been taking
22 care of them as well. She's always been willing to
23 cooperate. Actually, when the solicitor asked her for
24 cooperation, wanting her to go in and enter into her
25 plea, she did that. She stepped up, and she entered into

1 that plea prior to this, back on June 22, Your Honor.

2 She told me there was never any plan -- for
3 what this is worth, Your Honor, there was no plan to sell
4 the guns on the street. The plans that they had was to
5 sell to pawn shops and, you know, I know it's not great,
6 but it is -- guns are available at pawn shops anyway, and
7 they do have to go through proper procedures and
8 background checks there too, and she said there was never
9 any intent to just get these guns out on the street. It
10 was to get money from pawn shops.

11 If you would maybe hear briefly from her
12 mother, Your Honor. I also have a letter, if I may
13 approach, from a family friend a brief letter about her
14 as well.

15 THE COURT: All right.

16 MR. KING: This is Mrs. Gina Sample.

17 THE WITNESS: Yes, sir. Since Jessica got
18 out of jail, she has come home. I received some children
19 from DSS. She has been a big support with that, and she
20 is working full time and she's going to school on
21 Tuesdays and Thursdays to receive her GED, and she hasn't
22 been any trouble. She is, to me, a changed person, and
23 realized the seriousness of what she did.

24 THE COURT: Okay.

25 MR. KING: Your Honor, her mother, I believe,

1 blames Mr. Simmons. Ms. Kelly, she doesn't want to do
2 anything to make anything worse for him, but I would
3 point out that she is significantly younger and I believe
4 was influenced by him, to some extent.

5 THE DEFENDANT: I just want to say I
6 apologize for my actions, and I understand that it was
7 wrong.

8 THE COURT: Okay. Mr. Lewis?

9 MR. LEWIS: Thank you, Your Honor. As Lamar
10 told you, he's 19 years old. He's lived in Charleston
11 his entire life, along with his immediate family. As you
12 can see, he's still in stripes. He's been in for 260
13 days. He wasn't able to afford to bond out, has been in
14 since the date of arrest.

15 He was called in as kind of a third wheel in
16 this situation. He knows that he made the worst decision
17 of his life, and he is certainly sorry for that, and I
18 believe at the appropriate time he would also like to
19 address the Court.

20 I believe that he would be a good candidate
21 for probation. He's never been in trouble before. He
22 made a stupid decision on this date, but I would like to
23 reiterate, this 19-year-old that is in front of you with
24 no prior record is not the face of all the guns that are
25 attached to murder cases around the state. This was his

1 first mistake, and from that, I would ask that you give
2 him that other chance.

3 He has done, as I told you, 260 days, which
4 is a significant amount of time, no matter how you look
5 at it.

6 His mother, Katie Jones, would like to
7 address you if you're willing to hear from her. I know
8 Lamar would like to address you as well.

9 THE COURT: Yes, ma'am, your name.

10 THE DEFENDANT: My name is Katie Jones.

11 Lamar has been never been in trouble before, and I feel
12 like he was coerced into this that night, and for that, I
13 don't feel like this would ever happened. He was at
14 vocational rehabilitation center in Moncks Corner and
15 hopefully will get his GED to accomplish that because he
16 wanted to go to Trident Tech and become a productive
17 member of society.

18 I have no, you know, feeling at all that this
19 boy wants to put guns on the street. That's not just
20 him. He was a member of my church -- well, he took me to
21 church and he's been participating at our church for many
22 years now. For this to have happened was a very big
23 mistake on his part.

24 MR. LEWIS: Your Honor, if I may approach,
25 two letters, and then I think Lamar wants to address you.

1 THE COURT: Okay. What would you like to
2 tell me?

3 THE DEFENDANT: I would like to tell you that
4 I apologize for the crime. Me being in the Charleston
5 County Detention Center for 266 days changed my life.
6 I'm closer to God, my Bible, I plan ahead, whatever, what
7 to do when I got out. I'm going to finish my GED, get a
8 career, my job, also do what I was there to do, is to
9 keep myself on the right track, but at the same time I
10 apologize for the mistake I made.

11 It's my first mistake and the last time I
12 will ever do anything like that, Your Honor, it would
13 mean so much to me, sir. I apologize.

14 THE COURT: All right. What did you need
15 these guns for?

16 THE DEFENDANT: Just to make money, sir.
17 Times is hard. I ain't had no job, and so I had to find
18 a way to try to make money.

19 THE COURT: What did you need guns for during
20 the commission of a crime?

21 MR. KING: This -- they were not alleged to
22 be his guns, Judge.

23 THE COURT: Well, they were with him, right?
24 Who had the guns? The solicitor said y'all have guns at
25 the commission of the crimes.

1 THE DEFENDANT: At the time I didn't know
2 where the guns were at, sir. I didn't know.

3 THE COURT: All right. Anything else,
4 Mr. Lewis?

5 MR. LEWIS: No, Your Honor.

6 THE COURT: Ms. Mullaney?

7 MS. MULLANEY: Yes, sir. I certainly do not
8 want to minimize this crime in any way whatsoever, but I
9 would like to show you the pictures of what occurred.
10 This is a picture of the front of the store, and this is
11 the picture of the store in the back, and the reason why
12 I think those pictures are important is I wanted to point
13 out to you this crime is a property crime in the true
14 sense of the word, and that is really what was happening.

15 This happened two weeks before Christmas. I
16 don't think it's as sinister as it is stupid, that these
17 kids thought they would break into this storage container
18 and go and pawn these guns at a pawn shop and they would
19 have extra money for Christmas.

20 None of them had records. My client did not
21 have a record. Obviously, they were not good criminals.
22 They were caught within moments after jumping over the
23 fence that you see in the picture, cut up with all kinds
24 of cuts from the barbed wire right there on the highway.

25 The guns belonged to Mr. Simmons.

1 Mr. Simmons owned those gun. He legally purchased the
2 gun. The one gun was the rifle, which was in the truck
3 of the car, and then other gun was also a gun that he
4 legally purchased, which I believe was under the
5 passenger's front seat. These are guns that he owns and
6 that he carries with him because he lives in a dangerous
7 neighborhood. There was never any intention to use these
8 guns or to have these guns. It was just that, you know,
9 he keeps the guns in the car.

10 Mr. Simmons confessed to everything
11 immediately after this happened on videotape and
12 cooperated fully. At the time Mr. Simmons was 24 years
13 old. He graduated from Summerville High School, and at
14 the time this occurred, he was a full-time student at
15 Trident Tech, and he had a wonderful job, I'm going to
16 give you a letter, at Dorchester School District 2, which
17 he had that job for about a year and a half.

18 When he was arrested, he was in jail for 101
19 days. In March, when he got his income tax check back,
20 his mother was able to post bond, and to get him out of
21 bond. He got out, I believe, on March 26th. When he got
22 out of jail then, he got himself reenrolled in school,
23 again, a different school, but the same area of study,
24 which is what he wanted, electronic engineering, and I
25 have a letter from ECPI at the college of technology

1 where he is a student there.

2 I also have a letter from his manager at Taco
3 Bell, where he worked -- where he worked at Taco Bell,
4 and she writes a letter, and she says great things about
5 him and his reliability as a worker.

6 His mother is here. I think that
7 Mr. Simmons -- I think that this whole thing started off
8 as, you know, kids just doing something really, really
9 stupid, and there was no intention to hurt anybody or
10 some kind of big gun operation to put guns on the street
11 as much as it was this actual possession with intent to
12 distribute plan, almost like a treasure chest that they
13 could then go to a pawn shop and have money for
14 Christmas.

15 Mr. Simmons has not been in trouble. He's
16 been a model student. He's been a model son, and I know
17 that his mother would like to speak on his behalf. I'm
18 asking Your Honor to consider a suspended Y sentence.

19 Many times when I spoke with Mr. Simmons when
20 he was in jail he realized how stupid it is. He is not
21 somebody that you will ever, ever see in your courtroom
22 again, and at this time I think his mother would like to
23 address the Court.

24 THE COURT: Yes, ma'am?

25 THE WITNESS: My name is Inez Quarts. I'm

1 his mother. Your Honor, this mistake, it got to be a
2 mistake. This is something that is not like him. He has
3 never been in trouble. He got an 18-month-old son that
4 he really enjoy being with. He spend time with him, and
5 the child loves him. He pays for the child. Everything
6 that is mostly done for the child, he does it. He helps
7 run the house, he helps cake care of his aunt now that is
8 really not able to take care of herself. This is an
9 experience that he really grow from, so I just ask that
10 you please be lenient with him.

11 THE COURT: All right.

12 MR. SAVAGE: Just to be clear with the Court,
13 Your Honor, the vehicle that was used in this case, it
14 wasn't Mr. Simons' vehicle. It would be relative of the
15 juvenile that was in the car at the time so that the guns
16 weren't like that were just in there, this happenstance,
17 and were actually pulled from that vehicle that night.

18 THE COURT: Mr. Simmons, do you want to say
19 anything?

20 DEFENDANT SIMMONS: I am truly sorry for the
21 crime I committed. I apologize. It was a stupid
22 mistake, and if you give me a chance to prove to you, the
23 solicitor, and everyone here that I am a good person and
24 I would never be in your courtroom again.

25 THE COURT: Well, who cooked up this idea?

1 Nobody wants to take credit? Well, I guess there's two
2 sides to every story. The state has painted a pretty
3 good picture that this is the type of crime we really
4 need to throw the book at.

5 There is a serious problem in the streets
6 with guns, and this is a source of them, these kinds of
7 crimes. On the other hand, you know everybody is kind of
8 painting a picture that this is an innocent thing with
9 stupid people involved doing stupid things. I don't
10 know. I have yet to meet a criminal master mind in the
11 seven years I've been doing this, so I'm probably
12 inclined to go with the belief that there wasn't a real
13 brains behind this outfit. Nevertheless, that doesn't
14 diminish the seriousness of it. The only thing odd about
15 it is that this is something that it looks like it's a
16 first offense for everybody; is that right?

17 MR. SAVAGE: Yes.

18 THE COURT: That truly is an odd fact. I
19 don't know what to say about that. Ms. Kelly cooperated
20 with the police, so she'll get a little bit of credit for
21 that. The fact that you guys have no prior record before
22 means I won't give you the full 15, but, still, this is a
23 bad crime, and it was committed obviously with
24 premeditation. There were guns. It looks like they
25 caught the get away driver with a shotgun in the vehicle.

1 This is something that could have gone real bad real
2 fast, and y'all are probably lucky that you didn't know
3 what you were doing and set off the alarm and the police
4 showed up.

5 Here is what I'm going to do: Ms. Kelly, you
6 get 15 years suspended to five active, followed by five
7 years of probation on the burglary charge; five years on
8 the possession of tools of crime charge.

9 Mr. Jones, you get 15 years suspended to ten
10 years active, followed by five years of probation. You
11 get five years active on the possession of tools, credit
12 for the 260 days you served.

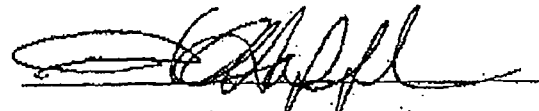
13 Mr. Simmons, yours is 15 suspended to ten
14 active, followed by five years of probation, five years
15 on the possession of the tools of a crime, and one year
16 on the unlawful carrying of a pistol. You get credit
17 for, I believe it was, 101 days, I heard. Good luck. It
18 will all run concurrent.

19
20 (Whereupon, the proceedings were concluded.)
21
22
23
24
25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 1st of September 2010.

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

October 14, 2010


Circuit Court Reporter

FORM 5

2011-CP-10-0034
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA)

County of Charleston)

Darren A. Simmons 342580)

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

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2011 AUG 24 PM 12:04
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Waltere River Correctional Inst, P.O. Box 189, Bembert SC 29128
2. Name and location of Court which imposed sentence Charleston County General Sessions, Charleston SC
3. Name(s) of co-defendant(s) (if any) Jessica Kelly, Lamar Jones
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010 GS1001722 : Burglary, 2nd Degree

MIORIVE GENERAL OFFICE
 RECEIVED
 ADMINISTRATIVE INSTRUCTIONS
 FILE OPEN AND
 HAVE COPIES MADE
 ROUTE TO
 CLERK RECORDS

MJF

28

- (b) _____
- (c) _____

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

- (a) 1 1/2 yrs suspend to 10 yrs plus 5 yrs probation Sept. 1, 2010
- (b) _____
- (c) _____

6. Check whether a finding of guilty was made:

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

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

no

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 - i. ~~_____~~
 - ii. _____
 - iii. _____

- (b) the result in each such Court to which you appealed:
 - i. ~~_____~~
 - ii. _____
 - iii. _____

- (c) the date of each such result:
 - i. ~~_____~~
 - ii. _____
 - iii. _____

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) pleaded guilty as directed by my counsel, however I know nothing of the law

- (b) counsel did not try to negotiate a proper plea
- (c) I had no professional advice from counsel

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

- (a) Insufficient counsel / ineffective counsel
- (b) subject matter jurisdiction
- (c) _____

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

- (a) counsel failed to properly investigate
- (b) charged with burglary 2nd, but should have been charged with
- burglary 2nd due to the alleged crime scene was not being a dwelling which is an element of burglary 2nd.

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

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

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

- (a) the specific nature thereof:
 - i. motion of reconsideration
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. Charleston County Court of General Sessions
 - ii. _____
 - iii. _____

30

iv. _____

(c) the disposition thereof:

i. motion denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. unavailable

ii. _____

iii. _____

iv. _____

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

i. unavailable

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

- (a) no prior appeals filed
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? yes
- (b) your trial, if any? no
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no

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

- (a) the name and address of each attorney who represented you:
 - i. Marybeth Mulloney, 101 Meeting Street, 5th Floor
Charleston, SC 29401
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____

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

sentence reduction

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Charleston Sumter)

I, Darren Aubrey Simmons, 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.

Darren Simmons
Darren Simmons

SWORN to and subscribed before me this 15th day of August

Carole D. H. H. H. (L.S.)
Notary Public

My Commission Expires: 3/15/2009

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

I, Darren Aubrey Simmons, 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.

Darren Simmons
Applicant

SWORN or affirmed to and subscribed before me this 18th day of August 2011

Pamela D. Hatfield
Notary Public

My Commission Expires: 3/15/2011

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Darren A. Simmons, #342580,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

2011-CP-10-6034

RETURN

FILED
 2011 OCT 12 PM 12:40
 JAMES H. WILSON, CLERK
 OF COURTS
 (Handwritten initials: AB)

The Respondent, making its Return to the application for post-conviction relief (PCR) filed August 24, 2011, 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 Charleston County Clerk of Court. The Applicant was indicted at the May 2010 term of the Charleston County Grand Jury for burglary – 2nd degree violent (2010-GS-10-1722), unlawful possession of a pistol (2010-GS-10-1723), and possession of tools of a crime (2010-GS-10-3109). Mary Beth Mullaney, Esquire, represented the Applicant. On September 1, 2010, the Applicant pled guilty as indicted. The Honorable Roger M. Young, Sr. sentenced him to fifteen (15) years suspended to ten (10) years plus five (5) years of probation for burglary – 2nd degree violent, five (5) years for possession of tools of a crime, and one (1) year for unlawful carrying of a pistol. The sentences were to run concurrently. The Applicant did not appeal the conviction or sentence.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction, the records of the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

- 1: Ineffective assistance of counsel in that counsel
 - a. Did not try to negotiate a proper plea.
 - b. Failed to properly investigate.
2. Subject matter jurisdiction in that Applicant was charged with burglary – 2nd degree, but should have been charged with burglary – 3rd degree due to the alleged crime scene not being a dwelling which is an element of burglary – 2nd degree.

III.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the 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 (1984); Butler, 286 S.C. 441, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

IV.

The Respondent submits that the Applicant's allegation that the court lacked subject matter jurisdiction is without merit. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). A review of the record clearly indicates that there is no basis upon which to conclude that the trial court lacked subject matter jurisdiction. Further, the Applicant's indictments are facially valid and proper. An indictment is adequate and valid on its face if the offense is stated with sufficient certainty and particularity to

enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution. State v. James, 472 S.E.2d 38 (S.C. 1996); State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). The indictments in this case are facially valid because they contain all the necessary elements of the offenses intended to be charged and state the date of the offenses and the name of the accused. The Respondent moves for summary dismissal pursuant to South Carolina Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that this allegation should be dismissed as a matter of law.

V.

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

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VI.

WHEREFORE, having made its Return, the State requests an evidentiary hearing be held.


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

October 10, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

2011-CP-10-6034

DARREN A. SIMMONS, #342580

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

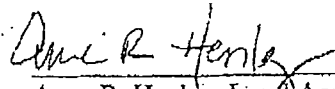
Respondent.

FILED
2011 OCT 12 PM 12:40
JULIAN A. BRIDGES
CLERK OF COURT

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Robert Anderson, Esquire
40 Colleton Drive
Charleston, SC 29407

DATED this 10th day of October, 2011



Anne R. Henley, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)	
Darren A. Simmons,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 11-CP-10-06034
)	
State of South Carolina,)	
)	
Defendant.)	

TRANSCRIPT OF HEARING

The within Hearing was held on January 11, 2012, before The Honorable R. Markley Dennis, Jr. in Courtroom 4B of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

Mark Archer, Esq.
(Information Not Provided)
Charleston, SC
Appearing for Applicant

Matthew J. Friedman, Esq.
OFFICE OF ATTORNEY GENERAL
P O Box 11549
Columbia, SC 29211-1549
Appearing for State of South Carolina

DEBORAH GARRISON
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@sccourts.org

Darren A. Simmons v State of South Carolina

2

Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

INDEX

Testimony of Applicant	6
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INDEX OE APPLICANT'S EXHIBITS

Number	Description	
1	Photo of tractor trailer container	7
2	Photo of tractor trailer container	8
3	Motion to reconsider	24
4	E-mail from Freeman	28

1 THE COURT: You are Darren Simmons?

2 APPLICANT: Yes, sir.

3 THE COURT: Good morning, Mr.

4 Simmons.

5 APPLICANT: Good morning.

6 THE COURT: Mr. Simmons, you are
7 here on your application. Mr. Archer, you were
8 about to say something?

9 MR. ARCHER: Well, Judge, I wear two
10 hearing aids. Okay? I went to an earlier
11 hearing and one of -- the battery went dead on
12 me. I normally carry one in my coat pocket but
13 I don't have one. I'm alright but I may need
14 to come sit up by the witness.

15 THE COURT: That's fine.

16 MR. ARCHER: If you wear two hearing
17 aids and one goes out, you don't hear ---

18 THE COURT: That's not a problem.
19 You don't need to argue any further. You win.
20 You can sit anywhere that you need to sit.
21 I'll make sure that we pull the mic so that --
22 can you hear me?

23 MR. ARCHER: Yeah. You know, I put
24 them in my coat pockets and leave them there,
25 just for this sort of contingency.

Darren A. Simmons v State of South Carolina

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Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

1 Unfortunately I've search my coat pockets and
2 I don't have one this time.

3 THE COURT: Mr. Simmons, we are
4 here today on your application for post-
5 conviction relief. Mr. Archer is your
6 lawyer, is that correct, sir?

7 APPLICANT: Yes, sir.

8 THE COURT: And you have discussed
9 your proceeding with him?

10 APPLICANT: Yes, sir.

11 THE COURT: And you understand
12 that basically the best that I can do for you
13 is to return you to square one? In other
14 words, you go back to the beginning and you
15 face the charges -- let me ask, were there
16 any other -- other than the plea, looks like
17 you pled to tools, two burg seconds, and they
18 appear to be violent, and unlawful possession
19 of a gun. Were there any other charges
20 dismissed?

21 MR. FRIEDMAN: I think there was
22 one, a burglary second violent.

23 THE COURT: Okay, there was an
24 amended sentence. That's the same thing.
25 Okay.

1 MR. FRIEDMAN: There was a
2 possession of a weapon during the commission
3 of a violent crime that was dismissed, Your
4 Honor.

5 THE COURT: All right. So that
6 was a charge that would be -- okay.

7 MR. FRIEDMAN: I believe that
8 carries five years.

9 THE COURT: It does, day for day
10 and can be run consecutive.

11 You understand that, Mr. Simmons?

12 APPLICANT: Yes, sir.

13 THE COURT: And you understand
14 that you could receive a five-year sentence.
15 Basically that's one that, I believe, that
16 they may give you credit. But once you've
17 maxed out your -- if it is run consecutive to
18 the burg fifteen, you have to max that one
19 and -- maybe you'd do the five years to max
20 it out. I don't know what the calculation
21 would be, but you'd have to do day for day
22 for five years. Do you understand?

23 APPLICANT: Yes, sir.

24 THE COURT: But it is your desire
25 to go forward with this application?

Darren A. Simmons v State of South Carolina

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Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

1 APPLICANT: Yes, sir.

2 THE COURT: I'll be delighted to
3 hear from you, sir. Mr. Archer, you may call
4 your first witness, sir?

5 MR. ARCHER: I call Mr. Simmons to
6 the stand.

7 (APPLICANT TAKES STAND)

8 DARREN A. SIMMONS, being duly sworn
9 to tell the truth, the whole truth and
10 nothing but the truth, testified, as follows:

11 DIRECT EXAMINATION

12 BY MR. ARCHER:

13 Q. Mr. Simmons, prior to this conviction,
14 did you ever have any other convictions?

15 A. No, sir.

16 Q. So this was your first time before the
17 Court?

18 A. Yes, sir.

19 Q. You were charged with burglary?

20 A. Yes, sir.

21 Q. Correct?

22 A. (Affirmative nod).

23 Q. And let me show you some pictures.

24 MR. ARCHER: Let me mark these as
25 Plaintiff's 1 and 2, please.

1 COURT REPORTER: Applicant's
2 Exhibits 1 and 2 for identification.

3 DIRECT EXAMINATION CONTINUED

4 BY MR. ARCHER:

5 Q. Now, the alleged burglaries took place
6 at the Carolina Rod & Gun Club out on
7 Savannah Highway; is that correct?

8 A. Yes, sir.

9 Q. Now I am going to show you two pictures.
10 Do you recognize what is in those pictures?

11 A. Yes, sir.

12 Q. What are they?

13 A. Tractor trailer containers.

14 Q. And that is what you were accused of
15 having broken into; is that correct?

16 A. Yes, sir.

17 Q. Okay.

18 MR. ARCHER: Any objection?

19 MR. FRIEDMAN: No objection.

20 MR. ARCHER: I would ask that
21 Plaintiff's Exhibits 1 and 2 be entered into
22 evidence.

23 THE COURT: Applicants 1 and 2 are
24 admitted without objection.

25 (SO ENTERED AS APPLICANT'S EXHIBIT 1)

Darren A. Simmons v State of South Carolina

8

Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

1 (SO ENTERED AS APPLICANT'S EXHIBIT 2)

2 DIRECT EXAMINATION CONTINUED

3 BY MR. ARCHER:

4 Q. Now, behind those containers is a
5 building; right?

6 A. Yes, sir.

7 Q. And that's where Carolina Rod & Gun is,
8 inside that building?

9 A. Yes, sir.

10 Q. All right. Did you ever go inside that
11 building?

12 A. No, sir.

13 Q. There were some locks on these things,
14 which I assume were cut; is that correct?

15 A. Yes, sir.

16 Q. Did you ever go inside either of those
17 containers?

18 A. No, sir.

19 Q. All right. So -- now, let me ask you
20 this, and you -- you never admitted -- you
21 never -- you gave a statement to the police,
22 correct?

23 A. Yes.

24 Q. And in that statement you never said
25 that you went inside either one of those; is

1 that correct?

2 A. That's correct.

3 Q. Okay. Now, you were represented by the
4 Public Defenders Office; correct?

5 A. Yes, sir.

6 Q. All right. And how about your co-
7 defendants, were they represented by the
8 Public Defenders Office also?

9 A. Yes, sir.

10 Q. Okay. Now, there was a lady -- a girl
11 with you that night. Correct?

12 A. Yes, sir.

13 Q. And her name was Miss Kelly?

14 A. Yes, sir.

15 Q. Did you ever discuss with your lawyer
16 the fact that Miss Kelly indicated that you
17 had gone into one of the trailers?

18 A. No, sir.

19 Q. You didn't?

20 A. No, sir.

21 Q. Okay.

22 MR. ARCHER: Judge, I told Mr.
23 Friedman earlier that I was going to amend
24 the petition. I forgot to when I started
25 off. I want to amend the petition that -- he

1 alleged that it wasn't burglary second. I
2 want to allege a conflict of interest between
3 the Public Defenders Office and the
4 Solicitor's Office in this case. All right?
5 I don't have any objection from Mr. Friedman.

6 THE COURT: All right, sir. Any
7 objection?

8 MR. FRIEDMAN: No, Your Honor.

9 THE COURT: Without objection, it
10 is amended.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. ARCHER:

13 Q. The lady sitting over there, that was
14 your lawyer; right?

15 A. Yes, sir.

16 Q. Ms. Mullaney? Mary Beth Mullaney.

17 A. Yes, sir.

18 Q. Do you ever remember talking to her
19 about what a conflict of interest was?

20 A. No, sir.

21 Q. You don't remember?

22 A. No, sir.

23 Q. You're not saying that she -- she might
24 have discussed it with you but you do not
25 remember?

1 A. I don't remember.

2 Q. You do not?

3 A. No.

4 Q. Okay. Do you remember her discussing
5 with you the fact that Miss Kelly was going
6 to testify against you?

7 A. Yes, sir.

8 Q. She did discuss that with you?

9 A. Yes.

10 Q. Did she at any time get you to sign any
11 sort of waiver? Do you know what a waiver
12 is?

13 A. Yes.

14 Q. Any sort of waiver of a conflict of
15 interest in the Public Defenders Office?

16 A. No, sir.

17 Q. Okay. Did she at any time ever bring
18 you up in front of a judge for a judge to
19 decide whether you should have a different
20 lawyer appointed?

21 A. No, sir.

22 Q. Okay. And -- now at one point in time,
23 you went back and forth between pleading
24 guilty and going to trial; is that correct?

25 A. Yes, sir.

1 Q. And at one point in time you were
2 planning on going to trial?

3 A. Yes.

4 Q. Do you recall discussing Miss Kelly's
5 testimony with Ms. Mullaney?

6 A. No, sir.

7 Q. All right. Okay. Do you recall her
8 ever telling you that there may be a conflict
9 not with her office but with the prosecutor's
10 office?

11 A. Yes.

12 Q. You do?

13 A. Yes.

14 Q. What did she tell you?

15 A. That there was some kind of connection
16 between the solicitor's office and the
17 victim.

18 Q. And the victim?

19 A. Yes, sir.

20 Q. What to your knowledge do you know that
21 you may have known about that?

22 A. She mentioned there'd be another
23 hearing.

24 Q. Another hearing?

25 A. Yes.

1 MR. ARCHER: Judge, I have no other
2 questions for this witness.

3 THE COURT: You may cross-examine.

4 MR. FRIEDMAN: Thank you.

5 CROSS EXAMINATION

6 BY MR. FRIEDMAN:

7 Q. Good morning, Mr. Simmons.

8 A. Good morning.

9 Q. You plead guilty; is that right?

10 A. Yes, sir.

11 Q. Do you remember telling the court that
12 you understood the charges and the possible
13 punishment?

14 A. Yes, sir.

15 Q. Do you recall that burglary second
16 carries up to fifteen years?

17 A. Yes, sir.

18 Q. Do you remember telling the court that
19 you understood your Constitutional rights,
20 including your right to a jury trial?

21 A. Yes, sir.

22 Q. Do you remember telling the court that
23 you were pleading guilty because you were
24 guilty?

25 A. Yes, sir.

Darren A. Simmons v State of South Carolina

14

Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

1 Q. You also told the court that you were
2 satisfied with your attorney?

3 A. Yes, sir.

4 Q. Do you recall telling the court that you
5 did not need more time to meet with her?

6 A. I don't recall.

7 Q. Do you remember telling the court that
8 you weren't threatened or promised anything
9 to get you to plead guilty?

10 A. Yes, sir.

11 Q. Do you recall addressing the court
12 during your guilty plea hearing?

13 A. Yes.

14 Q. Do you remember saying that you were
15 sorry for the crime that you committed, that
16 it was a stupid mistake?

17 A. Yes, sir.

18 Q. You gave a written statement in this
19 case, is that right?

20 A. Yes, sir.

21 Q. Do you remember saying that the guns
22 belonged to you?

23 A. Yes.

24 MR. FRIEDMAN: Nothing further.

25 THE COURT: Redirect, Mr. Archer?

1 MR. ARCHER: No redirect, Your
2 Honor.

3 THE COURT: Mr. Simmons, thank
4 you, sir. You may come down.

5 (WITNESS STEPS DOWN)

6 THE COURT: Call your next
7 witness.

8 MR. ARCHER: Your Honor, at this
9 point I would call defense counsel, Ms.
10 Mullaney, to the stand.

11 THE COURT: Very well.

12 (WITNESS TAKES STAND)

13 MARYBETH MULLANEY, being duly sworn
14 to tell the truth, the whole truth and
15 nothing but the truth, testified, as follows:

16 DIRECT EXAMINATION

17 BY MR. ARCHER:

18 Q. Ms. Mullaney, you represented Mr.
19 Simmons; is that correct?

20 A. Yes, sir.

21 Q. At that time you were employed by the
22 Charleston County Public Defenders Office?

23 A. Yes, sir.

24 Q. Now, this case had multiple defendants,
25 did it not?

1 A. That's correct.

2 Q. Three young people that were charged as
3 adults and one juvenile?

4 A. That's correct.

5 Q. All right. Now, you had some problems,
6 I believe, with the fact that the solicitor
7 was participating in the case?

8 A. Yes, I did.

9 Q. What was your concern?

10 A. My concern was that Tyler Whittaker's
11 father was the victim in this case, Carolina
12 Rod & Gun. I felt like because of the close
13 relationship that the victim had with the
14 solicitor's office that this case would be
15 better prosecuted by the AG's Office. I
16 contacted Mr. ---

17 Q. Let me ask you this, you said that Tyler
18 Whittaker was related?

19 A. Yes.

20 Q. Did they work at the solicitor's office?

21 A. Yes. Tyler Whittaker worked at the
22 solicitor's office. She was an assistant --
23 she is and was at that time an assistant
24 solicitor with Charleston County Solicitor's
25 Office. Her father was the victim in this

1 case.

2 Q. Okay. Good enough. Go ahead.

3 A. Yes. So I contacted Mr. Savage and I
4 asked him if they would send this case to the
5 AG's Office.

6 Q. And Mr Savage was the assigned
7 prosecutor?

8 A. Yes.

9 Q. Okay.

10 A. He said no. I went to my boss, Mr.
11 Pennington, and I asked him to speak with
12 Scarlett Wilson about the potential conflict.
13 Mr. Pennington called Ms. Wilson and sent her
14 an e-mail. Ms. Wilson sent him an e-mail
15 back saying that ---

16 Q. You are looking at the e-mail now, is
17 that correct?

18 A. Yes, sir. She said, on March 23rd she
19 sent an e-mail to Mr. Pennington, which Mr.
20 Pennington forwarded to me, which said,
21 (reading): "I spoke with Dale and am
22 comfortable with him handling the case.
23 SW."

24 Q. Now, during the course of handling this
25 case, did you come across any indications

1 that the solicitor's office was in fact
2 treating it differently from the usual case?

3 A. Absolutely.

4 Q. What sort of indications did you have
5 that they were treating it differently?

6 A. Well, I -- On March 18th, I asked Mr.
7 Savage to place the case on the plea docket.
8 My client was arrested December 15th. I asked
9 him to put the case on the plea docket in
10 front of Judge Hughston, which he did. It
11 was scheduled on March 18th at 2:00 o'clock
12 with Judge Hughston. At lunchtime, Mr.
13 Savage called me and told me that he was not
14 going to allow him to plead in front of Judge
15 Hughston, that he was looking into pursuing
16 additional charges against my client.

17 Q. Let me stop you there. Judge Hughston
18 is a fairly gentler sentencer, is he not?

19 A. Yes, sir.

20 Q. So that -- not that anybody is easy, but
21 he'd be more likely to give your client a
22 good sentence than some other judge you might
23 go in front of?

24 A. Yes, that's why wanted to go in front of
25 Judge Hughston.

1 Q. Did you sense that the reason for
2 withdrawing it from in front of Judge Simmons
3 -- from in front of Judge Simmons was because
4 he was a more lenient sentencer?

5 A. Yes, sir, that was my feeling.

6 Q. Okay. At that time they also said that
7 they were going to be filing additional
8 charges?

9 A. That's right.

10 Q. What additional charges did they file?

11 A. They brought the charge of possession of
12 a weapon during the commission of a violent
13 offense.

14 Q. Now, did you feel as though there was a
15 factual basis for such a charge?

16 A. No, I did not.

17 Q. Why? Tell us the background and
18 circumstances of why you felt that.

19 A. Because my reading of the statute is
20 that in order to be charged with possession
21 of a weapon during a violent offense, you
22 have to actually possess the weapon, the
23 firearm, during the commission of the crime.

24 In this case, it was undisputed that the guns
25 -- there were two guns, a rifle that was in

1 the trunk of a car parked down the street
2 from where the burglary was allegedly
3 committed and there was also a pistol which
4 was under the seat in the car down the street
5 from where the burglary was committed.

6 There was also -- Mr. Simmons was
7 alleged to have had a pocketknife. However,
8 the pocketknife was in his pocket. In order
9 to be charged with possession of a weapon
10 during the commission of a violent crime with
11 a pocketknife, you actually have to brandish
12 the knife during the commission of the crime.
13 There was no such testimony or no such
14 evidence in this case.

15 Q. All right. So you felt that these
16 charges were being added on as punitive?

17 A. Yes, sir, that was my understanding.
18 That was my feeling.

19 Q. Now, when you went to plea, did you feel
20 as though the solicitor fairly represented
21 the facts at the plea?

22 A. No, sir, I did not.

23 Q. In what regard did you feel that he did
24 not fairly represent the facts?

25 A. I -- the solicitor, I think, led the

1 court to believe that Mr. Simmons and the
2 other codefendants were responsible for
3 illegal guns being on the street. I believe
4 that he said, quoting from the transcript,
5 "they went in and they got guns to put on the
6 streets to sell." And he led the court to
7 believe that there was some type of ongoing
8 conspiracy that involved these defendants and
9 that these defendants were responsible for
10 putting guns on the street, where there was
11 no such evidence. They were all -- none of
12 them had criminal records prior to this.
13 There was no evidence, that I was aware of,
14 that they had done this before or that they
15 had in any way put illegal guns on the
16 street.

17 Q. The other defendants indicated that they
18 were going to try to pawn the stuff; is that
19 right?

20 A. My understanding was that Mr. Simmons
21 did this crime a week before Christmas. They
22 thought that they could sell the guns to a
23 pawn shop to raise money for Christmas
24 presents.

25 Q. Now, there was never in fact anything

1 taken, was there?

2 A. That's correct. It was in -- they
3 broke into a storage container which was
4 empty.

5 Q. It was empty? They broke into an empty
6 storage container?

7 A. (Affirmative nod).

8 Q. And I'm showing you Plaintiff's 1 and 2.
9 Do those appear to be the storage containers
10 that you are talking about?

11 A. Yes, sir.

12 Q. Your client, when he was arrested, made
13 a statement; did he not?

14 A. Yes. And I just want to correct. He
15 said that he made a written statement. He
16 might have been confused. It was actually
17 an oral statement which was videotapes and
18 audio-taped.

19 Q. And it was transcribed?

20 A. Yes, sir, I transcribed it.

21 Q. And at no point in time in that
22 statement did he ever indicate that he went
23 into the containers, did he?

24 A. That's correct.

25 Q. So he never admitted going into the

1 containers.

2 A. That's correct.

3 Q. And the only witness that ever puts him
4 in the container is Miss Kelly, the
5 codefendant; is that correct?

6 A. That is correct. Miss Kelly said in her
7 videotaped statement that Mr. Simmons went
8 into the container.

9 Q. She doesn't say whether it was empty or
10 not?

11 A. I would have to refresh my recollection.
12 I believe that she also said that it was
13 empty. But if I could ---

14 Q. Go ahead.

15 A. (Upon review), she said that they broke
16 into two bins but that they didn't take
17 anything, that they just popped the locks
18 off.

19 Q. I didn't hear you.

20 A. She said that they broke into two bins
21 but they didn't take anything. They just
22 popped the locks off. So in her statement
23 she doesn't address whether there was
24 anything in the storage containers.

25 Q. All right. Now, at the plea -- let me

1 ask you. I have what has been denominated as
2 Motion to Reconsider the Sentence or, in the
3 alternative, to withdraw the guilty plea. Do
4 you recall that?

5 A. Yes, sir, I wrote that.

6 Q. Okay. You filed it?

7 A. Yes.

8 Q. Did you ever have a hearing on it?

9 A. Yes.

10 Q. Was it denied?

11 A. Yes.

12 Q. All right.

13 MR. ARCHER: Let me mark this --
14 Plaintiff's 3.

15 THE COURT: Any objection?

16 MR. FRIEDMAN: No objection.

17 THE COURT: Without objection, it
18 is admitted.

19 (SO ENTERED AS APPLICANT'S EXHIBIT 3)

20 DIRECT EXAMINATION CONTINUED

21 BY MR. ARCHER:

22 Q. Now, going back to kinda of the
23 Solicitor's, uh, in that Motion you raised
24 the portion that you are talking about here;
25 correct?

1 A. Yes, sir.

2 Q. I believe that you raised the issue
3 about -- well, let me ask you this. Well,
4 you know -- hold on just one second. You
5 state in there that the State agreed to make
6 no recommendation with regard to sentencing;
7 is that correct?

8 A. That was my understanding.

9 Q. Did the State made this recommendations?

10 A. Yes, they did.

11 Q. And what were they?

12 A. They asked for active time.

13 Q. Okay. I want to show you attached to
14 that Motion the sentencing sheet; is that
15 correct?

16 A. Yes, sir.

17 Q. What does it indicate about
18 recommendations?

19 A. On the sentencing sheet.

20 Q. It indicates that there were no
21 recommendations?

22 A. That's correct.

23 Q. Okay. So one of the grounds was that
24 you believed that the solicitor had in fact
25 gone back on his agreement not to make a

1 recommendation?

2 A. That was my feeling; yes, sir.

3 Q. And let me ask you about the conflict
4 with the Solicitor's office. You initially
5 approached the prosecutor yourself; correct?

6 A. Yes, sir.

7 Q. Then you had your boss, Ashley
8 Pennington, approach the solicitor, Scarlett
9 Wilson; correct?

10 A. Yes, sir.

11 Q. Did you ever seek advice on this matter
12 from any person?

13 A. Yes, sir. After everything that had
14 occurred with my client not being allowed to
15 plea and then later being indicted for
16 charges that I thought were not factually
17 accurate, I consulted with Beattie Butler,
18 who is the director of litigation in our
19 office. He instructed me to write an e-mail
20 outlining all of the facts. Then he sent the
21 e-mail to Professor John Freeman, who I
22 believe is an expert in ethics. Mr. Freeman
23 made a recommendation to us.

24 Q. He made a response, did he not?

25 A. That's correct.

1 Q. And did you -- do you have a copy of
2 that e-mail?

3 A. Yes, sir.

4 Q. Let's see, ---

5 A. Would you like me to read his response?

6 Q. Yes.

7 A. He wrote, "I'd file a Motion to have
8 them relieved, with an affidavit saying the
9 case is being treated differently. The fact
10 that Mr. Schnatee was prosecuted with their
11 office before does not impress me if he has
12 ties to the Solicitor's office.

13 What seems normal to him seems not to be
14 normal for other victims connected to this
15 office. That is the problem. I would make a
16 record on selective vindictive prosecution
17 and let the chips fall where they may. Best,
18 J."

19 Q. And the remainder ---

20 MR. ARCHER: I am going to go ahead
21 and mark it. I believe that this is
22 Plaintiff's Exhibit 4.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. ARCHER:

25 Q. This is the email back to your e-mail to

1 him?

2 A. Yes, sir.

3 MR. ARCHER: (Tenders to Mr.
4 Freidman).

5 MR. FRIEDMAN: (Upon review), no
6 objection.

7 MR. ARCHER: I believe that he said
8 no objection, Your Honor.

9 THE COURT: Without objection, it
10 is admitted.

11 MR. ARCHER: I would ask that it be
12 admitted ---

13 THE COURT: It is admitted.

14 MR. ARCHER: Plaintiff's Exhibit 4.

15 THE COURT: Okay.

16 (SO ENTERED AS APPLICANT'S EXHIBIT 4)

17 DIRECT EXAMINATION CONTINUED

18 BY MR. ARCHER:

19 Q. Now, at this point in time, --

20 A. Yes.

21 Q. You go to a plea before a big judge and
22 they withdraw?

23 A. Yes.

24 Q. They add additional charges that you
25 believe there were no factual basis for?

1 A. Yes.

2 Q. At that point, you've got to forewarn
3 this problem?

4 A. Yes, sir.

5 Q. What makes you feel comfortable with
6 pleading him straight up to the charge?

7 A. Mr. Savage called me and said that he
8 would dismiss that charge and that we could
9 go forward on the plea without recommendation
10 and we would let the judge decide.

11 Q. I take it that without recommendation
12 was pretty critical?

13 A. Yes.

14 Q. Because you had a client with no prior
15 convictions, twenty-five years old, ---

16 A. And he was college at the time, and he'd
17 been working prior to the time of him being
18 charged with this. He worked for the School
19 District as a janitor for a year and a half,
20 and he was in college.

21 Q. Right.

22 A. He was in jail. And when Mr. Savage
23 wouldn't let him plead in March, I spoke with
24 his mother and told his mother that she
25 should do everything that she could to post

1 bond. The family posted bond for him. When
2 he got out, he enrolled back in school. He
3 got another job, at Taco Bell. He wasn't
4 allowed to go back to the School District
5 because of the record but he became, I
6 believe, management at Taco Bell.

7 Q. Okay.

8 A. I felt like I had a lot of good facts to
9 bring forward at a plea. I was hoping that
10 the judge would consider probation or
11 possibly a YOA sentence.

12 Q. And the recommendation -- the agreement
13 to no recommendation was important to you?

14 A. Yes, sir.

15 Q. Because that improves your ability to
16 get a good sentence for your client?

17 A. That was my feeling; yes, sir.

18 Q. If you know somebody is going to arguing
19 for time that you're going to have a harder
20 time getting for your client what you want.
21 Right?

22 A. Yes, sir.

23 Q. Now, -- so and you put that in your
24 Motion to withdraw the plea, that you thought
25 that they had gone back on their agreement?

1 A. Yes, sir.

2 Q. Did you ever make the Motion that
3 Professor Freeman recommended that you make?

4 A. I did not.

5 Q. Any particular reason other than you had
6 reached a plea agreement?

7 A. No, exactly. I felt that once Mr.
8 Savage was going to dismiss that charge and
9 allow me to plead straight up that I -- I
10 felt like maybe the prosecutor's office at
11 that point was going to play more on a level
12 playing field. So I decided at that time not
13 to make the Motion that Professor Freeman
14 suggested I make. I think that was a mistake
15 on my part.

16 Q. Okay. Now, we all have had cases where
17 we think 'oh, my client made a statement and
18 now I don't have a case to try.' But that
19 was not the situation here, was it?

20 A. I felt like there were some facts. I
21 certainly felt like I had a good position on
22 the possession of a weapon during a violent
23 offense.

24 Once that was charge was brought, it
25 carries a mandatory minimum of five year and,

1 in addition, is consecutive to any other time
2 that he might get.

3 So once my client had that charge, I
4 felt like I had a good chance at trial of
5 winning on that charge.

6 The burglary charge, I felt, turned on
7 the definition of a building and whether I
8 could get a charge at trial of grand larceny.

9 Q. So you really had two issues to try.
10 One was the definition of a building.

11 A. That's correct.

12 Q. And is a freight container a building?

13 A. That's correct.

14 Q. And the other is did he enter?

15 A. I didn't see that as being that big of
16 an issue, because Jessica Kelley had said
17 that he entered.

18 Q. Okay.

19 A. But certainly that may have been an
20 issue at trial.

21 Q. Jessica or Kelly said that; right?

22 A. That's right.

23 Q. Not Mr. Simmons'?

24 A. Yes.

25 Q. Okay. And Jessica Kelly is also being

1 represented by the Public Defenders Office;
2 right?

3 A. Yes, sir, that's correct.

4 Q. Did you not see that as a conflict of
5 interest? That she was giving critical
6 testimony that reflects on his guilt of
7 burglary?

8 A. Yes, sir, I did see that as a conflict
9 of interest.

10 Q. What did you do about it?

11 A. Unfortunately it's our office's policy
12 that we very rarely send cases out. It is my
13 recollection that we had spoken to our boss
14 and that he did not want us to send the cases
15 out. It is our policy, if it is at all
16 possible, to keep the cases.

17 Q. When you say your boss, you are talking
18 about Ashley Pennington?

19 A. Yes.

20 Q. So I -- you believe that you actually
21 talked to Ashley about sending it out?

22 A. I cannot remember if I talked to him
23 directly or if one of other lawyers spoke to
24 him. There were four of us -- there was
25 David Hazelton, who represented the juvenile;

1 there was Jason King, who represented Jessica
2 Kelly; then there was Ben Lewis. But I can
3 tell you that if we can gone to trial that
4 probably what would have happened -- we did
5 go to trial, so this issue was not raised.
6 But our policy is to keep the most serious
7 charge. So I would have kept the case but,
8 more likely than not, Mr. King probably would
9 have -- because he represented Miss Kelly, he
10 probably would have had to send the case out.

11 Q. How much of this did you present to Mr.
12 Simmons?

13 A. I don't remember having a conversation
14 with Mr. Simmons about this.

15 Q. Okay. So he never got a choice at all
16 about this kind of ---

17 A. That's correct.

18 Q. All right. Because, number one, Ashley
19 Pennington would not send the cases out.

20 A. It is not that he would not but he -- we
21 do it very sparingly. Usually it is in
22 murder cases, that type of thing. And, so,
23 this case didn't rise to that level.

24 Q. Okay. When everybody is arrested, we
25 started off with that you have a potential

1 conflict of interest ---

2 A. That's correct.

3 Q. --- merely by the fact that there are
4 multiple defendants; correct?

5 A. That's correct.

6 Q. All right. Then you look at the factual
7 situation. When you look at the factual
8 situation, Mr. Simmons never indicated
9 anything to you other than that he busted
10 the lock off, that he never went into the
11 trailer?

12 A. Yes, that's correct.

13 Q. But Miss Kelly gives a statement
14 indicating that he did go in the trailer?

15 A. Yes.

16 Q. Now that becomes -- that takes it from
17 breaking without entering to breaking and
18 entering; correct?

19 THE COURT: Mr. Archer, I
20 appreciate that. That's more argument than
21 it is law, because the hand of one is the
22 hand of all. That's the problem here.

23 MR. ARCHER: Yes, sir.

24 THE COURT: So it doesn't really
25 matter.

1 MR. ARCHER: Okay. Well, ---

2 THE COURT: Unless he just happens
3 to walk to there. So the question is whether
4 somebody entered the trailer or not. There
5 was other evidence other than the fact that
6 -- so I appreciate that, that's not going to
7 carry the day. That's a great argument and
8 you can argue that also up the road. Thank
9 you.

10 MR. ARCHER: Well, but let me --
11 when you've got a statement by witness, one
12 defendant against another, ---

13 THE COURT: But the problem that
14 you've got -- the conflict that you keep
15 talking about is the fact that one witness
16 puts him in the trailer, which really doesn't
17 affect him, because he's already there. He's
18 cut the lock off, you just said so. But that
19 he didn't go in the trailer. Okay. Well, so
20 what? He's there participating. So you've
21 got the hand of one is the hand of all
22 proposition.

23 MR. ARCHER: But I ---

24 THE COURT: All I am saying is
25 that you've covered that for the record.

1 Whether or not that is going to be some
2 basis, I don't know. But you don't need to
3 elaborate any further. I understand. You
4 and I have been practicing law the same
5 amount of time. I understand it. I got you.
6 Thank you, sir.

7 MR. ARCHER: Okay.

8 DIRECT EXAMINATION CONTINUED

9 BY MR. ARCHER:

10 Q. At some point in time Ms. Kelly agreed
11 to testify for the prosecution, did she not?

12 A. Yes.

13 Q. Against your client?

14 A. That's right.

15 Q. All right. At that point in time, did
16 you take any steps to address this issues of
17 a conflict of interest?

18 A. Well, it was shortly after that that Mr.
19 Savage contacted me and said that he was
20 going to dismiss the charge, the possession
21 of a weapon during a violent offense.

22 Q. So I guess the answer is that you never
23 came to waiver that conflict for Mr. Simmons;
24 correct?

25 A. That's correct.

1 Q. And you never took Mr. Simmons up in
2 front of a judge and said, 'Judge, our office
3 is representing one witness that is going to
4 -- one defendant who is going to testify
5 against the codefendant.'

6 A. That's correct.

7 Q. So the issue of a conflict of interest
8 never really was raised?

9 A. That's correct.

10 Q. And -- okay.

11 MR. ARCHER: I have no other
12 questions, Judge.

13 THE COURT: You may cross examine.

14 CROSS EXAMINATION

15 BY MATTHEW FRIEDMAN:

16 Q. Ms. Mulanney, how long have you been
17 practicing law?

18 A. Since 1993.

19 Q. And you were appointed in this case, is
20 that right?

21 A. Yes.

22 Q. Do you recall about how many times that
23 you met with the Applicant prior to the plea?

24 A. I met with him numerous times.

25 Q. Do you remember if you discussed the

1 elements of the charge that the State was
2 required to prove?

3 A. Yes.

4 Q. Did you explain to him the elements and
5 the maximum penalties?

6 A. Yes, I did.

7 Q. I believe that you testified that Ms.
8 Kelly's attorney was Jason King; is that
9 correct?

10 A. Yes.

11 Q. Do you remember if you communicated any
12 confidences about the Applicant's case with
13 Mr. King?

14 A. I did not.

15 Q. I believe that Ms. Kelly and the
16 Applicant and another codefendant ended up
17 pleading guilty together; is that right?

18 A. We all pled together at the same time,
19 all the adults did. The juvenile, of course,
20 pled in Family Court.

21 Q. Did the Applicant ever indicate that he
22 wanted to go to trial?

23 A. He always wanted to plead guilty up to
24 the point where the charge was brought
25 against him, the possession of a weapon

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Hearing of January 11, 2012
Before The Honorable R. Markley Dennis, Jr.

1 during the commission of a violent offense.
2 Once that charge was brought, he and I
3 discussed it and we both felt that he had to
4 go to trial on that charge because there
5 wasn't -- there wasn't evidence to support
6 that charge.

7 Q. And that charge was later dismissed, is
8 that right?

9 A. That's correct.

10 Q. After that was dismissed, the ---

11 A. It was my recommendation that he should
12 plead guilty because he had given a
13 videotaped statement admitting to planning
14 and participating in the burglary. I felt
15 like the chances of winning on the burglary
16 charge at trial were really not good.

17 Q. This was a joint decision?

18 A. (Affirmative nod), it was a decision
19 that I think that we made together.

20 Q. Tara Whittaker, she was an assistant
21 solicitor; is that correct?

22 A. That's correct.

23 Q. Do you know if she had any involvement
24 in the case?

25 A. She was there with her dad and her mom

1 every time the case was on. She came to
2 court with them several times: the day that
3 we weren't allowed to plea, the day that we
4 were allowed to plea, and I believe that she
5 was there the day that I filed my Motion to
6 reconsider.

7 Q. Do you know if she had any involvement
8 in preparing the case with Mr. Savage?

9 A. I wasn't -- I wouldn't be privy to that.

10 Q. I believe that you testified that the
11 State did not ask for a specific number of
12 years.

13 A. They did not. They asked for active
14 time.

15 Q. Did they ask for a sentencing range?

16 A. The judge had the discretion to sentence
17 anywhere from probation to fifteen years. I
18 believe that he sentenced fifteen years
19 suspended to ten, a sentence that I wasn't
20 anticipating.

21 MATTHEW FRIEDMAN: I have
22 nothing further.

23 THE COURT: Redirect, Mr. Archer?

24 MR. ARCHER: I have no redirect.

25 THE COURT: Very well. Thank you.

1 Let me ask you a question, Ms. Mulanney.
2 When you say that you talked about pleading
3 guilty, did you advise your client that he
4 would be waiving the right to appeal or to
5 challenge any of the Motions that could have
6 been made? Because by entering a guilty plea
7 in this state, as you know, those are now
8 foregone. You can't raise it. Did you
9 discuss that specifically with him?

10 THE WITNESS: I believe that I
11 did, Your Honor, (affirmative nod).

12 THE COURT: And did he understand
13 that, in your opinion?

14 THE WITNESS: I think he did.
15 Yes, sir.

16 THE COURT: And he decided
17 nevertheless to plead guilty?

18 THE WITNESS: Yes, sir.

19 THE COURT: Any followup
20 questions?

21 REDIRECT EXAMINATION

22 BY MR. ARCHER:

23 Q. Did you ever discuss with him potential
24 defenses?

25 A. Yes, we did.

1 Q. Did that include -- did you discuss with
2 him the fact that this may not have been a
3 building?

4 A. Yes, we did discuss that. I was
5 prepared to argue that at the appropriate
6 time in the trial.

7 Q. Would you have discussed with him the
8 fact that you may not have fulfilled all of
9 the elements of burglary, since he claimed
10 that he didn't enter?

11 A. I did not see that issue because I
12 believed that the codefendant had testified,
13 that it was the hand of one hand of all. I
14 did not see that as being my strongest issue
15 at trial.

16 Q. And that's the codefendant?

17 A. That's correct.

18 Q. So the codefendant who'd testify
19 actually affected, somewhat, your judgment
20 as to what defenses you had; is that correct?

21 A. I am not sure I understand that
22 question.

23 THE COURT: Mr. Archer, certainly
24 that would be one issue but that question is
25 misleading. Under 611(a), you need to ask

1 also the fact that your client made a
 2 statement, a video statement where he
 3 admitted to it. So let's put that in a
 4 proper context, sir. The way that the
 5 question is framed is that that is the sole
 6 reason for it.

7 MR. ARCHER: Well, I will withdraw
 8 it.

9 THE COURT: Thank you, sir. It's
 10 a misleading question. I understand why you
 11 asked it but I am not going to allow it.
 12 Thank you, sir.

13 MR. ARCHER: No other questions.

14 THE COURT: Anything further? (No
 15 response). You may come down.

16 (WITNESS STEPS DOWN)

17 THE COURT: Any additional
 18 witnesses from the State?

19 MATTHEW FRIEDMAN: No, Your
 20 Honor.

21 THE COURT: Mr. Archer, I will be
 22 happy to hear from you in closing argument.

23 MR. ARCHER: Yes, sir. Well, let
 24 me start off with what I think is probably
 25 one of the biggest problems that we have got.

1 That is, the conflict with members within the
2 Public Defenders Office.

3 I believe that a client has the
4 right to be represented by a lawyer without
5 conflict.

6 Now, our Supreme Court has said that
7 where there is a possible conflict -- okay --
8 that the defendant has to show actual
9 prejudice. But the way that I read the cases
10 is that where there is an actual conflict of
11 interest, that requirement of proving
12 prejudice goes out the window. He's got a
13 right to be represented by an attorney
14 without a conflict of interest. Okay?

15 And here, for some reason, and it's
16 a part of the questions that I was asking
17 about the going in, going out, -- if you look
18 at it -- let's take it in a logical
19 progression. Okay, we've got four defendants
20 accused of one crime. Okay? At that point
21 in time, you've got a potential conflict --
22 not necessarily an actual conflict.

23 Then you slow down and take it a
24 step further. Let's look at what the
25 evidence is. Well, the evidence is that she

1 says that he went into the thing, that he
2 went into this trailer. He never admits
3 that. Okay.

4 The elements of burglary are not
5 just the breaking, not just that he cuts the
6 lock off but it's a breaking and entering.
7 Okay?

8 So when you see that one defendant
9 is making a statement that goes substantially
10 beyond what he is saying, then you're into an
11 actual conflict -- not a potential conflict.
12 So when she says you cut the bolt off and you
13 walked in, then you've got an actual
14 conflict.

15 And then we -- we have a point where
16 the solicitor makes a deal for her testimony!
17 Okay? A deal for her testimony. She is
18 going to go to court and testify against him.
19 This is when the case is set for trial.
20 Okay?

21 If there any question -- I mean,
22 obviously you contrast this with -- with --
23 Demal Mattison, and we are partners in the
24 same firm, we couldn't represent those two
25 clients. We couldn't represent one and have

1 another prepared to testify against him.
2 That's such a clear conflict of interest.
3 Which for some reason -- and I used to keep
4 up with things a few years ago, and I don't
5 understand why the solicitor's office -- not
6 the solicitor's office but the public
7 defender's office didn't do something about
8 this. You know, other than some policy that
9 Ashley Pennington does not like to put all
10 these out.

11 But in this case, we are way beyond
12 a potential conflict of interest. The arrest
13 creates a potential conflict of interest.
14 The statements given at the time of the
15 arrest created an actual conflict of
16 interest. And the agreement to have this
17 girl to come in and testify just tops off the
18 cake. That's the icing on the cake.

19 I don't think that -- we're beyond
20 -- there never was a whole lot of explanation
21 given my client about the significance of
22 this conflict. You know, it was just sort of
23 glossed over. There was never any evidence
24 that he was aware that the conflict existed.

25 You know, at some point in time -- I

1 mean, you know, normally I -- at the
2 beginning of a case -- I've represented
3 husbands and girlfriends and I sit down, if I
4 do that, and I rarely do that -- rarely. But
5 if I do that, I get a signed statement saying
6 that I've advised them of the potential
7 conflict of interest, and that they
8 understand that if that potential ---

9 THE COURT: Mr. Archer, I
10 appreciate that. You don't need to argue
11 your policy.

12 MR. ARCHER: So ---

13 THE COURT: It either is or it
14 isn't. I understand that. So let's move on
15 to something else.

16 MR. ARCHER: Yes, but, you know,
17 that's where we are.

18 THE COURT: I appreciate your
19 opinion but that is not what the purpose of
20 this proceeding is. It doesn't have a thing
21 to do with what you believe how the public
22 defenders should run his office.

23 MR. ARCHER: But my point is ---

24 THE COURT: And that is what
25 you're arguing right now.

1 MR. ARCHER: My point is that there
2 was an actual conflict of interest.

3 THE COURT: In your opinion.

4 MR. ARCHER: Yes, sir.

5 THE COURT: Anything else?

6 MR. ARCHER: I don't see how you
7 can get around ---

8 THE COURT: I appreciate you don't
9 see how. In your opinion you believe that,
10 and you believe that automatically then says
11 that they can't handle the case, that your
12 client doesn't have to show any prejudice or
13 doesn't have to testify, that had he known
14 that he wouldn't have pled guilty. Because
15 that's what he did. He pled guilty here.

16 That's what you're saying?

17 MR. ARCHER: Um-humm.

18 THE COURT: Is that correct?

19 MR. ARCHER: That's what I'm
20 saying.

21 THE COURT: Okay. But I am saying
22 that your client doesn't -- he wouldn't have
23 pled guilty had he known the conflict of
24 interest?

25 MR. ARCHER: That's my thought.

1 THE COURT: I mean, that's what
2 you are saying?

3 MR. ARCHER: (No verbal response).

4 THE COURT: But where is the
5 testimony to that?

6 MR. ARCHER: (No verbal response).

7 THE COURT: Because I didn't hear
8 that.

9 MR. ARCHER: Well, I think that
10 goes to the fact that ---

11 THE COURT: I think that goes to
12 your opinion that what the public defender
13 should or shouldn't do in handling their
14 cases. I appreciate your position ---

15 MR. ARCHER: I understand that it
16 is legal. I say that goes to ---

17 THE COURT: Thank you, sir.

18 MR. ARCHER: He's operating without
19 the knowledge of the circumstances and
20 without an adequate explanation of what his
21 rights are or not.

22 THE COURT: Yeah, but to make it a
23 conflict of interest, doesn't your client --
24 if it is really and truly a conflict, doesn't
25 it have to conflict with his position? His

1 position would therefore have to be, 'I
2 didn't have anything to do with this. I
3 wasn't there. I didn't go in.'

4 I understand that statement that
5 puts him there but the bottom line is that we
6 all know that the simple process would have
7 been to simply -- if they didn't -- and I
8 don't know what -- I haven't heard all the
9 proof, only that particular proof, but your
10 client made a statement of what he intended
11 to do and what he did. Whether he entered the
12 building, whether any part into the building,
13 I don't know.

14 All of the arguments that you've
15 said are arguments that are legitimate but
16 everybody makes those kinds of
17 determinations. Every lawyer that I know,
18 and certainly we did, I did, and you did too.
19 You have to assess those:

20 How does that play out in a trial?

21 What the likelihood and probability
22 of an acquittal?

23 Given what I know, we don't know.

24 You make a call. That's what he had to do.

25 Correct? How is that inconsistent and how is

1 that a conflict. There is no question that
2 he was there. He admits to that.

3 MR. ARCHER: Um-humm.

4 THE COURT: He never took the
5 position contrary to that. He made a
6 statement about it. How is it a conflict?

7 No question that it changes the
8 dynamics of it but it's a technical conflict
9 in the sense if he is claiming, 'I didn't go
10 in the building.' But, there again, that's a
11 part of the defense aspect that you have that
12 'I can win this burglary based on the fact
13 that no one entered.' That is the argument
14 that you've been presenting, I guess. That
15 they can't prove that element.

16 A lawyer made an assessment with a
17 client and said, 'You know what? That's
18 there but I don't think that we have a very
19 strong position.' I think that's an
20 assessment that lawyers have to make every
21 day.

22 So the fact that you had a witness
23 who would have had to have come in and
24 testify -- and I agree with you to the extent
25 that -- are you saying -- is it your position

1 that once a conflict arose that no one in the
2 public defender's office could represent
3 anybody in this case?

4 MR. ARCHER: Well, I think at a
5 minimum ---

6 THE COURT: No, no, I just asked
7 you. Let's take you -- because without some
8 waiver of it, as you talked about, and that's
9 certainly one way of addressing the problem,
10 -- but is it your position then that no one
11 could represent anybody because there was a
12 conflict of interest?

13 MR. ARCHER: Possibly so, Your
14 Honor.

15 THE COURT: Well, I don't know
16 that that is realistic.

17 MR. ARCHER: Maybe it is but ---

18 THE COURT: That's why I don't
19 think it's necessarily actually a conflict in
20 this situation. I know that there was a
21 Greenville case recently that I read where
22 the -- and he benefit of arguing for a lesser
23 sentence. But in this particular case we
24 have that and I -- that gives me some concern
25 about -- because Kelly received a lesser

1 sentence than anyone else.

2 MR. ARCHER: Yeah. She got paid
3 for her services.

4 THE COURT: I understand. I
5 understand that. But, anyway, I understand
6 your argument. Okay?

7 MR. ARCHER: Yes, sir. Okay.

8 THE COURT: Anything else?

9 MR. ARCHER: Well, then there's the
10 issue of the solicitor recusing himself.
11 That's been presented by what the
12 circumstances were.

13 THE COURT: Let me ask you a
14 question, because we just had it in this
15 circuit. I wasn't the trial judge, I was
16 merely advised. The victim was Justice
17 Toal's home on the Isle of Palms, a burglary.
18 Does that mean that no solicitor can -- that
19 we have to go out of state?

20 MR. ARCHER: Well, I don't think
21 so.

22 THE COURT: Thank you, sir.

23 MR. ARCHER: But when a daughter or
24 a son is a member of the office and when ---

25 THE COURT: I am not talking about

1 going out of state to get a judge.

2 MR. ARCHER: Uh, ---

3 THE COURT: Have a judge to hear
4 that.

5 MR. ARCHER: Yes, sir.

6 THE COURT: I mean, isn't that an
7 obvious conflict? She's my boss. How does
8 any judge hear that case and sentence a
9 person in this state? How does a circuit
10 court judge do that when the chief justice is
11 the victim? You see? I just don't think I -
12 - I think you're -- I think that it is a
13 wonderful hypothetical question but it is not
14 a realistic argument.

15 You haven't shown me anything other
16 than -- and I agree -- I agree with you that
17 the exhibits that you've introduced,
18 prosecutorial misconduct, major issue in this
19 case. But the problem that we have is that
20 in order to get to that we've got to go to
21 trial. We've got to put him through a trial
22 and get a verdict. Then we can argue that
23 they should have dismissed it for
24 prosecutorial misconduct.

25 MR. ARCHER: I ---

1 THE COURT: I guess that's where
2 you are going with that because that's --
3 that obviously what you're saying, that they
4 should have never prosecuted and therefore it
5 was wrong, is prosecutorial misconduct. So
6 the case needs to be set aside.

7 I looked at one decision with Judge
8 Hayes, reversed based on the failure to give
9 a Brady response and prosecutorial
10 misconduct. The Supreme Court said 'we will
11 agree with you on the Brady issue, but we're
12 not going to do prosecutorial misconduct
13 because it was a guilty plea', basically.

14 So I don't know where that takes us,
15 because your client elected -- and I haven't
16 heard once yet that -- I didn't hear him say
17 in all of his testimony, and maybe I missed
18 it, 'that had I known any of these things
19 that I would not have pled guilty.' That's
20 what we are talking about. Did he change his
21 mind and not plead guilty? Would he have
22 changed his mind? Because that's the
23 problem. Maybe it is ineffective but how
24 does -- how do you get to the second prong?

25 MR. ARCHER: Well, maybe I am being

1 ineffective by now asking him.

2 THE COURT: Well, you didn't ask
3 him that because you know the answer, I know
4 the answer, everybody knows the answer.
5 That's what he said from the git-go, that he
6 wanted to go to trial on a charge that was
7 not appropriate. Fortunately the solicitor
8 dismissed that, so that is not an issue for
9 me.

10 MR. ARCHER: Well, I think that he
11 has the right to ---

12 THE COURT: I appreciate -- you're
13 spending all your argument on the first
14 prong.

15 MR. ARCHER: Yes, sir.

16 THE COURT: The second prong is
17 the key. What would -- how would it have
18 changed the outcome?

19 MR. ARCHER: Well, may it wouldn't
20 have ---

21 THE COURT: No, no, you've got to
22 prove that it would.

23 MR. ARCHER: Well, I think he had
24 the right to make an intelligent waiver.

25 THE COURT: I appreciate that but

1 it doesn't say that it would have changed his
2 mind. Again, I -- we're going to -- you are
3 still focusing on the first part. As a
4 lawyer, you've got to give your client the
5 right but I still have got to hear the
6 second.

7 MR. ARCHER: How can he make that
8 decision, Your Honor?

9 THE COURT: Very simply.

10 MR. ARCHER: When?

11 THE COURT: (No verbal response).

12 MR. ARCHER: It is never really
13 explained to him that ---

14 THE COURT: Mr. Archer, I
15 appreciate that. He makes the decision,
16 that's what these proceedings are for. It's
17 hindsight. It's after-the-fact. He comes in
18 and said, 'Hey, if I had known that, I'd
19 never have plead guilty in this case. No
20 way.'

21 I didn't hear that. No testimony
22 about that. That's what this proceeding is
23 about. Now what he might have done. He's
24 got to testify about what he would have
25 done. That is the second prong of

1 Strickland..

2 So I appreciate your argument. I
3 just think that he has failed on the second
4 one, assuming that you get a ---

5 MR. ARCHER: He didn't say it
6 because I didn't ask him.

7 THE COURT: Well, that's --
8 whatever it is, he failed. Thank you, sir.
9 What else?

10 MR. ARCHER: Well, the final thing
11 is this, that what we have is two ---

12 THE COURT: Let's don't argue that
13 because that's the second -- I appreciate
14 that. That's the second issue. I haven't
15 heard yet that he wanted to go to trial, Mr.
16 Archer. I understand your argument. I
17 understand the legal part of that. But you
18 and I both know that when you talk with your
19 client -- I did it, and I'm sure you have --
20 it's a great legal argument. I feel pretty
21 strongly about this legal argument. But if
22 you're convicted, you're going to jail. I am
23 not.'

24 MR. ARCHER: Okay.

25 THE COURT: I appreciate that.

1 How in the world does that change until your
2 client says, 'I wanted to go to trial. My
3 lawyer told me not to.'

4 MR. ARCHER: Well, anyway, today he
5 is asking for a new trial.

6 THE COURT: I don't think that's
7 what he is doing until he tells me that is
8 what he is doing, and he would have done it -
9 - and that had he known it that he wouldn't
10 have pled guilty.

11 MR. ARCHER: Can he tell you?

12 THE COURT: Sure. If you want to
13 put him back on the stand, I will be happy
14 for you to put him back on the stand and I
15 want to hear him say that "I would definitely
16 not have pled guilty." Under oath. He's an
17 intelligent person, he understands what
18 perjury is.

19 MR. ARCHER: Well, I -- (pause)'.
20

21 THE COURT: No, Mr. Archer. You
22 are being an advocate but I am not sure you
23 -- who you are advocating for right now,
24 yourself or him. Okay? I understand your
25 position. You're saying 'I am at fault' but
you may not be at fault because your client

1 may not have changed his mind at all.

2 MR. ARCHER: Um-humm.

3 THE COURT: So you may want to
4 talk to him.

5 MR. ARCHER: Well, that's what I am
6 getting ready to do.

7 THE COURT: Thank you, sir.

8 (SIDEBAR BETWEEN MR. ARCHER & APPLICANT)

9 MR. ARCHER: All right, Judge. I
10 will leave this.

11 THE COURT: Thank you, sir, I
12 appreciate this. And let me ask this now --
13 I don't know what the conversation with your
14 client was, but you talked with your client.
15 He came across from the stand as being a very
16 articulate, intelligent individual.

17 And this was not appealed because he
18 pled guilty, so -- but you -- I don't guess
19 that you can appeal a Motion to reconsider.
20 Yeah, you might could have. Yeah. Can you
21 appeal -- solicitor, can you appeal the
22 denial of the Motion to reconsider that was
23 not consistent with the plea agreement?

24 MATTHEW FRIEDMAN: I think that
25 you can..

1 THE COURT: I think that you can,
2 too. Was there an appeal?

3 MR. ARCHER: No, sir, not that I
4 know of.

5 THE COURT: Did you talk about
6 appeal?

7 MS. MULANNEY: Not that I
8 recall.

9 THE COURT: That has not been
10 argued, though, and it's not been raised,
11 that he lost his right to have that reviewed
12 as to whether or not there was -- whether or
13 not Judge Young's ruling violated the
14 agreement.

15 Where is the Motion? Let me just
16 look on that. Before I rule on that, let me
17 read specifically the Motion.

18 (Upon review), was there a written
19 Order denying the Motion to reconsider?

20 MS. MULANNEY: No, sir, none
21 that I am aware of.

22 THE COURT: Well, how do we hear
23 this? I mean, he can't appeal it until there
24 is. Has it ever been heard?

25 MS. MULANNEY: Yes, it was

1 heard.

2 THE COURT: What was the outcome?

3 He denied it, just on the record?

4 MS. MULLANEY: Yes, sir.

5 THE COURT: Since he raised the
6 issue about departure from the plea
7 agreement, I think that is really -- that is
8 where the court could have set it aside as a
9 matter of law, because it was not consistent
10 with the plea agreement and we don't get to
11 the prong two where he doesn't have to plea.
12 But he hasn't raised that issue, if he
13 doesn't have a right to have that reviewed
14 then she was ineffective in not doing that.
15 But that's not been raised, not been pled.
16 So -- I am practicing law a little bit right
17 now. I don't think that I can do that.

18 MR. ARCHER: Could you speak up a
19 little bit, Judge? I'm sorry, I can't hear
20 you.

21 THE COURT: Yeah. I haven't heard
22 him raise that. I'm raising it because it
23 seems to me that that would have been the
24 logical progression for things to happen and
25 how it's addressed, and that that would be a

1 part of the ineffective assistance of
2 counsel, that she failed to advise me that I
3 had the right to appeal the decision of the
4 court denying my Motion to reconsider; which
5 would then have created a legal issue for the
6 court to deal with as to whether or not the
7 system was consistent or inconsistent with
8 the plea agreement which she alleges that the
9 State had.

10 MR. ARCHER: Yes.

11 THE COURT: I think the evidence
12 of the -- the transcript, unfortunately, I
13 don't think is going to support that. But
14 I'm not in the appellate position here. I am
15 just sort of commenting.

16 I don't have that, because that's
17 not a ground that he's raised in his
18 application.

19 If you wish to make a Motion to
20 amend the application to conform to the
21 proof, ---

22 MR. ARCHER: I would make such a
23 Motion, Your Honor.

24 THE COURT: Any objection?

25 MATTHEW FRIEDMAN: I would

1 object, Your Honor.

2 THE COURT: I am going to allow
3 it. So let's do it. You can appeal that,
4 too. So we can figure out what we are going
5 to do. I think he's entitled to have that
6 reviewed. I think that would be ineffective
7 and therein lies the problem, because if it's
8 wrong then he gets his chance to come back
9 and be resentenced, I think. So -- he
10 doesn't even get to this issue. I think that
11 is really pertinent to this PCR because it
12 may resolve the whole case.

13 So I will grant that part, but I
14 deny the application. I think that he should
15 have had a chance to review the denial of the
16 Motion to reconsider, which was inconsistent
17 with -- as she has alleged -- the plea
18 agreement which he had.

19 Because he doesn't get to the PCR.
20 While she was ineffective, I don't think the
21 second prong has been met.

22 But he gets a chance to review
23 whether or not there was an error in the plea
24 that could have been set aside.

25 MR. ARCHER: May I get something

Darren A. Simmons v State of South Carolina

66

Case No. 11-CP-10-6034

Hearing of January 11, 2012

Before The Honorable R. Markley Dennis, Jr.

1 clear in my head, Judge?

2 THE COURT: Um-humm.

3 MR. ARCHER: Are you granting the
4 PCR or are you granting a belated appeal?

5 THE COURT: I am granting a
6 belated appeal, denying the PCR because he
7 fails on the PCR because of the second prong.
8 Assuming ineffective assistance, there is no
9 change -- it wouldn't have changed the
10 outcome, that is the guilty plea. The
11 sentence was consistent within the purview.

12 If the sentence had violated, as a
13 matter of law, the agreement then so be it.
14 But that's up to the reviewing court in
15 Columbia, not for me. Thank you. Good luck
16 to you, Mr. Simmons.

17 I will ask the State to prepare the
18 Order since I am denying it. I need you to
19 address, please, that while I find it
20 ineffective that I don't think that the
21 change would have been because the applicant
22 did not testify that he would have done
23 anything other than plead guilty.

24 I really believe that he needs to
25 have that ruling reviewed. I really don't

1 know that it -- I don't know that the ruling
2 departs from anything that is not really
3 contained in this, but I think he's got a
4 right to have that reviewed by the court as
5 to whether or not it was an agreement and
6 whether or not a straight up plea -- it would
7 be a great thing because -- let's put it this
8 way: that if the court grants that, and this
9 could be on the record because I -- I know
10 that they don't need my guidance on this but
11 we are going to have to change the sentencing
12 sheet to have another block, that says "This
13 is without negotiation or recommendations."
14 Or "this is without any recommendation as to
15 sentence" or -- and that probably is a better
16 block that we need to have rather than
17 "without negotiation" because we all know
18 that there are always negotiations. That's
19 up to them. Sir?

20 MR. ARCHER: Well, I am just
21 commenting.

22 THE COURT: Well, you don't need
23 to. I appreciate it. We can talk about that
24 off the record.

25 MR. ARCHER: Right.

Darren A. Simmons v State of South Carolina
Case No. 11-CP-10-6034
Hearing of January 11, 2012
Before The Honorable R. Markley Dennis, Jr.

1 THE COURT: Thank you. Mr.
2 Simmons, thank you, sir.

3 (HEARING CONCLUDED)
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1 CERTIFICATE OF REPORTER

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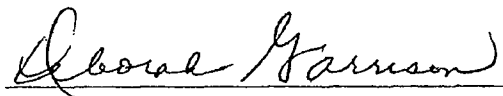
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I, the undersigned, Deborah Garrison, official court reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held before The Honorable R. Markley Dennis, Jr., on January 11, 2012;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.



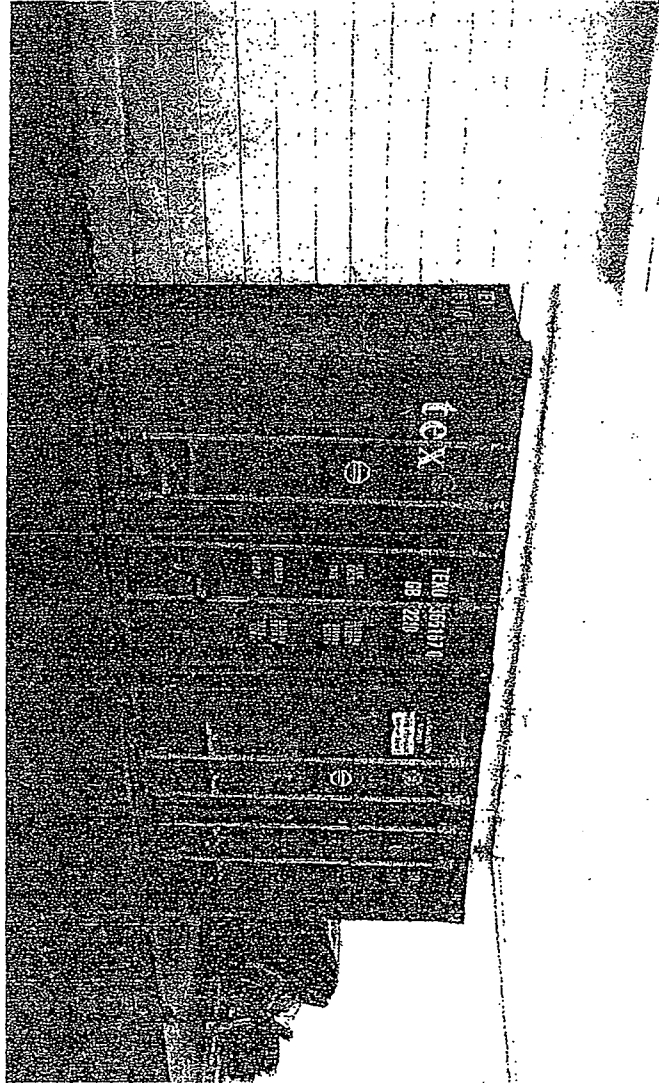
Deborah Garrison

Circuit Court Reporter

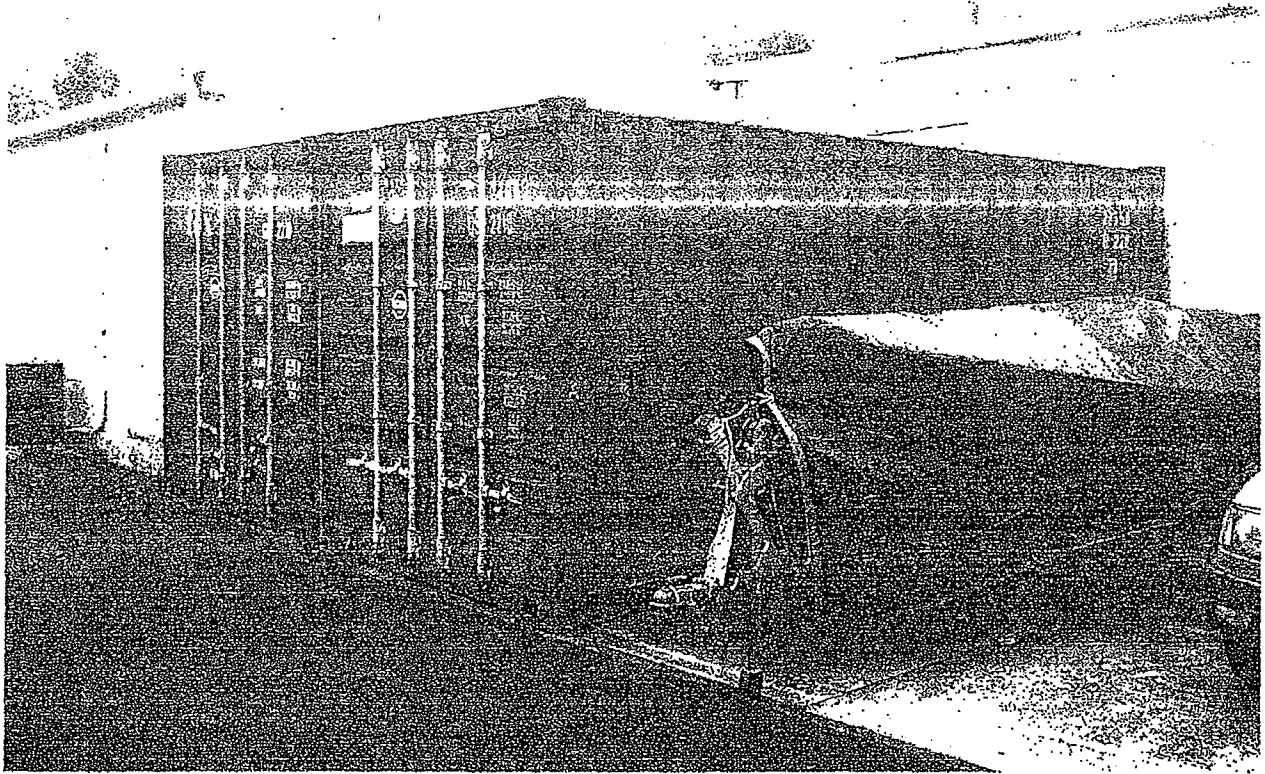
9th Judicial Circuit

Charleston, South Carolina

April 30, 2013



PENGAD 600-631-6989
PLAINTIFF'S
EXHIBIT
NO. /



PENGAD 800-64-0989
PLAINTIFF'S
EXHIBIT
NO. 2

Mr. Jones were sentenced to 15 years, suspended to 10 years with 5 years of probation to follow the 10 years active time. Ms. Kelly was sentenced to 15 years suspended to 5 years active with 5 years of probation to follow the active time. At sentencing the Court stated that Ms. Kelly's sentence was less severe because she was being given consideration for her cooperation with law enforcement.

3. The defendant files this motion because at the time of sentence the Court was under the misperception that the defendant had not cooperated. Furthermore the Court was not adequately informed during the plea regarding the extent of the defendant's cooperation with law enforcement.
4. The defendant's cooperation was equal if not greater than that of Ms. Kelly's and continued in the case up until the point that the Solicitor directly indicted the defendant for a charge that the evidence did not support.
5. The defendant immediately agreed to cooperate when he was taken into custody. Mr. Simmons was the first defendant to speak with law enforcement. He confessed to his role in the incident and implicated his co-defendants. Ms. Kelly gave a statement to law enforcement after she had been informed that Mr. Simmons had cooperated. The defendant gave a videotaped statement at 5:24 a.m. admitting his involvement and giving the police information which led to the arrest of his cousin Rodney Chaplin. Mr. Simmons told the police that his cousin was sitting in a Red Ford Focus with SC tags several blocks from Carolina Rod and Gun. As a result of that information Mr. Chaplin was arrested later that night driving a red Ford Focus in a nearby parking lot. Additionally, Mr. Simmons

voluntarily told the police about the rifle in the trunk and the gun under the front seat before Mr. Chaplin had been stop and the car was searched.

6. Initially Mr. Simmons was charged with Burglary 2nd Degree, Possession of Burglar's Tools and Unlawful Carrying of a Pistol. His bond was set at \$75,000. Mr. Simmons remained in custody until March 26, 2010. Ms. Kelly's bond was \$10,000 and she posted bond on February 5, 2010.
7. It was always defendant's intention to accept responsibility and plead guilty to the charges. Defense Counsel requested that the case be placed on the soonest available plea docket. The case was scheduled for a guilty plea on March 18, 2010 at 2:00. Defense Counsel contacted the defendant's family and obtained letters from his school and employer in preparation of the plea. Over lunch on March 18th Dale Savage, the Assistant Solicitor assigned to prosecute the case, told defense counsel that the defendants could no longer plead guilty because he was still investigating the case and may be bringing additional charges. Despite the fact that the defendant was transported to the courthouse, his family was present in court and defense counsel was prepared to go forward the Solicitor refused to give defense counsel sentencing sheets and prevented the guilty plea from going forward.
8. Mr. Simmons posted bond and was released from custody on March 26th 2010.
9. On May 10, 2010, Mr. Simmons was directly indicted by the Grand Jury for SC Ann 16-23-490 Possession of a Weapon during the Commission of a Violent Offense. The other co-defendants were not indicted for this charge.

10. SC Ann 16-23-490 (A) states "If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in 16-1-60 he must be imprisoned five years in addition to the punishment provided for the principle crime."
11. It is undisputed in this case that the pistol and the rifle were secure in the car down the street when the burglary occurred. In fact Mr. Savage told the court at sentencing that Mr. Chaplin was asleep in the car while the co-defendant's opened the containers. Although the defendant possessed a pocket knife when he was arrested there is no allegation that this knife was displayed during the commission of the burglary or during his arrest.
12. It was only when the Solicitor indicted Mr. Simmons for a charge that was not supported by the evidence that Mr. Simmons requested a trial. When the Solicitor agreed to reduce the Possession of a Weapon during the Commission of a Violent Crime to Unlawful Carrying of a Pistol, Mr. Simmons agreed to plead guilty on a waiver. (See Sentence Sheets). Mr. Simmons cooperated fully with law enforcement. Because the Court was not fully informed of this aspect of the case's history and was left with the impression that defendant did not cooperate or was unwilling to accept responsibly the defendant is requesting that his sentence be amended to the same sentence that Ms. Kelly received, 15 years suspended to 5 years active with 5 years of probation.
13. Mr. Simmons should not be punished more harshly because the Solicitor sought to bring a charge against him that was un-supported by the evidence. Mr.

Simmons had no criminal record, he graduated from Stall High School and prior to his arrest he was worked for 1 ½ years as a janitor for Dorchester County School District 2. He was also attending classes at Trident Technical College and was studying electrical engineering. After his release from jail in March, Mr. Simmons got another job working at Taco Bell and was taking online classes at ECPI College of Technology.

14. If the Court is unwilling to grant the motion to reconsider, then in the alternative the defendant moves to withdraw his guilty plea. The withdrawal of a guilty plea is generally within the sound discretion of the trial court. *State v. Riddle*, 278 S.C. 148, 150, 292 S.E 2d 795, 796 (1982).
15. Initially Mr. Simmons was planning on pleading guilty to the charges. In May of 2010 the Solicitor's Officer directly indicted him for Possession of a Weapon during a the Commission of a Violent Offense, a charge that was unsupported by the evidence. The defendant requested a trial at that time and the case was placed on the trial docket. Defense Counsel informed Mr. Savage that the defendant would plead guilty if that charge was dismissed or reduced to Unlawful Carrying of a Pistol. The Solicitor agreed to dismiss that charge and the defendant agreed to plead guilty under those conditions. Defense Counsel was under the impression that the defendant was pleading straight-up without a recommendation. Neither the defendant nor the State advised the Court of any plea negotiations or agreements prior to sentencing. The State agreed to make no recommendation with regard to sentencing. (See Sentence Sheet) Therefore the State violated its agreement when it asked the Court to impose an active sentence at sentencing.

16. The South Carolina Supreme Court has recognized a plea agreement rests on contractual principles. State v. Gates, 299 S.C. 92, 94-95, 382 S.E.2d 886-87 (1989); see also Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor ... such promise must be fulfilled.”). There was no prior agreement with regard to sentence. The State agreed to leave the sentence in the discretion of the trial court. Therefore the State breached the terms of the plea agreement when they requested an active sentence.

17. In Cooper v. United States, 594 F.2d 12,18 (4th Cir 1979) the Court stated that two distinct sources of constitutional rights are involved with plea bargaining, the right to fundamental fairness embraced with substantive due process guarantees and the Sixth Amendment right to effective assistance of counsel.

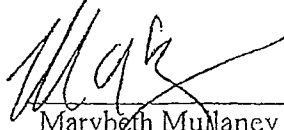
To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his capabilities and professional responsibility as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas. *Id* at 18, 19.

18. The victim in this case is the father of Tyler Whitaker an Assistant Solicitor with the Ninth Circuit Solicitor's Office and co-worker with Mr. Savage. When Mr. Simmons was directly indicted for a charge not supported by the evidence; defense counsel was concerned that this case was being treated differently because of the relationship the victim had with the Solicitor's Office. Defense Counsel contacted Mr. Savage directly asking him to reassign this case to the

Attorney General. Mr. Savage refused and defense counsel asked Mr. Pennington to contact Ms. Wilson directly regarding this request. Ms. Wilson responded that she was comfortable prosecuting the case. Given these circumstances it makes the Solicitor's request for active time even more egregious.

19. "[I]n a sentencing proceeding, evidentiary rules are inapplicable [,]" and the court may consider inadmissible evidence, so long as the information is relevant, reliable and trustworthy. *State v Thomason* 355 SC 278, 584 SE 2d 143 (SC App 2003); quoting *State v. Gullede* 326 S.C. at 228, 487 S.E.2d at 594(1994). The State and the victim presented evidence at sentencing that was not reliable or trustworthy. Both attempted to link the defendants to a city wide criminal conspiracy involving the selling of illegal guns on the streets. The Solicitor implied to the Court that these defendants were responsible for illegal guns being so easily available and for cities violent crime rate. There was absolutely no evidence of a larger criminal conspiracy or that that the defendants were going to sell these guns illegally. In fact there was evidence to the contrary that the plan was to sell the guns at local pawnshops in the area. Additionally defense counsel presented evidence that none of the defendants had records ~~and~~ prior to their arrest for these charges. For all of the reasons stated above, the defendant seeks to withdraw his plea.
20. Additionally, defense counsel hereby requests a hearing to present additional evidence and argument in support of this motion.

Respectfully Submitted,



Marybeth Mullaney
Assistant Public Defender
Attorney for Darren Simmons


Charleston, South Carolina

Dated: _____ 2010.

CERTIFICATE OF SERVICE

I hereby certify that this Motion for Reconsideration of Sentence was served on 9/10/10 in receipt for Dale Savage, Assistant Solicitor for the Ninth Judicial.

Affiant 

2010 SEP 10 PM 3:47
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

FILED

COUNTY OF Charleston
 STATE VS.
DARREN AULBRAY SIMMONS
 AKA:
 Race: B Sex: M Age: 25
 DOR: SS#:
 Address: T
 City, State, Zip: SUMMERVILLE, SC 294850000
 DL#: SID#:

INDICTMENT/CASE#: 2010GS1001722
 A/W#: K609532
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0312
 CDR Code #: 0080

SENTENCE SHEET

*CDL Yes | No | CMV Yes | No | Hazmat Yes | No |
 In disposition of the said indictment comes now the Defendant who was
 TO: Burglary, 2nd Degree, Non-Violent

CONVICTED OF or PLEADS

in violation of § 16-11-0312 of the S.C. Code of Laws, bearing CDR Code # 0080
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTORNEY: [Signature] 75420 [Signature] [Signature] 66585
 Savage, Dale SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of 10 days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for 5

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on;
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. 181 Days
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTRICTION: Deferred Def. Waives Hearing Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Recipient: _____
 *Fine:

§ 14-1-206 (Assessments 107.5%)	\$
§ 14-1-211(A)(1) (Conv. Surchage)	\$100 \$100.00
§ 14-1-211(A)(2) (DUI Surchage)	\$100 \$
§ 56-5-2995 (DUI Assessment)	\$12 \$
§ 56-1-286 (DUI Breath Test)	\$25 \$
Proviso 47.9 (Public Def/Prob)	\$500 \$ 500.00
§ 14-1-212 (Law Enforce. Funding)	\$25 \$ 25.00
§ 14-1-213 (Drug Court Surchage)	\$150 \$
§ 50-21-114 (DUI Breath Test Fee)	\$50 \$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
Proviso 90.5 (SCCJA Surchage)	\$5 \$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350 \$
3 rd to County (if paid in installments)	\$ 18.90
TOTAL	\$ 648.90

Condition Discharge, § 44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel.
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk Carolic. Demand
 Court Reporter: Amanda Heppner
 SCCA 217 (06/2010)

Presiding Judge: [Signature]
 Judge Code: 213916
 Sentence Date: 9/1/10

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COUNTY OF Charleston
 STATE VS.
DARREN AULBRAY SIMMONS
 AKA:
 Race: B Sex: M Age: 25
 DOB: SS#: _____
 Address: _____
 City/State/Zip: SUMMERVILLE, SC 294850000
 DL#: SID#:

INDICTMENT/CASE#: 2010GS1001723
 A/W#: K609533
 Date of Offense: 12/15/2009
 S.C. Code § : 16-23-0020, 0050(A)(2) 16-23-490
 CDR Code #: 0044 549

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 TO: Unlawful Carrying of Pistol

CONVICTED OF or PLEADS

in violation of § 16-23-0020, 0050(A)(2) of the S.C. Code of Laws, bearing CDR Code # 0044
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC § 17-25-45
 w/minor 1st or Lewd Act)

The charge is: As Indicted. Lesser Included Offense. Defendant Waives Presentment to Grand Jury. DS (defendant's initials)
 The plea is: Without Negotiations or Recommendation. Negotiated Sentence. Recommendation by the State

ATTEST: [Signature] 75420 [Signature] [Signature] 66585
 Savage, Dale SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of ONE days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/inonths/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SC DPPP

PTUP _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Recipient: _____
 *Fine:

§ 14-1-206 (Assessments (07.5 %))	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (DUI Breath Test Fee)	\$50	\$
§ 56-5-2942(1) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3 rd to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 33.90

Clerk of Court/ Deputy Clerk Cathie C. Broad
 Court Reporter: Armanda Stephens
 SCCA:217 (06/2010)

Condition Discharge, § 44-53-450(C) requires
 \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge [Signature]
 Judge Code: 2139
 Sentence Date: 9/1/10

STATE Charleston VS. JESSICA LEIGH KELLY
 AKA: _____
 Race: W Sex: F Age: 18
 DOB: _____ SS#: _____
 Address: _____
 City, State, Zip: LEXINGTON, SC 290730000
 DL#: _____ SID#: _____

INDICTMENT/CASE#: 2010GSI001715
 A/W#: K609535
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0312
 CDR Code #: 0080

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 TO: Burglary / Burglary (Violent) (After 06/20/85) - Second degree

CONVICTED OF or PLEADS

in violation of § 16-11-0312(B) of the S.C. Code of Laws, bearing CDR Code # 0086
 NON-VIOLENT VIOLENT SERIOUS MOST-SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentation to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Savage, Dale 75420 J. Kelly Jason T. King 68630
 SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of _____ days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
 Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment
 Payment Terms: _____ Obtain GED
 Set by SCDPPPS _____ Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____

Recipient: _____	\$ _____
*Fine: _____	\$ _____
§ 14-1-206 (Assessments 107.5 %)	\$ _____
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
§ 56-5-2995 (DUI Assessment)	\$12 \$ _____
§ 56-1-286 (DUI Breath Test)	\$25 \$ _____
§ 47.12 (Public Def/Prob)	\$500 \$ _____
§ 14-1-212 (Law Enforce. Funding)	\$25 \$ _____
§ 14-1-213 (Drug Court Surcharge)	\$100 \$ _____
§ 50-21-114 (BUI Breath Test Fee)	\$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
§ 90.7 (SCCJA Surcharge)	\$5 \$ _____
3% to County (if paid in installments)	\$ _____
TOTAL	\$ _____

Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: Plea Accepted / Sentencing Deferred
D.R. Fisher - June 22, 2010
#128

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk _____
 Court Reporter: _____
 SCCA/217 (11/2009)

Presiding Judge _____
 Judge Code: _____
 Sentence Date: _____

122

CHARITY OF Charleston)
 STATE VS.)
JESSICA LEIGH KELLY)
 AKA:)
 Race: W Sex: F Age: 18)
 DOB: SS#:)
 Address:)
 City, State, Zip: LEXINGTON, SC 290730000)
 DL#: SID#:)

INDICTMENT/CASE#: 2010GS1001715
 A/W#: K609535
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0312
 CDR Code #: 0080

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 TO: Burglary / Burglary (Violent) (After 06/20/85) - Second degree

CONVICTED OF or PLEADS

in violation of § 16-11-0312(B) of the S.C. Code of Laws, bearing CDR Code # 0086
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
 w/minor 1st or Lowd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
 ATTEST: [Signature] 75420 [Signature] [Signature] 68630
 Savage, Dale SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of 5 days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for 5

month/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

PTUP _____
 _____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund

Recipient:	
*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100 \$100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$
§ 56-5-2995 (DUI Assessment)	\$12 \$
§ 56-1-286 (DUI Breath Test)	\$25 \$
§ 47.12 (Public Def/Prob)	\$500 \$500.00
§ 14-1-212 (Law Enforce. Funding)	\$25 \$25.00
§ 14-1-213 (Drug Court Surcharge)	\$100 \$
§ 50-21-114(B)(1) (Breath Test Fee)	\$50 \$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
§ 90.7 (SCCJA Surcharge)	\$5 \$5.00
3% to County (if paid in installments)	\$18.90
TOTAL	\$148.90

Other:
Plea Accepted / Sentencing Deferred
2010 June 22, 2010
128

Clerk of Court/ Deputy Clerk Carol C. Darnard
 Court Reporter: Amanda Jefferson
 SCCA/217 (11/2009)

Appointed PD or appointed other counsel
 § 47.12 requires \$500 be paid to Clerk
 during probation.
 Presiding Judge: [Signature]
 Judge Code: 213
 Sentence Date: 6/11/10

COUNTY OF Charleston
 STATE VS.
LAMAR JONES
 AKA:
 Race: B Sex: M Age: 19
 DOB: SS#:
 Address:
 City, State, Zip: SUMMERVILLE, SC 294830000
 DL#: SID#:

INDICTMENT/CASE#: 2010GS1001706
 A/W#: K609534
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0312
 CDR Code #: 0080

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was
 TO: Burglary, 2nd Degree, Non-Violent CONVICTED OF or PLEADS

in violation of § 16-11-0312 of the S.C. Code of Laws, bearing CDR Code # 0080
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: [Signature] 75420 [Signature] 76922
 Ravage, Dale SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, Ben Lewis County Detention Center,
 for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of 10 days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for 5

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPTS _____

Recipient: _____
 *Fine:
 § 14-1-206 (Assessments 107.5%) \$ _____
 § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
 § 56-5-2995 (DUI Assessment) \$12 \$ _____
 § 56-1-286 (DUI Breath Test) \$25 \$ _____
 Proviso 47.9 (Public Def/Prob) \$500 \$ 500.00
 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
 § 14-1-213 (Drug Court Surcharge) \$150 \$ _____
 § 50-21-114(B)(1) (Breath Test Fee) \$50 \$ _____
 § 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
 Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00
 § 41-53-150(C) (Conditional Discharge) \$350 \$ _____
 3% to County (if paid in installments) \$ 18.40
 TOTAL \$ 648.40

_____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Clerk of Court/Deputy Clerk Carol C. Lewis
 Court Reporter: Annika Whitten
 SCCA 217 (06/2010)

Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.
 Presiding Judge _____
 Judge Code: 21301
 Sentence Date: 9/11/10

Marybeth B. Mullaney

From: Beattie Butler [scdfndr@yahoo.com]
 Sent: Wednesday, June 23, 2010 8:00 PM
 To: Marybeth B. Mullaney
 Subject: Fwd: Conflict with the Prosecutor/Simmons Jones & Kelly

Sent from my iPhone

Begin forwarded message:



From: John Freeman <jfreemanusc@gmail.com>
Date: June 23, 2010 7:58:31 PM EDT
To: Beattie Butler <BButler@charlestoncounty.org>
Subject: Re: FW: Conflict with the Prosecutor/Simmons Jones & Kelly

I'd file a motion to have them relieved, with aff. saying case is being treated differently
 Fact Mr. Schacte prosecuted before does not impress me if he has ties to Solicitor's office.
 What is normal for him seems not to be normal for other victims unconnected to the office,
 and that is the problem. I say make a record on selective/vindictive prosecution and let the
 chips fall where they may.... Best, J

On Wed, Jun 23, 2010 at 3:29 PM, Beattie Butler <BButler@charlestoncounty.org> wrote:

John,

I hope this email reaches you and you are enjoying your summer. I wonder if I might run a
 conflict question by you. Below is an email from a lawyer in my office. Our client is charged with
 burglary for attempting to break into the storage shed of a business owned by the father of an
 assistant solicitor in the office prosecuting the case. Our lawyer thinks the solicitor assigned to
 the case is being unreasonable. From my discussions with our lawyer, at least one aspect of this
 specific prosecution raises a red flag, discussed below.

The defendant has no prior record. He and his codefendants broke the lock off of a shed and
 entered but took nothing. Our client had a pocket knife in his pants pocket during the incident.
 There was a shotgun in the car the defendants used to drive to and away from the incident. No
 one claims any defendant possessed a gun while on the victim's property. No one claims a knife
 was ever displayed.

This type of situation almost always results in probation. However, the solicitor several times
 refused to allow the defendant to plead guilty because he, the solicitor, indicated he was
 contemplating bringing additional charges. He ultimately charged our client with possession of a
 weapon during the commission of a violent crime which carries a mandatory sentence of 5 years
 when someone possesses a gun or displays a knife while committing a crime categorized as

"violent" by statute. One facing this charge cannot get probation. The defendant is charged with a "violent" burglary. It's hard to see how the new charge applies, unless one was to say the shotgun in the car constitutes "possession during the commission of the crime," which is a stretch. I suspect this is an attempt to force the case to trial in front of a different, more lenient judge, assigned to take guilty pleas. The prosecutor likely knows the weapons charge is weak, but by bringing it forces the defendant to trial in front of a tougher judge. This is just a theory, however.

So, is the mere familial relationship between a victim and a lawyer in the prosecutor's office sufficient to raise the issue of a conflict? Or do we have to show actual bias on the part of the prosecutor? In either case, can the judge force the State to conflict cases to another prosecutor's office?

Sorry for the detail. As always, please remember I save only the tough cases for my best resources.

Thanks and hope all is well.

Beattie I. Butler

Chief Litigator

Charleston County Public Defender's Office

101 Meeting Street, Suite 500

Charleston, SC 29401

(843) 958-1850

bbutler@charlestoncounty.org

From: Marybeth B. Mullaney
Sent: Friday, June 18, 2010 9:06 PM
To: Beattie Butler
Subject: Conflict with the Prosecutor/Simmons Jones & Kelly

Beattie,

I need to get your opinion. My client was initially charged with Burglary 2nd and Possession of Burglary Tools for breaking into a storage container on 12/15/2009. The prosecutor's office has a conflict in my case because the complaining witness is Neil Schachte. Mr. Schachte owns Carolina Rod and Gun, he is the father of Tyler Whitaker who is an Assistant Solicitor in their office and he has sold guns and ammunition to the Charleston City Police Department and he has conducted a training session for our investigators.

Nothing was taken and the only damage was to the pad locks that were on the container. A bolt cutter was found on the scene in a duffle bag with a machete. My client and the co-defendant's were arrested that night walking away from the location with gloves, and 2 way radios. My client had a pocket knife and a razor blade in his jeans. Another co-defendant was driving the car which had a rifle in the trunk, a stun gun in the center console and a pistol under the seat. My client is 25 years old he has no record, he was working and in school at the time.

The Charleston County Solicitor's Office has taken a very hard line on this case. Because of the relationship between the complaining witness the Solicitor's Office and Police Department I asked the Dale Savage, the solicitor assigned to the case to re-assign this case to the AG's Office. He refused stating that Mr. Schachte has been a victim before and they prosecuted that case so he sees nothing wrong with prosecuting this case. My client was in jail and unable to make bond so I asked Dale to put his case on the plea docket as soon as possible. Dale made it very difficult for me to get the case on the plea docket but after about a month he finally agreed. The day the case was on the plea docket (3/18/10), my client and the co-defendant were brought over from the jail, my client's whole family was in court but Dale told me that he would not let my client plead guilty that day because he was investigating bringing additional charges. He refused to give me the sentence sheets.

After this, it became apparent to me that they were treating this case differently. I spoke with Ashley who agreed with me that this certainly has the appearance of impropriety so he called Scarlett and asked her to step down as the prosecuting agency. She sent Ashley an email stating that she had spoken with Dale and she was comfortable continuing to stay on the case.

In the mean time Dale directly indicted my client for possession of a weapon during a violent crime despite the fact that there is no evidence that my client ever visibly displayed a knife and the guns that were recovered were found in the getaway car down the street that the co-defendant was driving. Please advise me on how to proceed. The case is on the trial docket next week. Should I file a motion to have them relieved or should I just accept their position and pick a jury?

Thanks,

Marybeth

--
John Freeman
2329 Wilmot Ave.
Columbia, SC 29205
t803-254-4667
f803-753-9870
jfreemanusc@gmail.com

cc
AT
AG
SOL
GS

RECEIVED

AW9

MAR -1 2013

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 Darren A. Simmons, #342580,
 Applicant,
 v.
 State of South Carolina,
 Respondent.

S.C. Supreme Court IN THE COURT OF COMMON PLEAS

2011-CP-10-6034

ORDER GRANTING WHITE
APPEAL AND DISMISSING ALL
OTHER CLAIMS

FILED
 2012 FEB 29 PM 2:57
 JULIE HENNINGSON
 CLERK OF COURT
 BY: [Signature]

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 24, 2011. The Respondent made its Return on October 10, 2011. An evidentiary hearing into the matter was convened on January 11, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by Mark Archer, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant and plea counsel, Mary Beth Mullaney, Esquire, testified at the PCR hearing. This Court had before it the records of the Charleston County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, the PCR application, Respondent's Return thereto, photographs of the tractor trailer, the motion to reconsider sentence or withdraw guilty plea, and counsel's emails to and from Professor John Friedman.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2010 term of the Charleston County Grand Jury for burglary - 2nd degree

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violent (2010-GS-10-1722), unlawful possession of a pistol (2010-GS-10-1723), and possession of tools of a crime (2010-GS-10-3109). Mary Beth Mullaney, Esquire, represented the Applicant. On September 1, 2010, the Applicant pled guilty as indicted. The Honorable Roger M. Young, Sr. sentenced him to fifteen (15) years suspended to ten (10) years plus five (5) years of probation for burglary - 2nd degree violent, five (5) years for possession of tools of a crime, and one (1) year for unlawful carrying of a pistol. The sentences were to run concurrently. The Applicant did not appeal the plea or sentence.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that counsel
 - a. Did not try to negotiate a proper plea.
 - b. Failed to properly investigate.
2. Subject matter jurisdiction in that Applicant was charged with burglary - 2nd degree, but should have been charged with burglary - 3rd degree due to the alleged crime scene not being a dwelling which is an element of burglary - 2nd degree.
3. At the hearing, Applicant alleged conflict of interest in that the victim was the father of a Ninth Circuit Assistant Solicitor and Applicant and a co-defendant were both represented by the Public Defender's Office.
4. At the hearing, Applicant alleged that he was entitled to a White v. State review of his motion for reconsideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court had the opportunity to review the record in its entirety and hear the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that he and his co-defendants were all represented by the Public

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Defender's Office. He testified that he discussed with counsel that his co-defendant Ms. Kelly might testify against him. He asserted that he never talked to counsel about a conflict of interest with the Public Defender's Office, and he never signed a waiver of the conflict of interest. Applicant testified that he and counsel discussed the potential conflict of interest with the Solicitor's Office in that there was a connection between the victim and an Assistant Solicitor.

Plea counsel testified that she had a problem with the Solicitor's Office participating in this case because the victim was Assistant Solicitor Tyler Whittaker's father. She felt that the Attorney General's Office should prosecute the case due to this close relationship. She testified that she contacted Dale Savage, the assigned prosecutor, and asked if they would be willing to send the case to the Attorney General's Office. Chief Public Defender Ashley Pennington contacted Solicitor Scarlett Wilson, and Ms. Wilson indicated that she was comfortable with Mr. Savage handling the case. Counsel testified that she asked Mr. Savage to put the case on the March 18 plea docket with Judge Hughston, and he agreed to do so. Later, Mr. Savage informed counsel that he was not going to allow Applicant to plead in front of Judge Hughston and he might pursue other charges. Counsel testified that the State charged Applicant with possession of a weapon during the commission of a violent crime, even though there was no factual basis for the charge. She asserted that it was undisputed that the guns were left in the car during the commission of the crime. She testified that this extra charge was later dismissed. Counsel testified that Professor John Friedman, an ethics professor, suggested that she file a motion to have the solicitor relieved based on vindictive prosecution. She considered filing such a motion until Mr. Savage agreed to dismiss the extra charge.

Counsel testified that she spoke with her supervisor, Ashley Pennington, about the potential conflict of interest in the Public Defender's Office, and he indicated that he did not

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want to send the case to outside counsel. She testified that she did not communicate any confidences to Ms. Kelly's attorney, Jason King. She testified that Applicant and Ms. Kelly ultimately pled guilty at the same time. Counsel testified that she advised Applicant that he was waiving the right to make motions by pleading guilty. She testified that they discussed potential defenses, including the defense that the trailer may not have been considered a building. Counsel testified that Applicant always wanted to plead guilty until he was charged with possession of a weapon during the commission of a violent offense. She testified that after that charge was dismissed, Applicant again wanted to plea guilty. Counsel testified that she filed a motion for reconsideration, or in the alternative to withdraw the guilty plea, because the State asked for active time during the plea hearing after agreeing not to make a recommendation or negotiation. She acknowledged that the State did not ask for a specific number of years and that Judge Young had the discretion to sentence Applicant anywhere between probation and fifteen (15) years.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (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

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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, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). 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." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345

S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

This Court finds that counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the maximum sentences, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof.

This Court finds that the record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he understood the nature of the charges and the possible punishments. He indicated that no one had threatened him or promised him anything to get him to plead guilty. He admitted that was pleading guilty because he was guilty. Applicant told the court that he was satisfied with counsel's representation and did not need more time with her. This Court finds that it was Applicant's decision to plead guilty with a full understanding of the consequences of the plea.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in her representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

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This Court finds that Applicant has failed to demonstrate that but for counsel's alleged deficiencies he would have insisted on going to trial. Counsel testified that before Applicant was charged with possession of a weapon during the commission of a violent crime and after the charge was dismissed, Applicant wanted to plead guilty. This Court finds nothing to indicate that the outcome of the proceeding would have been any different regardless of who represented Applicant or who prosecuted the case.

Accordingly, this Court finds the Applicant has failed to meet both prongs of Strickland. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

Conflict of Interest

Applicant alleges two conflicts of interest in that the victim's daughter was an Assistant Solicitor with the Ninth Circuit Solicitor's Office and Public Defender's Office represented Applicant and each other co-defendant. 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. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

Here, no potential conflict of interest ever materialized into an actual conflict. First, there is no indication that Ms. Whittaker assisted Mr. Savage in preparing the case for the State. Ms. Whittaker attended the proceedings as part of the victim's family rather than as a member of the prosecution team. With respect to the potential conflict of interest at the Public Defender's

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Office, this Court finds that counsel and Mr. King did not share any confidences regarding their respective clients. In addition, Ms. Kelly did not testify against Applicant because they both pled guilty. Counsel properly brought the potential conflicts of interest to the attention of the assigned prosecutor, the Ninth Circuit Solicitor, and the Chief Public Defender.

White v. State Appeal

Applicant alleges that he did not freely and voluntarily waive his right to appeal the motion for reconsideration. This Court finds that Applicant is entitled to a review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). In White v. State, our Supreme Court determined that, where the post-conviction relief judge finds the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues. Applicant contends that the Solicitor breached the agreement by asking the plea court for active time after agreeing not to make any recommendations or negotiations. At the PCR hearing, the State submitted that there was no plea agreement, and the Solicitor and plea counsel were each able to argue their respective positions. The Solicitor asked for active time and plea counsel asked for a suspended YOA (Youthful Offender Act) sentence, and Judge Young had the discretion to sentence anywhere between probation and fifteen (15) years.

Based upon Applicant's assertion that counsel did not attempt to withdraw the plea if there was a plea agreement, this Court concludes the Applicant is entitled to a review of his guilty plea and motion for reconsideration pursuant to White v. State. In order to secure this review, however, the Applicant must appeal from this Order.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this

matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Applicant was not prejudiced by counsel's alleged deficiencies. Therefore, this application for PCR must be denied and dismissed with prejudice, with the exception that the Applicant is granted a review of direct appeal issues pursuant to White v. State.

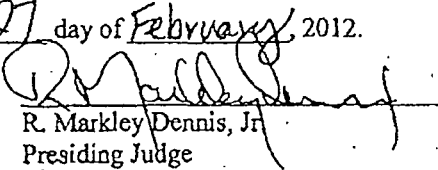
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

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IT IS THEREFORE ORDERED:

- 1. That the Applicant is GRANTED a belated appeal pursuant to White v. State;
- 2. That all other allegations for post-conviction relief be DENIED and DISMISSED with prejudice; and
- 3. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of February, 2012.


 R. Markley Dennis, Jr.
 Presiding Judge
 9th Judicial Circuit

Charleston, South Carolina

Rmoj/10

138

SAV20091207269

WITNESSES

GARRISON
Charleston City Police Department

AGENCY CASE NUMBER

0922739

ARREST WARRANT NUMBER

K609532

DATE OF ARREST

December 15, 2009

ACTION OF GRAND JURY

TRUE BILL

[Signature]
For a person of Grand Jury
Date: MAY 1, 2010

VERDICT

For a person of Petit Jury Date:

INDICT

DOCKET NO. 2010GS1001722

The State of South Carolina
County of Charleston

COURT OF GENERAL SESSIONS

May Term 2010

THE STATE 09 7494(01)

vs.

DARREN AUL RAY SIMMONS
DOB: B/M

Indictment for
Burglary Second Degree

FILED

6/2/2010 5:33:02 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

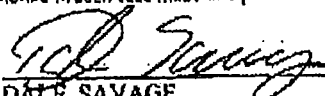
INDICTMENT

At a Court of General Sessions, convened on May 10, 2010 the Grand Jurors of Charleston County present upon their oath:

Burglary-Second Degree

That in Charleston County, on or about December 13, 2009, the Defendant; DARREN AULBRAY SIMMONS, did enter the building of Carolina Rod & Gun located at 1319 Savannah Highway without consent and with the intent to commit a crime therein. That, in addition the defendant did enter the business during the nighttime in violation of Section 16-11-312(B) of the South Carolina Code of Laws (1976) as amended

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


DALE SAVAGE
ASSISTANT SOLICITOR

140

843 722 4083

11:00:14 a.m. 12-16-2009

31 / 51

Charleston Police Department

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appear before me, a magistrate of this county etc **ROGER OWEN**

who first being duly sworn deposed and says that **Darren Aubray Simmons**

Did with in this county and state on the 15 December 2009 violate the criminal laws of the State of South

Carolina in the following particular:

DESCRIPTION OF OFFENSE

Burglary 2nd
16-11-312

The affiant states there is probable cause to believe that the defendant named did commit the crime set forth and that such probable cause is based on the following facts:

That on December 15, 2009 at 0357hrs at 1319 Savannah Hwy (Carolina Rod and Gun) in the City and County of Charleston the above named defendant did knowingly, willingly and unlawfully violate South Carolina law Burglary 2nd 16-11-312 in the following particulars:

To wit: The defendant, Darren Aubray Simmons and the co-defendants Jessica Leigh Kelly and Lamar Jones, did use bolt cutters to cut the locks off of the two Conex trailers located in the rear of the the business Carolina Rod and Gun with the intent to steal guns from the Conex trailers. They were interrupted when CPD officers arrived on scene due to an alarm activation. The Conex trailers are located on the ground and are used to house items for sale in the store.

The above is true and believable based on the investigations of CPD officers Cpl. Mills, Officers Cone, Scurry, Eiden and Garrison, also on the statements of the Co-defendant Kelly and defendant Simmons.

SWORD TO AND SUBSCRIBED BEFORE ME

THIS **DEC 16 2009** DAY OF **DEC**, 2009

SIGNATURE OF JUDGE

(L.S.)

COMPLAINT #:
WARRANT


AFFIANT

Charleston Police Department
180 Lockwood Blvd
Charleston, SC 29403
(843) 577-7434

142

STATE OF SOUTH CAROLINA)
 COUNTY OF Charleston)
 STATE VS.)
 DAKREN AULBRAY SIMMONS)
 AKA:)
 Race: B Sex: M Age: 25)
 DOB: SS#:)
 Address:)
 City/State/Zip: SUMMERVILLE, SC 294839000)
 DL#: SID#:)

IN THE COURT GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS1003109
 A/W#: DIRIND1020
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0020
 CDR Code #: 0124

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 ID: Possession of Tools of a Crime

CONVICTED OF or PLEADS

in violation of § 16-11-0020 of the S.C. Code of Laws, bearing CDR Code # 0124
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS/CSC § 17-25-45
 w/minor 1st or Lewd Act)

The charge is: As Indicted Lesser Included Offense. Defendant Waives Presentation to Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation Negotiated Sentence Recommendation by the State

ACTS: 7592 7592 7592 7592
 Waiver Date SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 3 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered. PTUP
 Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms:
 Set by SCOPPS

Obtain GED
 Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

*Fine:

Substance Abuse Counseling
 Random Drug/Alcohol testing

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DWI Surcharge)	\$100	\$
§ 26-5-299.5 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def Prob)	\$500	\$
§ 14-1-212 (Law Enforcement Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(B)(1) (Breath Test Fee)	\$50	\$
§ 36-5-2942(A) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCCA Surcharge)	\$5	\$ 4.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
% to County (if paid in installments)		\$ 390
TOTAL		\$ 193.00

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund
 Other: _____

Clerk of Court Deputy Clerk Pauline E. Howard
 Court Reporter Amanda W. Wiggins
 SC Case 17 (10/2010)

Presiding Judge [Signature]
 Judge Code: 213
 Sentence Date: 9/11/10

2010-Nov-17 04:11 PM SCDC Victim Services 403903000

342580
FOGTE
6/15

STATE OF SOUTH CAROLINA
 COUNTY OF Charleston 342580
 STATE VS.
DARREN AULBRAY SIMMONS
 AKA:
 Race: B Sex: M Age: 23
 DOB: 2-19-87 SSN:
 Address:
 City, State, Zip: Summerville, SC 29483-0000
 DL#: SIDA:

IN THE COURT OF GENERAL SESSIONS
 INDICTMENT/CASE#: 2010091001732
 A/W#: K609532
 Date of Offense: 12/19/2009
 S.C. Code §: 16-11-0312
 CDR Code #: 0080

SENTENCE SHEET
AMENDED
 CONVICTED OF or
 PLEADS

In disposition of the said indictment comes now the Defendant who was
 TO: Burglary / Burglary (Violent) (After 06/20/85) - Second degree
 In violation of § 16-11-0312(B) of the S.C. Code of Laws, bearing CDR Code # 0086
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS/GSC (w/minor 1st or Lower Act) §17-25-43

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Prosecution in Grand Jury. (defendant's initials)
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
 ATTORNEY: 75420
 Sarge, Ddc SC Bar Defendant Attorney for Defendant SC Bar

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed years
 and/or to pay a fine of \$; provided that upon the service of 10 days/months/years and/or payment
 of \$; plus costs and assessments as applicable; the balance is suspended with probation for
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.
 CONCURRENT or CONSECUTIVE to sentence on
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-15-40 to be calculated and applied
 by the State Department of Corrections. 101 Days
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-45 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:
 RESTITUTION: Deferred Def. Waives Interest Ordered
 Total: \$ plus 20% fee: \$
 Payment Terms:
 Set by SCDPPPS

PTUP days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp.
 May serve W/E beginning
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 install. of \$ beginning
 \$ paid to Public Defender Fee
 Other:

Recipient:
 *Fees:

§ 14-1-206 (Assessments (17.5 %))	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 87.9 (Public Def. Prob)	\$500
§ 14-1-312 (Law Enforcement Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114(BUI Breath Test Fee)	\$30
§ 56-5-2942(J) (Vehicle Assessment)	\$400
Proviso 90.3 (SCCA Surcharge)	\$5
§ 44-53-450(C) (Conditional Discharge)	\$350
3% to County (if paid in installments)	\$
TOTAL	\$

Clerk of Court/ Deputy Clerk
 Court Reporter:
 SCCA/217 (06/2010)

NOV 17 2010
 Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel § 47.12 requires \$300 be paid to Clerk during probation.
 Presiding Judge
 Judge Coder:
 Sentence Date:

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2010-Nov-17 04:11 PM SCLX Victim Services 803096300

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 STATE VS.
 DARRIN AULBRAY SIMMONS
 ARRESTED
 MARRIED: Single: Sex: M Age: 35
 Height: 5'10" Weight: 175 lbs
 Eyes: BSS Hair: B
 Address: 117 1/2
 City/State: SUMMERVILLE, SC 29485000
 Birth Date: BIRTH

IN THE COURT OF GENERAL SESSIONS
 INDICTMENT/CASE#: 2010CS1001722
 A/W#: K609352
 Date of Offense: 12/15/2009
 S.C. Code §: 16-11-0112
 CDR Code #: 0980
 SENTENCE SHEET

(C) Yes No CMV Yes No Hazard Yes No
 In violation of the said indictment comes now the Defendant who was
 (1) Harassment, 2nd Degree, Non-Violent

CONVICTED OF or PLEADS

In violation of § 16-11-0112 of the S.C. Code of Laws, bearing CDR Code # 0080
 Misdemeanor VIOLENT AGGRAVATED MOST SERIOUS Mandatory UPSCSC
 (with or without law Act) § 17-24-35

The charge is: An Indictment Charge included in arrest Defendant Waives Prosecution to Grand Jury (Defendant's initials)
 The plea is: Without Negotiations or Recommendation Negotiated Sentence Recommendation by the State
 Attorney for Defendant: 66585
 Attorney for Defendant: SC Bar

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 10 days/months/years under the Youthful Offender Act not to exceed your
 and of to pay a fine of \$ 10; provided that upon the service of 10 days/months/years or payment
 of \$ 5; plus costs and assessments as applicable; the balance is suspended with probation for 5

Defendant is subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation which are incorporated by reference.
 CONCURRENT or CONSECUTIVE to sentence on
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. 101 Days
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:
 RESTRICTION: No travel No. Without hearing Other: _____
 Total \$ _____ plus 20% fee \$ _____
 Payment Terms: _____
 See by SCOPPTS _____

Recipient: _____
 *Fine:

§ 14-3-208 (Assessments 107.5 fee)	\$	
§ 14-1-211(A) (Fines, Noncharge)	\$100	\$100.00
§ 14-1-211(A)(2)(B) (Surcharge)	\$100	\$
§ 36-3-2945 (1)(4) Assessment	\$12	\$
§ 36-1-266 (1)(1) (Health Fee)	\$25	\$
Pay for 47.9 (1)(6)(1) (Court Fee)	\$300	\$300.00
§ 14-1-212 (1) (Law, Defense, Fund)	\$25	\$85.00
§ 14-1-212 (3) (Law, Court Fund)	\$150	\$
§ 36-3-2945 (1)(4) (Health Fee)	\$30	\$
§ 36-3-2945 (1)(4) (Vehicle Assessment)	\$4000	\$
Pay for 40.5 (SCVA Surcharge)	\$5	\$8.00
§ 44-5-1-906 (1) (Conditional Discharge)	\$350	\$
State Court (if paid to installment)		\$15.00
CGM		\$142.00

Clerk of Court/Deputy Clerk: Christine A. Beach
 Court Reporter: AnnMarie Shepard
 W (202) 736-2010

_____ days/hours Public Service Employment
 Chain of Command
 Amend Voc, Rehab, or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 installments of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Condition Discharge, § 44-51-430(L) requires
 \$350 be paid to the Clerk prior to case disposition.
 Appointed PD or appointed other court
 § 47-1-17 requires \$500 be paid in cash
 during probation.

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 Presiding Judge: _____ SSDC
 Judge Code: _____ VICTIM SERVICES
 Sentence Date: 5/1/10

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