

PETITION FOR A WRIT CERTIORARI  
IN POST-CONVICTION RELIEF ACTIONS  
THE STATE OF SOUTH CAROLINA IX  
THE SUPREME COURT

**RECEIVED**

APR 21 2014

S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE G. EDWARD WELMAKER, CIRCUIT COURT JUDGE  
CASE NO. # 2012-CP-2333

Fred Dowser  
STATE OF SOUTH CAROLINA

PETITIONER,  
RESPONDENT.

PRO-SE SUPPLEMENTAL BRIEF FOR  
PETITION FOR WRIT OF CERTIORARI

s/ Fred Dowser  
490 WISACKY HWY.  
BISHOPVILLE S.C. 29010

## QUESTION PRESENTED

DID THE (P.C.R.) COURT ERR IN RULING THAT COUNSEL WAS NOT INEFFECTIVE FOR COERCING PETITIONER TO PLEAD GUILTY, AND FOR FAILING TO WITHDRAW THE GUILTY PLEA BECAUSE OF THE UNKEPT PLEA AGREEMENT, AND WAS COUNSEL INEFFECTIVE FOR FAILING TO MAKE SURE PETITIONER UNDERSTOOD THE FULL CONSEQUENCES OF THE PLEA WHEN COUNSEL KNEW THERE WAS NO TEN YEAR PLEA AGREEMENT ON THE TABLE WHICH VIOLATED PETITIONER DUE PROCESS, AND IS THERE ENOUGH EVIDENCE WITHIN THE (P.C.R.) TRANSCRIPT TO SUPPORT PETITIONER ALLEGATION THAT THIS GUILTY PLEA WAS UNCONSTITUTIONAL, UNKNOWINGLY, UNINTELLIGENTLY, AND INVOLUNTARILY MADE.

## ARGUMENT

PETITIONER ALLEGES HIS GUILTY PLEA WAS INVOLUNTARY AND THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL WAS INEFFECTIVE FOR FAILING TO INFORM PETITIONER OF THE FULL CONSEQUENCES OF THE PLEA BARGAIN. TO BE KNOWING AND VOLUNTARY, A PLEA MUST BE ENTERED WITH A FULL UNDERSTANDING OF THE CHARGES AND THE CONSEQUENCES OF THE PLEA. BOLKIN V. AIA 395 U.S. 238, 238, 243-44, 89 S. CT. 1769, 1772; DOVER V. STATE, 405 S.E. 2D 391, 392. IT IS AXIOMATIC THAT TO BE VOLUNTARILY AND UNDERSTANDINGLY MADE A PLEA OF GUILTY MUST BE SOLELY THE PRODUCT OF PETITIONER INFORMED FREE WILL. A GUILTY PLEA IS NOT VOLUNTARY AND MUST BE STRICKEN IF THAT FREE WILL IS OVERBORNE BY THE PROSECUTOR OR BY THE ACCUSED'S LAWYER.

PETITIONER STATES THE LAW MANDATES THAT IT IS PROPER TO CONSIDER THE GUILTY PLEA TRANSCRIPT AS WELL AS EVIDENCE PRESENTED AT THE (P.C.R.) HEARING, HARRIS V. LEEKE, 218 S.E. 2D 360, ANDERSON V. STATE, 535 S.E. 2D 699. FOR PETITIONER TO BE GRANTED (P.C.R.) AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, PETITIONER MUST SHOW BOTH: (1) THAT HIS COUNSEL FAILED TO RENDER REASONABLY EFFECTIVE ASSISTANCE UNDER PREVAILING PROFESSIONAL NORMS, AND (2) THAT HE WAS PREJUDICED BY HIS COUNSEL'S INEFFECTIVE PERFORMANCE, SEE STRICKLAND V. WASHINGTON, 466 U.S. 164 S. CT. 2052; PORTER V. STATE, 629 S.E. 2D 353, 356. WHEN THERE HAS BEEN A GUILTY PLEA, THE PETITIONER 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 PETITIONER WOULD NOT HAVE PLED GUILTY AND WOULD HAVE INSISTED ON GOING TO TRIAL, HEIL V. LOCKHART, 474 U.S. 82, 88-89, 166 S. CT. 366, 370; ROSCOVE V. STATE, 546 S.E. 2D 417, 419.

THE COURT STATED REGARDING PETITIONER CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THIS COURT FINDS THE APPLICANT HAS FAILED TO MEET HIS BURDEN OF PROOF. THIS COURT FINDS THE APPLICANT TESTIMONY IS NOT CREDIBLE, WHILE ALSO FINDING PLEA COUNSEL'S TESTIMONY IS CREDIBLE.

THE RECORD DEMONSTRATES THAT PETITIONER REFUSED TO PLEAD GUILTY, ALSO PETITIONER RAISED JAI (P.C.R.) THAT THE GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE BUT WAS THE PRODUCT OF

TRICKERY, MISADVISE AND INDUCEMENT WHICH VIOLATED PETITIONER DUE PROCESS AND 6TH AMEND CONST. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. PETITIONER PRESENTED CREDIBLE EVIDENCE AND RELIABLE EVIDENCE TO DEMONSTRATE THAT THERE IS A REASONABLE PROBABILITY THAT HAD NOT COUNSEL MISLEAD PETITIONER WITH THE TEN YEAR CAP PETITIONER WOULD NOT HAVE PLEAD GUILTY, HILL V. LOCKHART, SUPRA, BUT WOULD HAVE INSISTED ON GOING TO TRIAL. FRED DOWNER, JR. (THE APPLICANT'S FATHER) AND ASHLEY GLENN (THE MOTHER OF THE APPLICANT'S CHILD) STATED THEY MET WITH APPLICANT AND PLEA COUNSEL IN COUNSEL'S OFFICE ON THE DAY OF THE PLEA HEARING. DOWNER AND GLENN STATED PLEA COUNSEL TOLD THEM AND PETITIONER WOULD RECEIVE A TEN YEAR SENTENCE IF HE PLEAD GUILTY. DOWNER AND GLENN STATED PLEA COUNSEL RESTATED THIS WHEN THEY MET AT THE COURT HOUSE LATER THAT DAY.

OUT OF JUST CONSIDERATION FOR PERSONS ACCUSED OF CRIME, COURTS SHOULD BE CAREFUL THAT A PLEA OF GUILTY SHALL NOT BE ACCEPTED UNLESS MADE VOLUNTARILY AFTER PROPER ADVISE AND WITH FULL UNDERSTANDING OF ALL THE CONSEQUENCES, KERCHEVAL V. U.S., SUPRA, RESKIN V. AIA, SUPRA. A GUILTY PLEA, IF INDUCED BY PROMISES OR THREATS WHICH DEPRIVE IT OF THE CHARACTER OF A VOLUNTARY ACT, IS VOID, MACHIBRODA V. U.S. SUPRA. A CONVICTION BASED UPON SUCH A PLEA IS PROPERLY OPEN TO CHALLENGE IN COLLATERAL ATTACK, WALKER V. JOHNSON, SUPRA; WALKER V. JOHNSON, SUPRA. GUILTY PLEA IS PROPERLY OPEN TO CHALLENGE IN SITUATIONS INVOLVING UNCOUNSELLED DEFENDANT OR IN SITUATIONS WHERE THE CIRCUMSTANCES THAT COERCED THE CONFESSION HAVE ABIDING IMPACT AND ALSO THAT THE PLEA.

MISUNDERSTANDING, DURESS, OR MISREPRESENTATION BY COUNSEL MAKES A GUILTY PLEA A CONSTITUTIONAL INADEQUATE BASIS FOR IMPRISONMENT.

PETITIONER ALLEGED THAT HE HAD BEEN ADMONISHED BY COUNSEL THAT DISCLOSURE COULD JEOPARDIZE PLEA AGREEMENT, AND INSTRUCTED TO ANSWER THE QUESTIONS SO THAT THE COURT WOULD ACCEPT THE GUILTY PLEA. SO THE STATE REFERRING TO THE GUILTY PLEA RECORD HAS NO BASIS WITHIN THIS ARGUMENT, BECAUSE FEDERAL COURT HAS RULED THE ACCUSED MAY NOT ALWAYS ANSWER THE COURTS INTERROGATION IN A PLEA PROCEEDING WITH COMPLETE CANDOR. THE ACCUSED MAY BE FEARFUL THAT FULL DISCLOSURE WOULD JEOPARDIZE THE BARGAIN. WATERS V. HARRIS, 460 F. 2D 988.

WHITE V. GAFFNEY, 435 F.2D 1241, JONES V. U.S., 423 F.2D 252. THIS CANNOT BE USED AS A FACTOR BECAUSE PETITIONER PLEADED GUILTY. PETITIONER MAY BE OVERWHELMED BY HIS DESIRE TO HAVE HIS PLEA ACCEPTED, THATS WHY THE LAW IS CLEAR THAT A VALID PLEA OF GUILT REQUIRES THAT PETITIONER BE MADE AWARE OF ALL THE DIRECT CONSEQUENCES OF HIS PLEA. THE HIGHER COURTS HAVE ALSO STATED EXAMINATION OF PETITIONER ALONE WILL NOT ALWAYS BRING OUT INTO THE OPEN A PROMISE THAT HAS INDUCED THE GUILTY PLEA. IF THE JUDGE, THE PROSECUTION, OR DEFENSE COUNSEL MAKES A STATEMENT IN OPEN COURT THAT IS CONTRARY TO WHAT PETITIONER HAS BEEN LED TO BELIEVE, ESPECIALLY AS TO PROMISES BY THE PROSECUTOR OR DEFENSE COUNSEL, ... [PETITIONER] WOULD NO MORE CHALLENGE THE STATEMENT IN OPEN COURT THEN HE WOULD CHALLENGE A CLERGYMAN'S SERMON FROM THE PULPIT, U.S.V. WILLIAMS, 407 F.2D 940.

ATMOSPHERE OF SECRECY CHARACTERIZED THE PLEA BARGAINING AT THE TIME OF THE PLEA WHICH WAS BROUGHT OUT BY EVIDENCE PRESENTED AT THE (P.C.R.). PETITIONER STATES HIS GUILTY PLEA WAS INDUCED BY AN UNKEPT PROMISE, AND THEREFORE WAS NOT THE FREE AND WILLING CHOICE OF PETITIONER, AND SHOULD BE SET ASIDE BY THIS COURT. AN UNKEPT BARGAIN WHICH HAS INDUCED A GUILTY PLEA IS GROUND FOR RELIEF. THE COURTS HAVE HELD THAT PETITIONER IS ENTITLED TO SOME FORM OF RELIEF WHEN PETITIONER SHOW THAT COUNSEL RENEGED ON SENTENCING AGREEMENT MADE IN CONNECTION WITH PLEA BARGAIN.

PETITIONER CONTENDS THAT EDWARDS V. GARRISON, 529 F.2D 1374, CERT. DENIED, 424 U.S. 980 AND ALTESSA V. BLACKEDGE, 533 F.2D 894, SUPPORT THE SUFFICIENCY OF THE ALLEGATIONS TO REQUIRE WRIT OF HABEAS CORPUS. BOTH OF THESE CASES INVOLVED CHARGES OF A BROKEN PLEA BARGAIN, COUPLED WITH AN AVERMENT THAT THE DEFENDANT WAS COUNSELED BY HIS ATTORNEY TO ANSWER FAISLY THE COURTS INQUIRY, WHICH HE WAS ASSURED WAS MERELY COURTESY FORMALITY. PETITIONER CAN CHALLENGE HIS ARRANGEMENT ANSWER WHEN PETITIONER HAS BEEN ADVISED BY COUNSEL TO GIVE ANSWERS THAT THE COURT WOULD REQUIRE IN ORDER TO ACCEPT THE PLEA, RATHER THAN THOSE WHICH REFLECTED THE TRUTH.

CRAWFORD V. U.S., 519 F.2D 347, STATED IT IS NOT ENOUGH FOR THE PRISONER MERELY TO CHALLENGE THE VOLUNTARIANESS OF THE PLEA. HE MUST ALLEGE SUFFICIENT FACTS TO RAISE AN ISSUE ABOUT THE VALIDITY OF THE ARRANGEMENT. PETITIONER (P.C.R.) RECORD SATISFIES THESE DUAL REQUIREMENTS. PETITIONER STANDS ON THE GROUNDS RAISED IN THE (P.C.R.) APPLICATION:

- (A) AN UNKEPT BARGAIN WHICH HAS INDUCED A GUILTY PLEA IS GROUNDS FOR RELIEF FROM SENTENCE, SPANTORIELLO V. NEW YORK, 404 U.S. 287.
- (B) IF PETITIONER WAS IN FACT PROMISED BY COUNSEL THAT PETITIONER WOULD RECEIVE A TEN YEAR SENTENCE, PETITIONER IS ENTITLED TO RELIEF, U.S. V. CARTER, 454 F. 2D 426.
- (C) IT IS WELL KNOWN THAT A DEFENDANT WILL SOMETIMES DENY THE EXISTENCE OF A BARGAIN THAT HAS IN FACT OCCURRED, WHITE V. GAFFNEY, 435 F. 2D 1241, JOHNS V. U.S., 423 F. 2D 252, U.S. V. WILLIAMS, 407 F. 2D 940, MALFORD V. U.S., 519 F. 2D 347; OUT OF FEAR THAT THE TRUTH WOULD JEOPARDIZE THE BARGAIN.

### REASON FOR GRANTING THE PETITION

PETITIONER SHOULD BE GRANTED WRIT OF CERTIORARI TO DEMONSTRATE THAT DUE PROCESS CAN BE VIOLATED BY THE ADVICE OF COUNSEL BEFORE A DEFENDANT DECIDES TO PLEAD GUILTY. THEN COUNSEL GO COMPLETELY AGAINST WHAT HE SAID TO INDUCE THE PLEA. THE NATIONAL IMPORTANCE OF THIS HONORABLE COURT DECIDING TO GRANT CERTIORARI IS TO DEMONSTRATE THE IMPORTANCE OF OTHERS SIMILARLY SITUATED THAT THE RIGHT TO EFFECTIVE COUNSEL INCLUDING GUILTY PLEA APPLIES TO ALL CRITICAL STAGES OF THE PROCEEDING BEFORE AND AFTER THE DECISION OF THE LOWER COURT IS ERRONEOUS BECAUSE IT DID NOT TAKE INTO CONSIDERATION ALL THE PROBATIVE EVIDENCE PRESENTED AT THE (P.C.R.) HEARING, BECAUSE PETITIONER STATES HAD NOT COUNSEL MISTAKENLY INFORMED PETITIONER ABOUT THE LENGTH OF THE SENTENCE PETITIONER WOULD NOT HAVE AGREED TO PLEAD GUILTY.

### CONCLUSION

FOR THESE REASONS STATED, PETITIONER ASKS AND PRAYS THAT THIS HONORABLE COURT GRANT THE PETITION FOR A WRIT OF CERTIORARI AND VACATE PETITIONER UNCONSTITUTIONAL SENTENCE

## AFFIDAVIT

Ashley Glenn

The above person appeared before me, who, first being duly sworn deposes and states that the following declarations are true correct under the penalty of perjury!

- 1.) I witnessed and discussed with Fred Downer that it would be best for him to take the 10 years instead of the 30 years. Fred counsel and I influenced him to plea to the 10 year plea. At no time did I or he hear counsel inform him of the possibility of getting anything else. That's why we told him to plea.

*Ashley Glenn*

*Notary Public of Greenville SC*

*Laura Blackmon 4-11-13*

Laura G. Blackmon  
My Commission Expires  
August 10, 2021

# AFFIDAVIT

Thomas Downer

*Thomas Downer*

*10/1/2012*

The above person(s) appeared before me, who, first being duly sworn deposes and states that the following declarations are true and correct under the penalty of perjury!

I That I witness and discussed with Fred Downer that it would be best for him to take the 10 years instead of the 30 years. Fred counsel and my family influenced him to plea to the 10 year plea. At no time did we or him hear/or counsel inform him of the possibility of getting anything else. That's why we told him to plea.

*Phillip B Cole*

**PHILLIP B. COLE**  
**NOTARY PUBLIC**  
Kentucky, State At Large  
My Commission Expires 9/12/2016  
I.D. # 474565

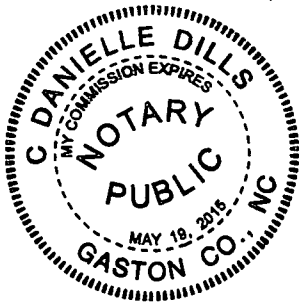


Affidavit

Labertha Downer

North Carolina, C. Danielle Dills, a Notary Public  
for Gaston County, North Carolina, do hereby certify that  
Labertha Downer personally appeared before me this day and acknowledge the due  
execution of the forgoing instrument.

Witness my hand and official seal this the 24<sup>th</sup> day of September,  
2012.



C. Danielle Dills

My commission expires: May 19, 2015

The above persons appeared before me, who first being sworn deposes and states that the following declarations are true and correct under the penalty of perjury!

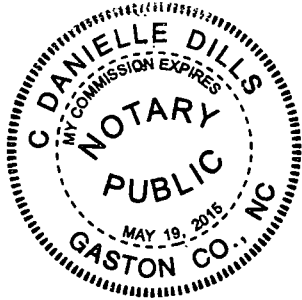
- 1.) That I witness and discussed with Fred Downer Jr., that it would be best for him to take the 10 years instead of the 30 years. I and Fred Downer Jr. counsel influenced him to plea to 10 year plea bargain. At no time did I or he hear or counsel informed him of the possibility of getting anything else. That's why I told him to plea. Labertha Downer

Affidavit

Frederick Downer Sr.

North Carolina, C. Danielle Dills, a Notary Public  
for Gaston County, North Carolina, do hereby certify that  
Frederick Downer Sr. personally appeared before me this day and acknowledge the due  
execution of the forgoing instrument.

Witness my hand and official seal this the 24<sup>th</sup> day of September  
2012.



C. Danielle Dills

My commission expires: May 19, 2015

The above persons appeared before me, who first being sworn deposes and states that the following declarations are true and correct under the penalty of perjury!

- 1.) That I witness and discussed with Fred Downer Jr., that it would be best for him to take the 10 years instead of the 30 years. I and Fred Downer Jr. counsel influenced him to plea to 10 year plea bargain. At no time did I or he hear or counsel informed him of the possibility of getting anything else. That's why I told him to plea.

Frederick A. Downer  
Sr.

FRED Downor # 346507  
Lee Correctional Institution/Dar-51228  
990 WISSYKY Hwy  
Bishopville, SC, 29010

The Supreme Court of South Carolina  
Post Office Box 11330  
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