

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

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MAY 21 2014

S.C. Supreme Court

LONZIE JOSEPH FOX,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000368

APPENDIX

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JULY 14, 2011
 RICHLAND, SOUTH CAROLINA

B-E-F-O-R-E:
 HONORABLE CASEY L. MANNING, JUDGE;

A-P-P-E-A-R-A-N-C-E-S:
 FOR THE PLAINTIFF:
 LUCK CAMPBELL, ESQ.

FOR THE DEFENDANT:
 RHODES BAILEY, ESQ.
 JENNIFER DAVIS, ESQ.

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PLEA:

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CERTIFICATE OF REPORTER:

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E-X-H-B-I-T-S

(REPORTER'S NOTE: THERE WERE NO EXHIBITS ENTERED.)

1 (The following proceedings were
2 held on July 14, 2011.)

3 MS. DAVIS CAMPBELL: May it please the Court?

4 THE COURT: Yes, ma'am.

5 MS. DAVIS CAMPBELL: Your Honor, this is Mr.
6 Lonzie Fox. He's before you today pleading to one count of
7 assault with intent to commit criminal sexual conduct in the
8 second degree and one count of burglary in the second
9 degree. In exchange, there was a reduction in this case and
10 also in exchange for this the remaining charges will be
11 dismissed arising out of this incidence.

12 THE CLERK: Raise your right hand.

13 THEREUPON,

14 LONZIE FOX,
15 after having been duly sworn, testified as follows:

16 MS. DAVIS CAMPBELL: Your Honor, I was informed
17 and just informed too that I believe he's pleading under
18 Alford to the burglary.

19 MR. BAILEY: Not on the CSC just the burglary,
20 Judge.

21 THE COURT: Attempt second that's still 20 years,
22 is it not?

23 MS. DAVIS CAMPBELL: (The solicitor nodded head.)
24 It's 20 years and it is 85 percent and it's considered most
25 serious.

1 THE COURT: Okay. Mr. Bailey and Ms --
2 MS. DAVIS: Davis.
3 THE COURT: Davis.
4 MS. DAVIS: Yes, sir.
5 THE COURT: Mr. Bailey, Ms. Davis, y'all represent
6 Lonzie Fox?
7 MR. BAILEY: Yes, Your Honor.
8 THE COURT: Have y'all explained to Mr. Fox the
9 charges contained in these two indictments, the possible
10 punishments and his rights, including his constitutional
11 right to a jury trial?
12 MR. BAILEY: Yes, Judge.
13 THE COURT: In your opinion, Mr. Bailey, does
14 Mr. Fox understand the charges, the punishment and his
15 rights?
16 MR. BAILEY: Yes, Your Honor.
17 THE COURT: How does he indicate to you and Ms.
18 Davis he wishes to plead, guilty or not guilty?
19 MR. BAILEY: Guilty, sir, under the CSC charge and
20 guilty under North Carolina versus Alford on the burglary
21 charge, Judge.
22 THE COURT: Y'all agree with his decision to do
23 so, that is to enter these pleas?
24 MR. BAILEY: Yes, Judge.
25 THE COURT: From your investigation of the facts

1 and circumstances surrounding these cases, do you feel that
2 the state could produce sufficient evidence to convince a
3 jury here in Richland County of Mr. Fox's guilt beyond a
4 reasonable doubt, and if he were to stand trial on these
5 charges his convictions would be probable?

6 MR. BAILEY: Yes, Your Honor.

7 THE COURT: Now, has Mr. Fox been ordered to
8 submit to a mental examination to determine his competency
9 to stand trial?

10 MR. BAILEY: No, Your Honor.

11 THE COURT: Any question in your mind, Mr. Bailey,
12 Ms. Davis, that Mr. Fox is in fact competent to enter this
13 guilty plea?

14 MR. BAILEY: No, Judge.

15 THE COURT: All right. You are Lonzie Fox, is
16 that correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Mr. Fox, before I can accept your
19 pleas of guilty, it's necessary for me to make sure that
20 you're making this plea freely and voluntarily. To do that,
21 sir, I need to ask you a series of questions.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: At any point during my questioning of
24 you, if you do not understand anything that I say or any
25 words that I use please stop me. I will be more than happy

1 to repeat or explain anything I say, Mr. Fox. Additionally,
2 I'll be more than happy to stop this plea and allow you as
3 much time as you feel you may need to consult with your
4 lawyers, Mr. Bailey and Ms. Davis, do you understand, sir?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: How old are you, Mr. Fox?

7 THE DEFENDANT: 48.

8 THE COURT: How far did you go in school?

9 THE DEFENDANT: Eighth grade.

10 THE COURT: All right. What kind of work have you
11 done?

12 THE DEFENDANT: Construction mostly.

13 THE COURT: All right.

14 THE DEFENDANT: And mechanic.

15 THE COURT: All right. Mr. Fox, have you ever
16 been treated for the abuse of alcohol or drugs or mental
17 illness?

18 THE DEFENDANT: No, sir.

19 THE COURT: Have you taken any medications, drugs
20 or alcohol in the past 24 hours?

21 THE DEFENDANT: Just for -- medication for my
22 liver.

23 THE COURT: All right. Do that effect, this
24 medication for your liver, effect your ability to know and
25 understand and appreciate what you're doing here today?

1 THE DEFENDANT: No, sir.

2 THE COURT: You know what you're doing, is that
3 correct, Mr. Fox?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you agree, Mr. Bailey, Ms. Davis,
6 that Mr. Fox knows, understands, appreciates what he's doing
7 here this morning?

8 MR. BAILEY: Yes, Your Honor.

9 THE COURT: All right. Now, Mr. Fox, you heard
10 your lawyers Mr. Bailey, Ms. Davis tell me that they have
11 explained to you the charges contained in these two
12 indictments, the possible punishments and your rights,
13 including your right to a jury trial and that you understand
14 these things, is that correct?

15 MR. BAILEY: Yes, sir.

16 THE COURT: Mr. Fox, you're first before me on
17 Indictment Number 2011-847, The State versus Lonzie Fox,
18 this is an indictment for criminal sexual -- attempted
19 criminal sexual conduct in the second degree, do you
20 understand this charge, sir?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: This indictment, Mr. Fox, alleges that
23 you did here in Richland County on or about December the
24 30th of 2009 attempted to commit a criminal sexual conduct
25 act against Ms. Mini Peters, do you understand this

1 allegation?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You tried to sexually assault
4 Ms. Peters. You understand this allegation, this is what
5 you want to plead guilty to, is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Realizing, Mr. Fox, that by pleading
8 guilty to attempted criminal sexual conduct in the second
9 degree, sir, you could go to jail for 20 years.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Knowing then, Mr. Fox, that you can go
12 to prison for 20 years by pleading guilty to this charge, do
13 you still wish to do so?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Next, Mr. Fox, I have
16 before me Indictment Number 2010-616, The State versus
17 Lonzie Fox. This the an indictment for burglary in the
18 second degree.

19 Is this violent or nonviolent?

20 MS. CAMPBELL: Nonviolent, Your Honor.

21 THE COURT: All right. Do you understand this
22 charge, sir?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: This indictment, Mr. Fox, alleges that
25 you did here in Richland County on or about December the

1 30th of 2009 enter the dwelling of Ms. Peters located at [REDACTED]
2 [REDACTED] without consent or with the intent to commit the
3 crime therein. You understand this allegation?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You want to plead got under North
6 Carolina versus Alford to breaking into Ms. Peters house, is
7 that correct?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Realizing that by pleading guilty to
10 burglary in the second degree, Mr. Fox, you could go to jail
11 for 15 years?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Knowing then, sir, that you can go to
14 prison for 15 years by pleading guilty to burglary second
15 degree nonviolent, do you still wish to do so?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: That is guilty under North Carolina
18 versus Alford. Now, Mr. Fox, are you currently on probation
19 or parole for any prior offenses?

20 THE DEFENDANT: No, sir.

21 THE COURT: Mr. Fox, I could run the -- I can run
22 the sentences on these two charges consecutively that is put
23 one after the other or add one to the other and if I did so
24 you're looking at 35 years in the penitentiary, do you
25 understand that, sir?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Knowing then, Mr. Fox, that you could
3 go to prison for 35 years by pleading guilty to these two
4 charges, do you still wish to plead guilty to them?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: That is guilty to the CSC -- attempted
7 CSC second and guilty under Alford to the burglary second,
8 do you still wish to enter these guilty pleas?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Now, Mr. Fox, when you plead guilty or
11 guilty under Alford you have to give up certain basic
12 rights. First of all, you have to give up your right to
13 remain silent. Now, this is your right against self
14 incrimination, Mr. Fox, your right to say nothing at all.
15 No one can compel you to come into court to provide evidence
16 or to testify against yourself, do you understand this, sir?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Secondly, Mr. Fox, when you plead
19 guilty, or guilty under North Carolina versus Alford you
20 have to give up your right to a jury trial. That is your
21 right for a jury trial here in Richland County to decide
22 whether or not you're guilty of these two charges beyond a
23 reasonable doubt. A jury would base its decision on
24 whatever evidence the state would introduce at trial against
25 you and also on whatever evidence you and your lawyers

1 Mr. Bailey and Ms. Davis here may wish to introduce. Now,
2 Mr. Fox, I emphasize may wish to introduce, sir, because in
3 a trial you'd be presumed innocent. Would not have to prove
4 anything and you could not be convicted unless the state
5 convinced all 12 jurors of your guilt beyond a reasonable
6 doubt. The jury's decision would have to be unanimous. All
7 12 would have to agree that you broke into Ms. Peters house
8 and tried to sexually assault her, you understand this, sir?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Thirdly, Mr. Fox, when you plead
11 guilty you give up your right to confront and to be
12 confronted by the witnesses against you, that is your right
13 to see, hear and cross-examine any witnesses the state may
14 call to testify against you during a trial.

15 And additionally, Mr. Fox, while pleading guilty
16 you give up your right to subpoena and call witnesses on
17 your own behalf, that is, someone who may testify for you,
18 do you understand that, sir?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now, do you understand these rights I
21 just mentioned to you, Mr. Fox?

22 THE DEFENDANT: Excuse me?

23 THE COURT: Do you understand these rights I just
24 mentioned to you?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Those three things that I went over
2 with you. Do you understand, sir, that when you plead
3 guilty you have to give up these constitutional rights?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Now, is that what you want to do?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You want to give up your
8 constitutional rights?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Now, you realize you will not receive
11 a jury trial on any of these two charges by pleading guilty
12 to them?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Once again, Mr. Fox, you're pleading
15 guilty to attempted criminal sexually conduct in the second
16 degree that carries a prison term of up to 20 years. You're
17 pleading guilty to burglary in the second degree nonviolent
18 that carries a term of up to 15 years. I've explained to
19 you already that you're facing 35 years in the penitentiary
20 by pleading guilty and guilty under Alford to one of the
21 charges. Now, you're giving up all of your constitutional
22 rights, Mr. Fox.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Considering what I just said to you
25 that is the time you're facing and everything, I'll ask you

1 once again, how do you wish to plead to these charges guilty
2 or not guilty?

3 THE DEFENDANT: Guilty.

4 THE COURT: And guilty under Alford to the
5 burglary.

6 You realize, Mr. Fox, that when you plead guilty
7 you admit the truth of the allegations contained in the
8 criminal -- attempted criminal sexual conduct in the second
9 degree and you're saying that you do not wish to fight the
10 charges on the burglary second you feel that you might be
11 convicted, you understand this?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: I tell you all of this, Mr. Fox, is
14 because you may have some defenses to these charges, of
15 course, I have no way of knowing that but you need to
16 realize that by entering this plea here today you give up
17 any defenses you might have, do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Additionally, Mr. Fox, I will tell you
20 that because when you were arrested by the Richland County
21 Sheriff's Department you may have given so type of
22 incriminating statement, that is made some admission or
23 confession about your guilt. You need to realize that by
24 pleading guilty here today or guilty under Alford your waive
25 to later on challenge or contest that that is if you gave

1 any statements or whether or not they were written --
2 whether or not they were obtained from you freely and
3 voluntarily in accordance with your constitutional rights,
4 you understand?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. So, Mr. Fox, I will ask
7 you once again, did you commit this attempted CSC second
8 degree?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right. So once again, you're
11 telling me you're pleading guilty to Indictment 2011-847,
12 attempted criminal sexual conduct in the second degree
13 because you did, in fact, here in Richland County on or
14 about December 30th, 2009 attempted to commit a sexual
15 assault on one Ms. Peters?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You're pleading guilty because you are
18 guilty of this, is that correct?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. And once again, Mr. Fox,
21 in connection to Indictment Number 2010-616, burglary second
22 degree, once again, you want to plead guilty under North
23 Carolina versus Alford to the allegation that you did here
24 in Richland County on or about December 30th, 2009 enter the
25 dwelling of Mini Peters located a [REDACTED] without

1 consent or with the intent to commit a crime therein?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You're pleading guilty under the CSC
4 second because you are guilty and you want to plead guilty
5 under Alford to the burglary once again, is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. What are the plea
8 negotiations again, solicitor?

9 MS. CAMPBELL: Your Honor, the only plea
10 negotiations in the case is a reduction in the charge as
11 well as a dismissal. He was also charged I believe with a
12 kidnapping as well as transmitting a sexually – sexual
13 disease, he's got Hepatitis C and those are being
14 dismissed on --

15 THE COURT: A sexual --

16 MS. CAMPBELL: A sexually transmitted disease.

17 THE COURT: Okay. STD I guess is what they call
18 it. Anything additional, Mr. Bailey, Ms. Davis, that needs
19 to be added to the record in connection with any plea
20 negotiations or any recommendations?

21 MR. BAILEY: No, Judge.

22 THE COURT: Do you still continue -- do you still
23 wish to continue with your plea, Mr. Fox?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Now, sir, has any promised you

1 anything or held any hope of reward in order to get you to
2 plead guilty and guilty under Alford?

3 THE DEFENDANT: No, sir.

4 THE COURT: Has anyone threatened you or used
5 force to get you to enter this guilty plea?

6 THE DEFENDANT: No, sir.

7 THE COURT: Has anyone used any pressure or
8 intimidation to cause you to plead guilty?

9 THE DEFENDANT: No, sir.

10 THE COURT: Have you had enough time to make up
11 your mind as to whether or not you want to enter this guilty
12 plea under particular CSC second and Alford under the
13 burglary, is that correct?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Are you making this plea
16 freely and voluntarily?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: All right. Now, Mr. Fox, are
19 satisfied with the manner of your lawyers here Mr. Bailey
20 and Ms. Davis the way they have advised and represented you
21 on these charges?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Have you talked with them for as long,
24 for as often as you feel it necessary for them to properly
25 represent you?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you need any more time to talk with
3 them?

4 THE DEFENDANT: No, sir.

5 THE COURT: Have you understood your talks with
6 them?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Fox, has Mr. Bailey and Ms. Davis
9 done everything for you you feel they should do or could do
10 on your behalf in advising and representing you on these
11 charges?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have they done anything you feel they
14 should not have done?

15 THE DEFENDANT: No, sir.

16 THE COURT: Are you completely satisfied with
17 their services?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: You have any complains, Mr. Fox,
20 against anyone against anyone at the Richland County
21 Sheriff's Department?

22 THE DEFENDANT: No, sir.

23 THE COURT: Any complaints against anyone working
24 here in the solicitor's office?

25 THE DEFENDANT: No, sir.

1 THE COURT: All right. Very well, solicitor, will
2 be happy to hear about it.

3 MS. CAMPBELL: May it please the Court, Your
4 Honor. This did occur back on December the 30th of 2009 in
5 the early evening hours and to give you -- and I don't know
6 if this is appropriate at this time, but I got to give you a
7 little bit of a background to setup a scenario that
8 transpired on that date. This did happened down in the
9 Eastover Community, Your Honor, off 601 if you're going
10 toward Sumter it's right there not far off the highway.

11 The families involved, Mr. Fox had actually dated
12 the victim who was 84 years old at the time this occurred he
13 had dated her daughter for a period of time. They had
14 broken up sometime prior to this happening; however, the
15 defendant was pron to show up over at their house. And had
16 actually I believe been there the night before and was drunk
17 kind of out of control and had actually passed out I believe
18 on their couch. He was then escorted back to his house that
19 day by Ms. Micky Sites who is present in the courtroom, Your
20 Honor, here representing her mother who is the victim in the
21 case. And --

22 THE COURT: Ms. Sites is a former girlfriend?

23 MS. CAMPBELL: She is a former girlfriend, yes.

24 THE COURT: All right.

25 MS. DAVIS CAMPBELL: On the date in question -- on

1 that date Ms. Sties had told him not to come back over to
2 the house and -- but he was aware of kind of what went on in
3 the household and he knew that that day that the mother who
4 was 84 would be alone in the house.

5 The mother, Your Honor, was a recovering
6 alcoholic. She had been fighting that disease for a long
7 time. They actually would dole out certain amounts to her
8 but it was a very controlled atmosphere. She is elderly and
9 her health is not -- well, to say the least was not what it
10 was at one time. She was all of about five foot four and
11 might weigh 100 pounds soaking wet and was in the house.

12 That day the arrangement was that Ms. Sites, the
13 daughter, was going on a deer run. So, the granddaughter,
14 Stephane Sites, and I'll get back to her in a minute was
15 scheduled to come by and check on her grandmother because
16 Micky Sites and Mini Peters who is the victim in the case
17 actually lived together because Ms. Sites took care of her
18 mother.

19 THE COURT: All right.

20 MS. CAMPBELL: On the date in question it was in
21 the early -- late afternoon early evening hours Mr. Fox came
22 over he brought some moonshine with him according to the
23 victim. He knew that the victim would susceptible to that,
24 Your Honor, quite frankly, that she was recovering alcoholic
25 and that she would want to have alcohol. At that point they

1 started drinking together. He had been told though prior to
2 this by Ms. Sites not to come over to the house and not to
3 be there that day. He then entered the house. He
4 apparently had a shotgun with him. At some point Ms. Peters
5 went back into her bedroom area of the house and this is
6 kind of a remote area, Your Honor, there aren't a lot of
7 houses around, there are some houses within sight but it's
8 down on the lower side. She went back into her bedroom at
9 which point Mr. Fox followed her into her bedroom. He
10 then -- she ended up on the bed. She was saying no. He
11 then pulled her nightgown up over her head. He then got on
12 top of her and was attempting to have sex with her, Your
13 Honor. There was a conflicting statement about whether or
14 not there was actual penetration made; therefore, we've
15 given him the benefit of the doubt and given him the lesser
16 charge.

17 And at that point is when Ms. Stephane Sites the
18 28 year old granddaughter showed up to check on her
19 grandmother. She approached the house she noticed one door
20 was locked but she went around to another door that was
21 unlocked. When she entered the house she was looking for
22 her grandmother. She ended up back in the bedroom at which
23 time in time she observed the defendant on top of her
24 grandmother. Her grandmother's nightgown rolled up over her
25 head struggling to get away at that point she started

1 screaming. She was able to get Mr. Fox off her grandmother.
2 She immediately called 911. Mr. Fox then somehow, he was
3 inebriated, and very intensely inebriated. He then wondered
4 into the living room area he had the shotgun just sitting
5 there naked on the couch with the shotgun I believe in his
6 hand when the deputies showed up. Deputies showed up. They
7 then attempted to take him into custody at which point he
8 became more belligerent and they put him in the car at which
9 point he attempted to kick out the windows of the car. He
10 was then taken into custody.

11 She was taken to the hospital. A rape protocol
12 was done. There were miscellaneous swabs that were taken
13 from -- not the vaginal swabs or the anal swabs, Your Honor,
14 but just the miscellaneous swabs they do a lot of times with
15 the -- they were taken from her. There was a DNA match to
16 the semen of Mr. Fox from those swabs. We were never able
17 to say exactly where they were taken from but they were
18 obtained at the hospital and then the chain of custody was
19 complete at that point.

20 At that point, they also took a statement from
21 Ms. Peters at that point. She denied any kind the
22 penetration and that's pretty much where we are today.

23 As far as his prior record, Your Honor, he does
24 have a disorderly conduct from '79; an assault and battery
25 with intent to kill pled down to simple assault from 1980.

1 Um, those are non convictions. And that's the extent of his
2 record.

3 THE COURT: One question, solicitor, had there
4 ever been any indications or allegation or talk about any
5 sort of relationship between the defendant and the victim?

6 MS. CAMPBELL: No.

7 THE COURT: Is that a fair statement?

8 MR. BAILEY: I'm sorry, about that relationship?

9 THE COURT: I will repeat that. Listen carefully.
10 Have there ever been any talk, discussion, allegation about
11 any prior conduct or contact between Mr. Fox and the victim?

12 MR. BAILEY: I think they knew each other and
13 Mr. Fox stayed at that house a lot but I don't think there
14 was any romance there.

15 THE COURT: There was no hint, no suggestion that
16 there ever been anything going on between them?

17 MR. BAILEY: No, sir.

18 THE COURT: The victim and defendant, okay.
19 That's fine.

20 MS. CAMPBELL: And one thing I did -- didn't put
21 on the record, Your Honor, she actually wore dentures and
22 they were broken at some point. And I'm not saying that he
23 actually hit her in the mouth but they came out and were
24 broken.

25 THE COURT: All right. I think that someone

1 indicated to me that there was no evidence of any bruising
2 or beating or something that.

3 MR. BAILEY: That's correct.

4 THE COURT: But everything else is pretty much as
5 outlined by the solicitor is that a fair statement?

6 MR. BAILEY: Substantially, we just dispute some
7 of the facts and some of them are less material than others.

8 THE COURT: Okay. Very well, Mr. Fox, I find that
9 there's a substantial factual basis for your plea, sir. I
10 further find your decision to plead guilty to be freely,
11 voluntarily, knowingly and intelligently made, that you had
12 the advice of competent counsel -- counsels, whom you
13 indicated to me you're completely satisfied with; therefore,
14 I will accept this plea.

15 Anything further from the state?

16 MS. CAMPBELL: Yes, Your Honor. Ms. Sits is
17 present in the courtroom I think she would like to address
18 the court. This has been, Your Honor, just, I mean, the
19 only reason for these plea negations is the age and the
20 health of the victim. She doesn't want to come to court.
21 She is willing to though. We met with her again last week.
22 She is still lucid and understands and remembers what
23 happened to her; however, in talking with Ms. Micky Sites
24 and Ms. Peters, I mean, we feel like the best way to resolve
25 this is with the plea negations that we've entered into.

1 THE COURT: All right.

2 MS. CAMPBELL: We would be asking for a
3 substantial sentence, Your Honor, I believe Ms. Sties wants
4 to say thing.

5 THE COURT: All right. Ms. Sites. Good ahead.
6 I'll see if I can hear you from back there.

7 MS. SITES: Okay.

8 THE COURT: You can come down a little bit if you
9 like to.

10 (The witness moves closer.)

11 I think they will ask you to stop there. And give
12 me your full name please.

13 MS. SITES: Micky.

14 THE COURT: Micky?

15 MS. SITES: Sites.

16 THE COURT: Yes, Ms. Sites.

17 MS. SITES: Yes. I just want to say this man I've
18 tried to help him in anyway I could. I never thought he
19 would take it out on my mother like he did. I didn't want
20 anymore to do with him because of his drug habit and
21 drinking. I tried to get him to leave. I told him to go
22 stay with his father; he wouldn't do. I asked him to go
23 stay with his bother they had a couch. He could stay on it;
24 he wouldn't do it. He was constantly just keep coming to
25 the house. And I told him I said, finally, Monday -- I

1 mean, Friday before I went on this deer drive he came to my
2 house that morning. He threatened to shoot me if he caught
3 me with anybody else. He was going to burn my car. So, I
4 finally got him home and I'm terrified of this man and his
5 background. I do not want him around my family. I do not
6 want him around me. And God forgive me I will never help
7 anybody else again in my life.

8 THE COURT: All right.

9 MS. SITES: Never. My mother has gone downhill.
10 She has an erratic heartbeat now. She's in bad health. She
11 can hardly walk and we live on a tight income. She has to
12 have blood test done every six months because of the
13 Hepatitis C. And I don't want to ever --

14 THE COURT: Ms. Sites, relax. Hold on now.

15 Now, is this Hepatitis C that's the sexually
16 transmitted disease that you spoke of?

17 MS. CAMPBELL: Yes, and she never -- she didn't
18 have it before he did.

19 THE COURT: All right. I'm sorry, Ms. Sites.

20 MS. SITES: That's okay.

21 THE COURT: I've got to listen. I know you're
22 emotional but I got to accept it in a calm way. Continue
23 please, ma'am.

24 MS. SITES: And I really, you know, tried to work
25 with Joe in every way I could. I tried to even help his

1 father any way I could. And anyway, but like I say, please
2 don't -- if you let him out please do not let him come near
3 me or nobody in my family.

4 THE COURT: I understand, Ms. Sites. Thank you so
5 very much. All right. Thank you, ma'am.

6 MS. SITES: Thank you.

7 THE COURT: Mr. Bailey.

8 MR. BAILEY: Thank you, Judge. I'm going to try
9 and be as efficient as possible with our time. First, I
10 would like to -- just for the record we've gotten no record
11 that the victim has Hepatitis C and we haven't gotten any
12 physical evidence.

13 THE COURT: She just has to be tested for it
14 because of the exposure?

15 MR. BAILEY: Well, being that it's -- okay, well,
16 we don't have any evidence that she has Hepatitis C.

17 THE COURT: What was the STD?

18 MS. CAMPBELL: Hepatitis C.

19 THE COURT: Huh?

20 MS. CAMPBELL: Hepatitis C.

21 MR. BAILEY: This is the first time we've heard
22 about this. We know that, I mean, our client has it.
23 Initially he was charged with knowledge of knowingly having

24 --

25 THE COURT: All right. I'm confused. So does the

1 victim, does she have it or not have it?

2 MR. BAILEY: I can -- this is the first time we've
3 heard about this, Judge.

4 MS. DAVIS: Your Honor, I think that they're
5 saying that she just has to be tested as a precaution but
6 she doesn't actually have it --

7 MS. CAMPBELL: Because of the exposure sexually to
8 it.

9 THE COURT: All right. Okay. All right. At
10 least that's clear.

11 Go ahead, Mr. Bailey.

12 MR. BAILEY: Thank you, Judge. I've gotten to
13 know Mr. Fox for a long time. He's been in jail for 561
14 days. His father is with him today right over here
15 (indicating) in the chair. And he's going to speak, he and
16 his bother is going to speak on his behalf briefly if the
17 court would hear them.

18 First I would like to say, you know, Mr. Fox is --
19 he's a terrible alcoholic. He's had a terrible drinking
20 problem. Although, I think this is the first time he's been
21 in jail especially for any extended period of time. It's
22 the first time he spent an extended period of time in jail
23 other than for the things like getting arrested for drunken
24 and disorderly conduct. You know, personally I think it's
25 been good for his health to be in jail this long because

1 he's got such bad cirrhosis. He does have Hepatitis C which
2 he's always been very up -- fourth coming about. As I've
3 gotten to know him and I know Ms. Davis has gotten to know
4 him he was always very cooperative, very friendly. I don't
5 think he's a violent person. I think that, I think that,
6 what's happened here we -- I am very sorry and I know
7 Mr. Fox is sorry for the trama that Ms. Peters has gone
8 through. But I don't think that it was -- I don't think
9 that it occurred in the, perhaps, in the extreme situation,
10 you know, characterized by the state. If we were going to
11 go to trial -- which first I would like to say Mr. Fox
12 doesn't want a trial. He does not want to put Ms. Peters or
13 her family through trial. He wants to take responsibility
14 for, for, his actions here.

15 But we had a witness, Dr. Gibes, who had reviewed
16 the file and showed that there was no conclusive evidence of
17 any type of physical harm, any type of penetration that --
18 and if the woman was 100 ponds or less Mr. Fox is a
19 substantially large gentleman who would defiantly dispute
20 the dentures being broken because, I mean, that kind of came
21 out of nowhere but, you know, if they were broken I think, I
22 mean, you know, it's -- they were broken in her mouth I
23 don't really need to speak to this but I think that they
24 would clearly be injury. But especially considering the age
25 of the woman, the lack of estrogen in, in, her system there

1 would be very obvious visual, there would be obvious visual,
2 damage to, to, her body. Now, I'm not trying to down play
3 this. I just don't think that this was a, I just don't
4 think that this was a, violent assault.

5 Additionally, this poor woman who I sympathize
6 with is an alcoholic as well. She was given alcohol by her
7 family on a regular basis and she admits in her statements
8 that when Mr. Fox came in and that they sat and drink
9 continually together. I think that they're all -- I think
10 there's a lot of alcohol in this family. I think there are
11 a lot of people who do unhealthy things. I think this is
12 a bad situation. Now, this is not -- this is just to
13 provide context, Your Honor.

14 I, you know, Mr. Fox is here to, is here to, take
15 responsibility for what he did. But we don't believe that
16 he's a violent man. When he does, if he's eventually
17 released from prison, he will not only be on community
18 supervision but he will be on the sex offender registry.
19 And, of course, community supervision is even more intense
20 supervision than just the standard probation. I'd like, I'd
21 like, for his dad to speak briefly on his behalf and his
22 brother too if that's all right, Judge.

23 THE COURT: That's very well.

24 Yes, sir, your name please?

25 SIDNEY FOX: Sir?

1 THE COURT: Your name please. What do you want to
2 tell me on behalf of your son? You're Mr. Fox also I would
3 assume?

4 SIDNEY FOX: Sidney Fox, yes, sir.

5 THE COURT: Yes, sir. Go ahead, Mr. Fox.

6 SIDNEY FOX: I -- my son has like the lawyer says
7 has had a bad drinking problem but he's not a bad boy, sir.
8 He's worked hard all of his life and there was some comments
9 made a while that are not quite up to par but I'm not going
10 to go there, sir. I'm asking for leniency from the court.
11 My son is a good boy. I need him home.

12 THE COURT: All right. Thank you, Mr. Fox.
13 Yes, sir. Your name please?

14 DAVID FOX: My name is David Fox and I'm Joey's
15 bother. We grew up together. I was always the bad one. I
16 -- he never really been in no trouble or nothing. And he's
17 never been a violent person and, I mean, he does need help
18 with the drinking problem and being in here. It is, more or
19 less, I believe saved his life and I just ask you to be
20 lenient on him. And just, I mean, he's a good person.

21 THE COURT: All right. Thank you, sir.
22 Anything further?

23 MR. BAILEY: Your Honor, just we understand also
24 that emotions run high especially with individuals that were
25 previously romantically involved. We would ask, Your Honor,

1 to -- considering that the amount of supervision that he's
2 going to be on when and if eventually released rather the
3 community supervision or registering for the sex offender
4 registry we would ask, Your Honor, to consider especially
5 this being an 85 percent time we would ask you to consider,
6 you know, two or three years something that's, that's,
7 reasonable. He is, he is sick. We, you know, he doesn't
8 want to die in jail and we don't think, we don't think,
9 that's necessary, Judge. But I think when he, when he,
10 comes out I know we can guarantee that there won't be any
11 contact with the, with the, victim's family.

12 THE COURT: All right. Anything further?

13 MS. CAMPBELL: No, sir.

14 THE COURT: Very well, on Indictments 2010-616
15 burglary second, 2011-847 attempted CSC second, sentence of
16 the court that you Lonzie Fox be committed to the South
17 Carolina Department of Corrections for a period of 15 years
18 provided upon the service of seven years, the balance
19 suspended. And when you're released on community
20 supervision have no contact with the victims. Give him
21 credit for time served.

22 Good luck to you, Mr. Fox.

23 MR. BAILEY: Thank you, Judge.

24 END OF PROCEEDINGS

25

1 COUNTY OF RICHLAND)

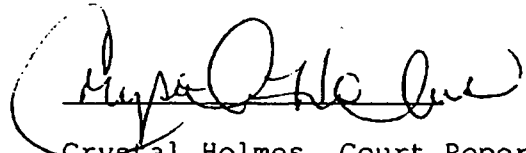
2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled State of SC V. Lonzie Fox Case
5 No. 2010-GS-40-616 2011-GS-40-847, at the Richland County
6 Courthouse, July 14, 2011.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 32 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 20th day of September,
15 2012.

16 

17 Crystal Holmes, Court Reporter
18 and Notary Public for the
19 State of South Carolina my
Commission Expires:
20 April 21 2014
21
22
23
24
25

FORM 5

2012 CP 4003938

STATE OF SOUTH CAROLINA

County of Richland

Lonzie Joseph Fox 346954

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
FIFTH COUNTY
2012 JUN -8 PM 1:30
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

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 Ridgeland Correctional Facility
2. Name and location of Court which imposed sentence General Sessions
County of Richland, Fifth Judicial Court (circu
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-GS-40-847 attempted criminal sexual
 - (b) 2010-GS-40-616 burglary 2nd

(c) _____

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

(a) July 14th, 2011 } 15 years provided that upon se.

(b) July 14th, 2011 } of 7 years the balance is susp.

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty to burglary under N. Carolina V. Alf

(b) after a plea of not guilty 91 S. Ct. 160 (1970)

(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. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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

(a) was not aware that I could appeal thi.

(b) 'it was never explained to me by my law OR the Judge at sentencing!

(c) did not understand because of 5th grade s:

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

- (a) Innocent and pled guilty on advice of my lawyers
- (b) ineffective assistance of counsel
- (c) was not given a competency test to prove

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

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

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

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

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

- (a) the specific nature thereof:
 - i. NONE
 - ii. NONE
 - iii. NONE
 - iv. NONE

- (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. N/A

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

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. N/A
- ii. /
- iii. N/A

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

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

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) N/A
 (b) N/A
 (c) N/A

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? _____
 (c) your sentencing? 15 yrs - suspend remainder upon service
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NONE
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
NONE

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. Rose Bailey } Public Defender Office
Jennifer Davis } Richland County
Columbia, S.C.
29209?
- iii. Ms Heinz same as above
- (b) the proceedings at which each such attorney represented you:
- i. sentencing
- ii. sentencing
- iii. preliminary hearing

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

I would seek to get my sentence overturned
and have a fair trial where I can prove my
innocence

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

No

STATE OF SOUTH CAROLINA)
County of JASPER)

VERIFICATION

I, LONZIE J. FOX, 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.

Lonzie J Fox

SWORN to and subscribed before me this 30
day of 2 May, 2012.

Virginia Robinson (L.S.)
Notary Public

My Commission Expires: May 20, 2021

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

I, Lonzie Joseph Fox, 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.

Lonzie J Fox
Applicant

SWORN or affirmed to and subscribed before me this
30 day of May, 2012.

Virginia Robinson
Notary Public

My Commission Expires: May 20, 2021

RICHMOND
 FILED
 2012 JUN -8 PM 1:30
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
)	
FOX Lonzie J -)	2012CP4003938
# 00346956,)	
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed June 8, 2012, 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 Richland County Clerk of Court. The Applicant was indicted at the July 2010 term of the Richland County Grand Jury for Burglary – Second Degree (2010-GS-40-00616), and at the January 2011 term for Assault with Intent to Commit Criminal Sexual Conduct – First Degree (2011-GS-40-00847).² He was represented by John H. Heinz, Esquire, on the charge(s). On July 14, 2011, the Applicant appeared before The Honorable L. Casey Manning where he pled guilty to Burglary – Second Degree as indicted and the lesser included Attempted Criminal Sexual Conduct. He was sentenced to fifteen (15)

¹ <http://www4.rcgov.us/publicindex/PCCaseDetails.aspx?County=40+&Casenum=2012CP4003938&CourtType=G&CaseType=Civil&CourtAgency=40002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00346956>

years imprisonment suspended to service of seven (7) years on each charge to run concurrently.

Direct Appeal

The Applicant did not appeal his conviction and/or sentence .

The application for post conviction relief (PCR) was filed June 8, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files.³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

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

- (a) Innocent and pled guilty on advice of my lawyers only
 (b) ineffective assistance of counsel
 (c) was not given a competency test to prove

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

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

IV.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel.⁴ The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. 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.

⁴ Respondent respectfully submits Applicant's "actual innocence" claim is improper under S.C. Code Ann. § 17-27-20(a)(6) (2003) ("Provided, however, that this section shall not be construed to permit collateral attack on the ground that evidence was insufficient to support a conviction.")

Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating 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." 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. 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). Even 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 (1985)

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

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Ely O. Grote, Esquire regarding when the hearing should be set.⁵

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

ROBERT D. CORNEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

June 25, 2012

⁵ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

FOX Lonzie J -
00346956,

2012CP4003938

Applicant,

v.

CERTIFICATE OF SERVICE


State of South Carolina,

Respondent.

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

Ely O. Grote, Post Office Box 7966 , Columbia, SC 29202

DATED June 26, 2012.



 Jean R. Indriago
 Legal Assistant

I N D E X

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<u>Witness/Description</u>	<u>Page No.</u>
Lonzie Fox	
Direct Examination by Mr. Grote	13
Cross-examination by Mr. Corney	16
Redirect Examination by Mr. Grote	17
Examination by the Court	18
John Rhodes Bailey	
Direct Examination by Mr. Corney	21
Cross-examination by Mr. Grote	35
Certificate Page	

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID</u>	<u>Ex.</u>
S-1	Advisement of Plea Form		25

1 PLAINTIFF: The state calls the PCR application of
2 Lonzie Fox, docket number 2012-CP-40-3938. Mr. Fox was
3 true-bill indicted at the July 2010 term of the Richland
4 County Grand Jury for burglary second degree, and at the
5 January 2011 term for assault and battery with intent -- or
6 assault with intent to commit criminal sexual conduct in
7 the first degree.

8 He pled guilty July 14, 2011, before Judge Manning to
9 burglary second degree as indicted, and that was pursuant
10 to *North Carolina vs. Alford*, as well as to the
11 lesser-included attempted criminal sexual conduct in the
12 second degree. He was sentenced to fifteen years
13 imprisonment, suspended to service of seven years on each
14 charge, and those were running concurrently.

15 He filed a timely PCR application June 8, 2012. He
16 is represented today by Mr. Ely Grote, and I believe they
17 have a motion to bring before the court, Your Honor.

18 THE COURT: All right. Well, for the record, I have a
19 letter from Mr. Grote indicating that Mr. Fox does not wish
20 to proceed. At least it's his understanding that Mr. Fox
21 does not want to proceed with him as counsel. I also have
22 a copy of a letter dated June 9, 2012, which probably
23 should be 2013, which is a copy of a letter to Mr. Grote
24 from Mr. Fox, and a letter dated September 18th to Judge
25 Kinard from Mr. Fox asking that he be appointed other

1 counsel.

2 Now, Mr. Fox, is that correct?

3 APPLICANT: Yes, sir.

4 THE COURT: Do I have everything in front of me that
5 you have submitted?

6 APPLICANT: Yes, sir.

7 THE COURT: All right. Well, you have appointed
8 counsel, and let me ask of Mr. Grote.

9 Mr. Grote, when you were appointed to represent Mr.
10 Fox?

11 MR. GROTE: Just one second, Your Honor. I need to
12 find the order of appointment.

13 (A PAUSE.)

14 THE COURT: Well, just give me an approximate date.

15 MR. GROTE: Probably sometime in June.

16 THE COURT: June of 2012?

17 MR. GROTE: Yes, Your Honor.

18 THE COURT: All right.

19 MR. CORNEY: This -- the order that I have for
20 appointment is June 13, 2012, Your Honor:

21 THE COURT: All right, and upon receiving that
22 appointment, what did you do? What action have you taken
23 in this case?

24 MR. GROTE: Your Honor, I have researched the law
25 according to this case as to what it takes to overcome a

1 guilty plea. I have had written correspondence with Mr.
2 Fox concerning his grounds for why he felt his PCR counsel
3 was ineffective.

4 Prior to the first hearing, I had a phone conference
5 to confirm those grounds and get on the same page as to
6 what he wanted to do, and discuss the law and how he wanted
7 to proceed, and what the pros and cons of doing so were.

8 THE COURT: Did you correspond with him prior to that?

9 MR. GROTE: Yes, Your Honor. We had corresponded in
10 writing prior to that. We did not meet face-to-face prior
11 to the first hearing. Judge Kinard requested that we do
12 meet face-to-face before the hearing.

13 I then traveled down to the Ridgeland Correctional
14 Facility and met with Mr. Fox for a significant amount of
15 time and felt everything had been discussed. All his
16 questions had been answered, and we're on the same ground
17 as to how we're going to proceed with his hearing.

18 THE COURT: All right. When was that?

19 MR. GROTE: And he's written subsequent letters after
20 that saying he's still not happy with the services I
21 provided.

22 THE COURT: When was that? That was after Judge
23 Kinard's letter, his letter to Judge Kinard?

24 MR. GROTE: Yes, Your Honor, and I've also received
25 the guilty plea, reviewed the guilty plea and all of

1 the ---

2 THE COURT: The transcript?

3 MR. GROTE: Yes, Your Honor, and all of the materials
4 provided by the attorney general's office. As
5 investigating the claims, since it's a guilty plea, the
6 grounds are solely related to the discussions he had with
7 his attorney relating to the guilty plea. This is not a
8 PCR trial as to finding other witnesses that could have
9 been brought, that type of thing. It's solely related to
10 the guilty plea itself.

11 There's not -- I, I believe I've represented Mr. Fox
12 to the best of my ability. I don't know what else I can do
13 for him, and based on the statements he's made against me,
14 it's obvious he's not happy with my services, and I don't
15 think that I can proceed forward with the way he feels
16 about the services I've rendered.

17 THE COURT: Well, I don't know about that. I might
18 order you to do so. You understand that?

19 MR. GROTE: Yes, Your Honor.

20 THE COURT: All right.

21 MR. GROTE: I will proceed if you order me to do so.

22 THE COURT: All right, Mr. Fox.

23 APPLICANT: Yes, sir.

24 THE COURT: What's the problem?

25 APPLICANT: Well, sir, I just don't feel like he ---

1 THE COURT: Stand up.

2 APPLICANT: Excuse me.

3 THE COURT: You can sit down, Mr. Grote.

4 APPLICANT: We haven't met very often. I just talked
5 to him once on the phone, and once he come down there.
6 First time I ever met him was last month when I appeared in
7 the courtroom, and when we have met, he's more or less
8 asking me questions. The way I feel, that -- like I'm the
9 lawyer and he's the client.

10 THE COURT: Well, tell me, tell me specifically what
11 you're talking about.

12 APPLICANT: Well, like when he come down there to see
13 me at the prison, he, he asked me what we're going to do.
14 To me, that's not a question that -- he ought to be telling
15 me what we're going to do. He's my lawyer. I don't -- I'm
16 -- got a seventh grade education. I don't know nothing
17 about the law as far as this goes. It's my first ever
18 being on the other side of the law.

19 THE COURT: Well, he did tell you that if you win your
20 PCR, that you got to go back to another trial, didn't he?

21 APPLICANT: Yes, sir.

22 THE COURT: All right. Well, that's an important
23 thing he told you, right?

24 APPLICANT: Yes, sir.

25 THE COURT: And he told you that in order to be

1 successful in a PCR hearing, you've got to prove that your
2 lawyer was ineffective. You understand that?

3 APPLICANT: Yes, sir.

4 THE COURT: And you take the position that your lawyer
5 was ineffective?

6 APPLICANT: Excuse me? I didn't understand that.

7 THE COURT: Hmm?

8 APPLICANT: Excuse me. I didn't understand that.

9 THE COURT: I said is it your position here today your
10 lawyer was ineffective in representing you at your plea?

11 APPLICANT: Yes, sir. I feel he was.

12 THE COURT: All right, and tell me why.

13 APPLICANT: Like I said, the first time we met, he
14 hadn't met me, didn't know me.

15 THE COURT: No. I'm talking -- who? Mr. Sutherland?

16 MR. BAILEY: Rhodes, Your Honor.

17 THE COURT: Mr. Bailey.

18 MR. BAILEY: Yes, sir.

19 THE COURT: This gentleman, right?

20 APPLICANT: Yes, sir.

21 THE COURT: He was your lawyer?

22 APPLICANT: Yes, sir.

23 THE COURT: All right, and you take the position that
24 he was ineffective?

25 APPLICANT: Yes, sir. I was more -- I don't know what

1 you mean by ineffective. I feel I was misled.

2 THE COURT: Well, tell me what you think.

3 That's all right, Mr. Bailey.

4 APPLICANT: Well, I was told that the -- my lawyer at
5 that time, Mr. Bailey, him and the solicitor, which I think
6 was Ms. Luck Campbell, had met with the judge on more than
7 one occasion and discussed my case. And that Ms. Luck
8 Campbell was going to ask for eight years, we were going to
9 ask for time served, and the judge would split it down the
10 middle.

11 THE COURT: Okay. Who was the judge?

12 APPLICANT: Judge Manning.

13 THE COURT: All right, and that didn't happen?

14 APPLICANT: No, sir.

15 THE COURT: What's this case all about, I mean his
16 underlying case. What was the underlying case?

17 MR. CORNEY: Your Honor, it's a, it's a burglary,
18 burglary second-degree and assault, intent to commit CSC
19 first.

20 THE COURT: Okay.

21 MR. CORNEY: I don't know if you want me to get into
22 the facts of it. They're set forth in the transcript.

23 THE COURT: Well, I don't have anything.

24 MR. CORNEY: And I can hand them up to you. I
25 apologize, but the motion -- I didn't know if you wanted

1 the packet.

2 THE COURT: Well, I want to know what Mr. Fox wants.
3 Now, have you got another lawyer?

4 APPLICANT: No, sir.

5 THE COURT: You want me to pay for another lawyer to
6 represent you when you've got a good lawyer who says he's
7 investigated your case?

8 APPLICANT: Well, if he feels he's investigated it,
9 then I, I guess we can proceed that way, but I just don't
10 feel like he's got my interest at best heart.

11 THE COURT: Well, whose interests you think he's got
12 at best heart?

13 APPLICANT: I'm not sure of that, sir.

14 THE COURT: Well, I'm not going to appoint you a new
15 lawyer because you might not like him. Then you come back
16 up again, say I don't like that lawyer either.

17 APPLICANT: Okay.

18 THE COURT: Mr. Grote said he's prepared to defend
19 you. This is not unusual. You're down there in Ridgeland,
20 and a lot of thoughts going through your mind, and when is
21 the last time you talked to Mr. Grote?

22 APPLICANT: The day that he come down. I can't
23 remember what day it was when he come down there.

24 THE COURT: Did you talk to him today?

25 APPLICANT: No, sir.

1 THE COURT: You think you need to talk him today, tell
2 him anything?

3 APPLICANT: I would feel more at ease if I could
4 discuss with him and see if he has -- and -- to my opinion,
5 discuss my case and did a little research on it.

6 THE COURT: Okay, tell you what I'm going to do. You
7 got any help?

8 DEPUTY: What you want to do?

9 THE COURT: Take him over to the jury room, let him
10 sit with Mr. Grote for a few minutes. You go with them.

11 DEPUTY: Yes, sir.

12 THE COURT: All right. Y'all go. There's a little
13 room right across the hall. I want y'all to go and talk
14 about it. I want Mr. Grote to tell you everything that he
15 knows about your case and how your case is likely to go
16 forward.

17 I will tell you. Let me tell you something just up
18 front. It's very difficult, if not very unusual, when you
19 enter a plea to get that plea reversed. It's got to be
20 something pretty serious.

21 APPLICANT: Yes, sir.

22 THE COURT: To get that plea reversed because you
23 stood up there -- and I'll bet you it's in that transcript
24 -- told the judge that you understood all your rights.

25 APPLICANT: Yes, sir.

1 THE COURT: And you didn't have to plead. You could
2 have always gone to trial. So, you and Mr. Grote step
3 across the hall for a minute. I'm going to have to have an
4 officer with you.

5 APPLICANT: That's fine.

6 THE COURT: He's part deaf. He's not listening to
7 you.

8 (OFF THE RECORD.)

9 THE COURT: Mr. Fox, come on back around. Now, Mr.
10 Fox, have you and Mr. Grote had the chance to review your
11 case?

12 APPLICANT: Yes, sir.

13 THE COURT: You feel he's adequately prepared to
14 proceed in this matter?

15 APPLICANT: Yes, sir.

16 THE COURT: All right, and you have any objection to
17 proceeding with him at this time?

18 APPLICANT: No, sir.

19 THE COURT: All right. Have a seat.

20 Mr. Corney, you may proceed. Just review what you...

21 MR. CORNEY: Yes, sir.

22 THE COURT: For my benefit.

23 MR. CORNEY: Yes, sir. This is the post-conviction
24 relief action of Lonzie Fox, docket number 2012-CP-40-3938.
25 Mr. Fox was indicted in July of 2010 for burglary second

L. FOX - DIRECT EXAMINATION BY MR. GROTE

13

1 degree and at the January 2011 term for assault with intent
2 to commit criminal sexual conduct in the first degree. He
3 pled guilty July 14, 2001, before Judge Manning to burglary
4 second degree as indicted -- I mean, that was under the
5 *North Carolina vs. Alford*. He also pled guilty to the
6 lesser included attempted criminal sexual conduct in the
7 second degree. He was sentenced to fifteen years
8 imprisonment, suspended to service of seven years on each
9 charge to run concurrently.

10 He did not have direct appeal but filed his PCR
11 application timely June 8, 2012. And as Your Honor is
12 aware, he is represented by Mr. Eli Grote today.

13 THE COURT: All right, Mr. Grote, you may proceed.

14 MR. GROTE: Yes, Your Honor. At this time, I call
15 Lonzie Fox to the stand.

16 THE COURT: Come around, Mr. Fox.

17 LONZIE J. FOX, BEING DULY SWORN,

18 TESTIFIES AS FOLLOWS:

19 THE COURT: Have a seat. State your full name for the
20 record.

21 WITNESS: Lonzie Joseph Fox.

22 DIRECT EXAMINATION BY MR. GROTE:

23 Q. Mr. Fox, where are you currently incarcerated?

24 A. Ridgeland Correctional Institution.

25 Q. Were you indicted for burglary second degree, assault

1 with intent to commit -- or commit criminal sexual conduct,
2 kidnapping, and knowingly exposing someone to a venereal
3 disease?

4 A. Yes, sir.

5 Q. On about July 14, 2011, did you plead guilty to
6 burglary second and attempted criminal sexual conduct?

7 A. Yes, sir.

8 Q. Who was your counsel at the plea hearing?

9 A. Mr. Rhodes Bailey.

10 Q. Was Judge Manning the presiding judge?

11 A. Yes, sir.

12 Q. Did you have discussions with your counsel about what
13 type of sentence you would receive if you pled guilty to
14 those charges?

15 A. Are you talking about with my lawyer?

16 Q. Yes.

17 A. Yes, sir.

18 Q. Were you promised any type of sentence if you pled
19 guilty?

20 A. I was -- I felt that I was promised. He never come
21 out and said he'd made -- that this is a promise, but he
22 told me that him and Ms. Campbell had met with Judge
23 Manning on more than one occasion, and she was going to ask
24 for seven years, he was going to ask for time served, and
25 Mr. Manning was going to split it down the middle.

L. FOX - DIRECT EXAMINATION BY MR. GROTE

15

1 Q. Do you believe you were promised three and a half
2 years?

3 A. Yes, sir.

4 Q. If you pled guilty?

5 A. Yes, sir.

6 Q. Did you get the sentence that you were promised?

7 A. No, sir.

8 Q. Would you have pled guilty had it not been for that
9 promise?

10 A. No, sir.

11 Q. Do you believe that your counsel did anything else
12 wrong in connection with the plea?

13 A. No, sir.

14 Q. Do you have anything else you'd like to ask the judge
15 concerning your grounds for post-conviction relief?

16 A. No, sir.

17 Q. Are you satisfied with the services that I've rendered
18 to you in this case?

19 A. Yes, sir.

20 Q. Do you wish that I had done anything else for you?

21 A. No. I think you done it.

22 Q. Okay. Do you wish I would have investigated anything
23 else concerning your post-conviction claim?

24 A. No, sir.

25 MR. GROTE: Your Honor, I have no further questions of

1 this witness.

2 THE COURT: Mr. Corney.

3 MR. CORNEY: Yes, sir, Your Honor, just very briefly.

4 CROSS-EXAMINATION BY MR. CORNEY:

5 Q. Mr. Fox, at your plea hearing in front of Judge
6 Manning, he advised you that you were looking at
7 thirty-five years in jail under the plea, correct?

8 A. Yes, sir.

9 Q. Okay. You said you understood that?

10 A. Yes, sir.

11 Q. Okay. He advised you of your constitutional rights
12 and the fact you would be waiving those rights by pleading
13 guilty?

14 A. Yes, sir.

15 Q. And you recall that, and you said you understood them?

16 A. Yes, sir.

17 Q. All right, and after advising you of all that, he
18 asked you did you still want to go forward with your plea,
19 correct?

20 A. Yes, sir.

21 Q. And you said you did want to?

22 A. Right.

23 MR. CORNEY: Okay, and specifically I'll direct the
24 court's attention to page 12.

25 Q. Judge Manning said:

L. FOX - CROSS-EXAMINATION / REDIRECT EXAMINATION 17

1 Considering what I've just said to you, that this
2 is the time you're facing and everything, I'll
3 ask you once again. How do you wish to plead to
4 these charges, guilty or not guilty?

5 And you said you wanted to plead guilty, correct?

6 A. Yes, sir.

7 Q. Okay. So, at that point you knew that you could
8 potentially get thirty-five years' imprisonment under the
9 plea, but you were just hoping to get three and a half
10 years, correct?

11 A. That's what I was led to believe.

12 Q. Okay, but the judge informed you you could get
13 thirty-five years? That was a possibility?

14 A. Yes. Yes, sir.

15 MR. CORNEY: That's all I have, Your Honor. Thank
16 you.

17 MR. GROTE: Just briefly, Your Honor.

18 REDIRECT EXAMINATION BY MR. GROTE:

19 Q. Mr. Fox, in connection with your guilty plea, were you
20 told to go along with what, what the judge asked you, so
21 that your guilty plea would go through?

22 A. Yes, sir.

23 Q. And the things you stated on the record were because
24 you wanted the guilty plea to go through based on the
25 promises you'd been made?

1 A. Yes, sir.

2 MR. GROTE: Thank you. No further questions, Your
3 Honor.

4 EXAMINATION BY THE COURT:

5 Q. Mr. Fox, did you ever ask for a jury trial?

6 A. No, sir.

7 Q. So, your intention all along was to enter a plea?

8 A. No, sir. We was -- I never was advised to ask for a
9 jury trial. I was advised that I had the right to, but
10 never had -- you know, never come out so that's what you
11 need to do.

12 Q. Well, I understand, but did you ever tell your lawyer
13 or Judge Manning that you wanted a jury trial?

14 A. No, sir.

15 Q. Now, were the witnesses in your case present on the
16 day of your plea?

17 A. Witnesses?

18 Q. I mean the victim.

19 A. I don't remember, sir.

20 Q. Okay. How long had Mr. Bailey been representing you?

21 A. Well, since, pretty much since the beginning. I
22 couldn't -- I can't give you the dates because I don't
23 know.

24 Q. And I think he had a co-counsel, too, didn't he, a Ms.
25 Davis?

L. FOX - EXAMINATION BY THE COURT

19

1 A. Yes, Ms. Davis.

2 Q. Right, and she was -- she's probably the deputy public
3 defender. I think she was. I'm not sure. How many times
4 did you meet with Mr. Bailey?

5 A. I would say over the course of time, we probably met a
6 dozen times or so.

7 Q. Did he share with you your Rule 5 motion?

8 A. I'm not sure what that is, sir.

9 Q. Any evidence that the state had that they were going
10 to use against you.

11 A. Just briefly, yeah.

12 Q. He told you what it was?

13 A. Yes, sir.

14 Q. Okay, and did you ask him, did you ask him, Mr.
15 Bailey, to do anything that he didn't do?

16 A. No, sir.

17 Q. Okay. So, he...

18 A. This was the first plea bargain that they brung up to
19 me, and I was -- felt like I was instructed to take that as
20 the best deal I was going to get at the time. And then he
21 told me that him and Ms. Campbell had met with Judge
22 Manning on more than one occasion, and that he was going to
23 split everything down the middle after he told me what she
24 was asking for and what we was asking for.

25 Q. You think Judge Manning told them that?

1 A. I don't know, sir. I was going by what Mr. Bailey
2 told me.

3 Q. Of course you know a judge, whatever he talks about
4 with the lawyers, he can always do something different in
5 the courtroom if he sees it's necessary to do so. You
6 understand that, don't you?

7 A. Yes, sir.

8 Q. So, did he, did Judge Manning hear all the facts in
9 your case?

10 A. I believe so, sir.

11 Q. And you were there?

12 A. Yes, sir.

13 Q. Did Mr. Bailey object to any of that?

14 A. Not to my memory.

15 Q. So, when Mr. Campbell went through the facts of your
16 case, they were pretty true?

17 A. Yes, sir.

18 Q. Okay.

19 A. As far as what I was being charged with you talking
20 about?

21 Q. Yes.

22 A. Yes, sir.

23 Q. That's what I meant.

24 THE COURT: All right, thank you. You can come on
25 down. Let me ask you one other question. Do you have

J.R. BAILEY - DIRECT EXAMINATION BY MR. CORNEY

21

1 anything you want to ask me?

2 APPLICANT: No, sir.

3 THE COURT: All right. Well, sit down. Have a seat.
4 We've got another witness.

5 (THE WITNESS EXITS THE STAND.)

6 MR. GROTE: Your Honor, no further witnesses for Mr.
7 Fox.

8 MR. CORNEY: Your Honor, the state would briefly call
9 Rhodes Bailey to the stand.

10 THE COURT: Come around, Mr. Bailey. I want to hear
11 from Mr. Bailey on the record.

12 MR. BAILEY: I didn't hear. Am I going to the stand?

13 THE COURT: Yes.

14 MR. BAILEY: Okay. Sorry.

15 JOHN RHODES BAILEY, BEING DULY

16 SWORN, TESTIFIES AS FOLLOWS:

17 THE COURT: Have a seat, and as you know, state your
18 full name for the record.

19 WITNESS: Yes, sir. My name is John Rhodes Bailey.

20 MR. CORNEY: May it please the court, Your Honor?

21 DIRECT EXAMINATION BY MR. CORNEY:

22 Q. Mr. Bailey, you recall your representation of Mr. Fox
23 on these charges?

24 A. I do.

25 Q. All right, and that was in your capacity as assistant

1 public defender for Richland County?

2 A. That's correct.

3 Q. Have you had an opportunity to look over your file
4 before coming in here today?

5 A. Yes, I have.

6 Q. Could you tell the court when you took over your
7 representation of Mr. Fox?

8 A. I was first appointed to Mr. Fox's case in January of
9 2010, and I represented him until his guilty plea in July
10 of 2011.

11 Q. All right, and do you recall meeting with him to
12 review the charges with him and the indictments?

13 A. Yes. We, we met fairly frequently because it was a,
14 you know, serious charge, group of serious charges.

15 Q. Did you have the opportunity to review the elements of
16 the offenses with him and discuss what that meant?

17 A. Yes. There was a lot of discussion about that because
18 he was initially charged with burglary first, which carries
19 a mandatory minimum of fifteen to life. He was charged
20 with CSC, all of -- criminal sexual conduct first, I
21 believe. That was what he was initially charged with. He
22 was also charged with transmitting a sexually transmitted
23 disease and kidnapping.

24 Q. And those were nolle prossed essentially?

25 A. Right. To the best of my memory in reviewing this, I

1 believe that part of the plea negotiation was the burglary
2 first, which would carry fifteen to life, would be reduced
3 to a burglary second. So, there wasn't a mandatory minimum
4 on that.

5 The criminal sexual conduct second, I believe we got
6 it to criminal sexual conduct -- like attempted criminal
7 sexual conduct second, which isn't really a change in --
8 you know, isn't really a change in, in the amount of time
9 it carries, but it seemed to fit. We thought it more
10 fitting on the elements. Tried to get it down to CSC third
11 but was unsuccessful in my negotiations with Ms. Campbell
12 on that, and then they dismissed the kidnapping charge and
13 the transmitting of sexually transmitted disease, I
14 believe.

15 Q. All right. Did you have the opportunity to review the
16 potential sentences that each of these charges carried?

17 A. Yes, I did, and I've got -- I don't know if -- I have
18 here the advise -- advisement of rights form I did -- I do
19 with all my clients for guilty pleas dated July 14, 2011.
20 I don't remember whether I, I had a chance to give this to
21 you previously, but I've got the original one, and
22 questions 1 and 2 are:

23 The penalties for the charges are zero to fifteen
24 and zero to twenty, and the maximum sentence I
25 could get is zero to thirty-five.

1 Q. Okay, and on the bottom of that advisement of right
2 forms, did Mr. Fox sign that?

3 A. Yes, he did.

4 THE COURT: Let's make that part of record.

5 MR. CORNEY: And, Your Honor, I'd also move to get
6 copies of that if I may approach the witness?

7 WITNESS: I should have given you this earlier. I'm
8 sorry.

9 MR. CORNEY: That's fine.

10 THE COURT: Show it to ---

11 MR. CORNEY: We'll move to introduce this as State's
12 Exhibit 1.

13 THE COURT: Show it to Mr. Grote.

14 MR. CORNEY: If we could get a copy of that?

15 THE COURT: Show it to Mr. Grote. Have you seen it,
16 Mr. Grote?

17 MR. GROTE: Not yet, Your Honor.

18 MR. CORNEY: Well, I, I apologize. I'm sorry.

19 THE COURT: Why don't you let your client confirm
20 that's his signature?

21 (A PAUSE.)

22 THE COURT: Any objection?

23 MR. GROTE: No objection, Your Honor.

24 MR. CORNEY: If we could move to admit this into the
25 record, a copy of it?

J.R. BAILEY - DIRECT EXAMINATION BY MR. CORNEY

25

1 THE COURT: Without objection.

2 (ADVICE OF RIGHTS FORM MARKED INTO EVIDENCE AS STATE'S
3 EXHIBIT NUMBER 1.)

4 BY MR. COURNEY:

5 Q. Mr. Bailey, in your meetings with Mr. Fox, did you
6 ever have any concern with his ability to comprehend your
7 discussions or participate in those discussions?

8 A. No.

9 Q. You feel that he was able to understand all these
10 legal type of topics you were talking with him about?

11 A. Yeah. We talked about the elements a lot. My only --
12 my, my primary concern was his health. He had some -- he
13 had a lot of problems with alcoholism before being
14 arrested, and I don't have his medical stuff right in front
15 of me. He, I think he has syrosis. He had some other
16 problems, and he was definitely going through some serious
17 -- you know, I'm not a doctor, but some serious withdrawal
18 effects when he was in prison at first. I mean, I'm sorry,
19 when he was in the county jail at first.

20 I, I thought he was perfectly competent, competent.
21 He was a, he was a, he was a great client and that he was
22 very cooperative. He was engaged in this defense. We got
23 along very well. He did seem to have, you know, memory
24 problems as to the day/evening of the incident, but other
25 than that, I didn't think it was related to competency in

1 any way.

2 Q. Okay.

3 A. Probably, I mean, inebriation due to intoxication at
4 the time of the, the offense.

5 Q. Do you recall receiving the discovery file from the
6 state?

7 A. Yes.

8 Q. And did you have the opportunity to review that with
9 Mr. Fox?

10 A. Yes, we did.

11 Q. And as part of that discovery file, there were DNA
12 test results?

13 A. Yes, there were.

14 Q. And that was, that was semen recovered from the victim
15 and it tested positive as a match to Mr. Fox?

16 A. Right. There were, there were issues there as to
17 where -- who recovered it and the chain of custody, and if
18 we had proceeded to trial, we would have, we would have --
19 we, we think that we maybe could have won on that issue, or
20 there was a chance because we think they had chain of
21 custody problems. But after the Schmerber hearing, he did
22 test positive there, but Mr. Fox was not -- he, he, he was
23 not interested in going to trial.

24 Now, we were for a while until we got -- you know,
25 what we thought a more fair offer. We were set up for

1 trial for some time, but I wouldn't say that there was a
2 real fire in his belly to, to go to trial.

3 Q. Were you able to discuss with Mr. Fox that, that
4 potential challenge to the DNA he could have raised at
5 trial?

6 A. Right. We told him that there were issues with it,
7 and we told him that if we went forward, we would
8 definitely be challenging them. The problem was they --
9 you know, we had a Schmerber hearing. And, you know, I
10 argued at the time, you know, let them come back when they
11 can tell us where exactly this came from. They just said
12 we found it on the lady. They couldn't tell me where they
13 found it on the victim. They couldn't tell us, they
14 couldn't tell us whether it was a doctor or a nurse or, or
15 they couldn't hardly give us any kind of chain of custody
16 for the evidence. Despite that, they were -- their
17 Schmerber motion was still granted, but I never had a
18 Schmerber motion that wasn't granted. So, at that point we
19 still think -- and so they, you know, they got the sample
20 of his DNA. They tested it.

21 I, you know, I -- we explained to him what would be
22 going on there, but we also explained that despite the fact
23 that we may be successful in suppressing some of the
24 evidence, you know, there were other problems with the
25 case. Primarily there was an eyewitness.

1 Q. And that eyewitness had essentially walked in and more
2 or less seen Mr. Fox on top of the victim?

3 A. Right. She was the granddaughter of -- she was the
4 grand -- I'm sorry, the granddaughter of the victim, and
5 she said she saw -- she gave a detailed statement about
6 seeing Mr. Fox on top of her grandmother.

7 Q. And just to be clear, when you say we discussed these
8 things, you're referring to yourself and Jenn Davis?

9 A. That -- that's right. That's right. Most of my
10 meetings with Mr. Fox were just me, but Ms. Davis and I had
11 discussed it a lot, and I can't remember how many times she
12 met with Mr. Fox along with me. But as, as we got close to
13 a trial date, she, she did -- I believe she met with us a
14 few times.

15 Q. Did ---

16 A. But all -- you know, it was -- she, she and I were
17 engaged in, you know, trial strategy. So, that's why I
18 said we.

19 Q. Any conversations that Ms. Davis has with Mr. Fox,
20 would those be something you were privy to?

21 A. Yeah. I -- I'm sure she didn't meet with him alone.
22 Actually, one thing. I think she handled his bond hearing
23 before I was appointed to him. Sometimes right when we get
24 guys to the office, somebody will handle a bond hearing,
25 and then you'll get assigned to him later. I think she

1 might have been the duty attorney in handling the bond
2 hearing, though that was before I'd met with him.

3 Q. Okay, I want to talk about plea negotiations with the
4 state. Do you recall entering into plea negotiations with
5 Ms. Campbell in this case?

6 A. Yeah. We had several conversations with Ms. Campbell,
7 and Ms. Davis was involved in a lot of these, too.

8 Q. Okay, and what were the result of those plea
9 negotiations?

10 A. As I said earlier, we got the burglary first reduced
11 to a burglary second. We believed that, that -- I mean,
12 I'd liked, I would have liked the burglary to be dismissed
13 outright because we don't think there was any forced entry,
14 but considering that, that it was a -- he did have a
15 firearm with him, which testimony -- a lot of people -- a
16 lot of Americans have firearms and carry them with them,
17 especially if they're outdoorsmen or, you know,
18 self-defense, and he was friends with this family. I --
19 you know, the facts were a little -- you know, were not
20 extremely favorable, but we got it reduced from the
21 burglary first, which was a mandatory minimum of fifteen,
22 down to a burglary second, and that's why he pled under
23 *Alford* to the burglary charge.

24 Then we got -- you know, as I said, we got the CSC
25 reduced to a CSC second or attempted CSC second. I believe

1 it was initially a first. I don't have that warrant on me
2 right here, but we'd gotten past that threshold of a
3 mandatory minimum of fifteen years for the burglary. Then
4 of course they dismissed the kidnapping and the, you know,
5 knowingly transmitting sexually transmitted disease.

6 Q. Now, you've been here this morning and heard Mr. Fox's
7 testimony?

8 A. Yes.

9 Q. Do you recall having a conversation with the
10 solicitor, Luck Campbell, and Judge Manning prior to the
11 plea hearing?

12 A. We met with Judge Manning to kind of talk about the
13 case, talk about that it was on the roster. You know, I --
14 we gave him background on the case. You know, wanted to
15 sort of, you know, inform him, have a discussion with him
16 primarily because, you know, you never know what the
17 solicitor's going to say in court, and sometimes it might
18 be really inflammatory. He wanted to know about the case
19 because it was set for the -- I believe it was on the trial
20 roster. I can't remember. It floated back and forth, but
21 they were in a hurry to try it because they were afraid
22 that the victim was going to die because she was, I think,
23 eighty-four or so at the time. And, you know, essentially
24 we gave sort of the facts to Judge Manning. And, you know,
25 later on I told him what I thought Judge Manning would do,

1 but Judge Manning never told me what he -- never -- Judge
2 Manning never said -- you know, gave, gave us a, you know
3 -- I mean, he never said I'm going to give him this much
4 time or whatever.

5 I told him. We, we both gave our facts, you know,
6 just kind of, you know, in an informal setting. We were
7 talking to the judge, so he sort of -- because it was a
8 complicated case. There was a lot of -- there were a lot
9 of emotions. There were victim's family members. We knew
10 it was going to be an involved case, and it, and it was
11 important to have background and have a discussion before
12 the plea went forward anyway.

13 And I told him in my experience with judges and, and
14 just knowing Judge Manning, I thought what would happen is
15 I would ask for something, Ms. Campbell would ask for
16 something, and that he would probably split down the
17 middle. That's what -- that was my, you know, guess, but I
18 made clear, you know, that I, I, I certainly -- you know,
19 Judge Manning didn't promise anything and wouldn't promise
20 anything, and I wouldn't ask him to promise anything.

21 Additionally, you know, I, I couldn't guarantee him as
22 to a particular sentence. I told him, though, I thought it
23 was in his best interest to go forward the way it was, and
24 I told him I would ask for two to three years but that, you
25 know -- not -- don't be surprised if he gave him, you know,

1 more.

2 Q. And based on those discussions, do you have any
3 concerns with, I guess, with him -- with understanding that
4 he could have received a lot more than what you were
5 saying? It's up to the judge?

6 A. Right. I thought I was pretty clear about that. I
7 mean, you know, as a lawyer, you try not to promise
8 anything that -- you know, you can't be sure that the sun's
9 going to come out tomorrow, you know? But, I mean, but I
10 -- you, you give the best advice you can. You tell him
11 what you think will happen. You tell him what you think is
12 in his best interest, and I certainly thought it was in his
13 best interest to take -- the, the problem was even --
14 there, there were some good facts or some things that
15 worked in our advantage in the case.

16 If he went to trial, he'd be facing a mandatory
17 minimum of fifteen years, and he was charged with, you
18 know, sexually assaulting an elderly lady and, you know, we
19 -- they had an eyewitness that he was, that he was
20 assaulting this, this old lady. And the facts were just so
21 unfavorable, even just at a first glance, that, that I
22 thought that he would benefit from a plea negotiation. And
23 I think even now, I think he got probably half of what the
24 minimum could have been had he gone to trial, or less than
25 half what the minimum -- so.

1 I'm sorry. Was that clear? I might have talked more
2 than I need to.

3 Q. You answered my question just fine, and did he
4 understand it was ultimately his decision whether to enter
5 this plea and kind of leave it in Judge Manning's hands?

6 A. Yes, yeah and, I mean, you know, this would have -- we
7 would have fought hard for him at trial. We fought hard
8 for him just negotiating, but, you know, Joey was not
9 interested in going to trial really. Additionally, he, he
10 wouldn't have been able to testify to the facts as they
11 happened because he told me that he was, you know, drunk at
12 the time. Didn't really remember everything that happened.
13 Remembered a few things, didn't remember everything.

14 I didn't believe that the facts were as bad as the
15 prosecutor set it out to be or, or the state had. But it's
16 kind of difficult when you're in a position, and I think
17 Joey thought this and I think he, you know, agreed, you
18 know, it's -- you can't really testify in your own defense
19 when you don't really know the facts. You don't know all
20 the facts yourself or you don't have memory of them.

21 Q. Okay, and do you feel you gave him all the advice and
22 information necessary to make a knowing, intelligible, and
23 voluntary decision whether to enter the plea?

24 A. I do.

25 Q. Did you ever advise him how to answer any of these

1 questions to Judge Manning at the plea hearing?

2 A. I, I can't remember specifically, but that's why I go
3 through, you know, this, this list ahead of time because
4 I'm saying, you know -- I'm going to ask you these
5 questions. Some of them may seem simple. Some of them
6 may, may seem redundant, but I -- you know, these are the
7 same questions the judge is going to ask you. Are you
8 doing this voluntarily? Has anybody made you do this or
9 threatened you? Has anybody promised you anything? And if
10 you review the rights form, those are the types of
11 questions that are on it.

12 I do that, one, to make sure that they are properly
13 advised of their rights. And, two, so that, you know, it's
14 not new and strange whenever the judge asks them so they
15 understand it. So, I did review some things that the judge
16 was going to talk to him about ahead of time so that he
17 understood. You know, so that he, he understood the
18 questions before he was asked them.

19 Q. Okay, and just not to belabor the point, but just want
20 to make sure. Based on your discussions with Mr. Fox, do
21 you believe that he entered this plea with the
22 understanding that three years or the splitting in time
23 that you talked about was not a guarantee to him?

24 A. Oh, I mean, I'm -- certainly. I mean, I, I, you know,
25 I think it was clear that he was -- you know, that there

J.R. BAILEY - CROSS-EXAMINATION BY MR. GROTE

35

1 was no fixed number that he was, you know, guaranteed or
2 going to get.

3 I thought, under the circumstances, this was our best
4 chance. This was his best chance to get the smallest
5 possible sentence under the facts, and, and the -- and I
6 think that's -- I'm pretty sure that's what I told him. I
7 said this is your -- this is our best chance to get what we
8 think is a fair and, you know, easier sentence than what it
9 could be and, you know, that's why we should go forward
10 today. And I, and I can't tell you what that number is
11 going to be specifically. I'm going to ask for this, and
12 they're probably going to ask for this, and I'm guessing
13 the judge will, you know, do it somewhere in the middle
14 because, you know, that's just -- that was just my guess.

15 MR. CORNEY: No further questions, Your Honor. Thank
16 you.

17 THE COURT: Mr. Grote.

18 CROSS-EXAMINATION BY MR. GROTE:

19 Q. Mr. Bailey, you admit to having a discussion with Mr.
20 Fox concerning what kind of sentence he could receive,
21 correct?

22 A. Yes.

23 Q. And you told him to the best of your legal abilities
24 that the judge would likely split the sentence that you
25 asked for versus what solicitor asked for, correct?

1 A. Right. In looking at the, looking at the transcript,
2 and I haven't read the entire thing today. I mean, I'd
3 read it before the last time this was scheduled. I don't
4 -- I couldn't find at a glance that Ms. Campbell actually
5 asked for a particular number here. I, I can't be sure of
6 that, you know, right this moment.

7 I -- you know, to answer your question, and I told
8 him, you know -- and you're asked to make educated guesses
9 as a lawyer all the time. I mean, your client's always
10 asking what's going to happen? What's the judge going to
11 do? Well, I can't control what the judge is going to do.
12 I can tell you what I'm going to ask for, and I can make a
13 guess as to what he's going to do. But I can certainly
14 tell you that I think this is -- that, that if we go
15 forward today with the deal that's offered, this is going
16 to be the best possible result. Although I can't assure
17 you of what the number would be, it's probably going to be
18 better than another day or going to trial at another time.

19 Q. But you told Mr. Fox to the best of your ability you
20 believed that his sentence would be split down ---

21 A. I ---

22 Q. --- the middle, correct?

23 A. You know, I, I can't say that I used those words. I
24 mean, I, I, I told him -- I certainly never -- that sounds
25 like a very exact assessment of time that's going to be

1 split down the middle.

2 What I said was is, you know, usually the defense
3 lawyer asks for something, the prosecutor asks for
4 something, and lot of times judges will go somewhere in the
5 middle. You know, it's kind of like, you know, it's -- I
6 mean, not to trivialize it, but it's kind of like, you
7 know, haggling for a car or something. You know, you make
8 a low offer. They've got a higher offer, and sometimes,
9 you know, the, the thing you settle on is somewhere in the
10 middle. And, you know -- or you, you know, you go back and
11 forth and, you know, it's -- obviously we want lower. The
12 state wants higher and, and I -- the judge in, you know,
13 his or her wisdom picks what they think is fair, and
14 sometimes fair is, you know, in the middle.

15 That's what -- you know, I -- that was a guess. That
16 was a rough guess. I wouldn't say I promised him it was
17 going to be split down the middle or told him that was
18 going to happen. And I really can't say that in the end
19 that Ms. Campbell even asked for fifteen years. I thought
20 that's what she was going to ask for, but I, I don't know.

21 Q. Now, you understood that Mr. Fox was relying on your
22 advice and your opinion in connection with this guilty
23 plea, correct?

24 A. Correct. Yes.

25 Q. And you understand based on your representations as to

1 what he would get for a sentence if he pled guilty,
2 correct?

3 A. I'm sorry. What? You...

4 Q. You understand that based on your representations as
5 to the time that he would get for a sentence if he pled
6 guilty, correct?

7 A. I didn't quite -- you -- I understand that -- I'm
8 sorry. Say that one more time.

9 Q. You understand that your representations to Mr. Fox
10 concerning the amount of sentence that he would receive
11 influenced his decision to plead guilty?

12 A. Oh, yes. I'm sure it did.

13 (A PAUSE.)

14 Q. You understand Mr. Fox ended up pleading guilty based
15 on your advice, correct?

16 A. Right and, you know, you know, what I told him, yes.
17 I advised him to do it. He did. I still think that it was
18 the right decision. I think that he made the right
19 decision.

20 MR. GROTE: No further questions, Your Honor.

21 THE COURT: All right, any redirect?

22 MR. CORNEY: No redirect, Your Honor.

23 THE COURT: All right, you may come down, Mr. Bailey.
24 Thank you very much.

25 (THE WITNESS EXITS THE STAND.)

1 MR. CORNEY: No further witnesses from the state.

2 THE COURT: All right, anything further from the
3 applicant?

4 MR. GROTE: No further witnesses, Your Honor. We
5 would like to make a brief statement to the court.

6 THE COURT: All right. You may proceed.

7 MR. GROTE: Your Honor, as you are aware, the law
8 concerning a PCR from a guilty plea, there's two things you
9 have to prove: number one, that counsel's performance was
10 defective; and there's a reasonable, probable -- a
11 reasonable probability that but for counsel's errors, the
12 defendant would not have pled guilty. I can cite *Johnson*
13 *vs. Cato* 336 SC 354.

14 COURT REPORTER: Excuse me, Your Honor. I need him to
15 speak up.

16 THE COURT: Court reporter has got to take it down, so
17 just speak up and speak a little slower.

18 MR. GROTE: Sure. I cite you the case of *Johnson vs.*
19 *Cato*. That's 336 SC 354. That's a South Carolina Supreme
20 Court case from 1999. With regard to this specific case,
21 if I may approach, Your Honor?

22 THE COURT: Sure. Thank you.

23 MR. GROTE: I would refer you to the case *Craddick vs.*
24 *State*. The cite for that is 327 SC 303. That is a 1997
25 decision of the South Carolina Supreme Court. This case

1 stands for the proposition that even though he pled guilty
2 for a crime, if you would have not pled guilty but for a
3 promise of a certain sentence, that's a grounds for PCR,
4 and Mr. Fox stated on the stand he was promised that they
5 would split the sentence down the middle. That the
6 solicitor would ask for seven, they'd ask for time served,
7 he'd end up with three and a half years. That amounts to a
8 promise of a sentence, and I think he's entitled to a PCR
9 under *Craddick vs. State*.

10 Second, Mr. Bailey admitted on the stand back and
11 forth, but during his direct testimony he said they
12 discussed the fact that the sentence, in his opinion, the
13 sentence would be split down the middle. Mr. Fox
14 understood that to be a promise, and I think under *Craddick*
15 *vs. State* it is relatable.

16 COURT REPORTER: Excuse me. I didn't understand his
17 last statement.

18 MR. GROTE: Under *Craddick vs. State*, I believe Mr.
19 Fox would be entitled to his relief based on the promise by
20 his counsel.

21 THE COURT: All right.

22 MR. CORNEY: Your Honor, the state would rely on the
23 testimony that was presented today.

24 Just as a brief note, I would respectfully disagree
25 with opposing counsel that Mr. Fox took the stand and said

1 he was promised anything. That's pretty clear on
2 cross-examination to have him say I understood I could get
3 thirty-that five years. The judge advised me of that, and
4 I knew that was a potential outcome, and I pled guilty
5 anyway. So, it's pretty clear that he was -- he's saying
6 he was led to believe that. He wasn't promised anything,
7 and I think that's what the testimony before this court
8 reflects.

9 And I think Mr. Fox's testimony even reflects the fact
10 that he knows he wasn't promised anything. That that was
11 what Mr. Bailey's educated guess had been before he told
12 him, you know, he can't promise him anything for sure.

13 Other than that, I would just rely upon the record and
14 the testimony presented.

15 THE COURT: All right. All right, counsel, thank you
16 very much. I will take the matter under consideration, and
17 if you wish, either or both of you can submit proposed
18 orders within ten days.

19 MR. CORNEY: Thank you, Your Honor.

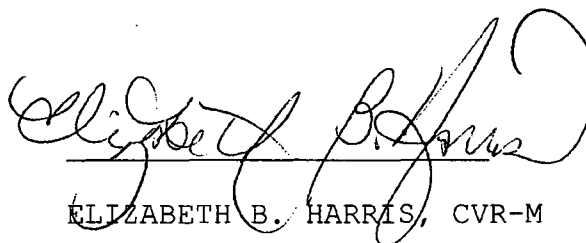
20 THE COURT: Thank you very much.

21 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
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 HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 17TH DAY OF JANUARY, 2013.

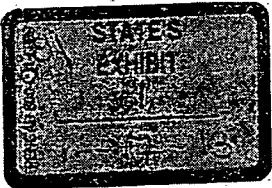
I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

JANUARY 31ST, 2014



RICHLAND COUNTY GENERAL SESSIONS

THE STATE v. Conric Fox SOLICITOR Luck Campbell

INDICTMENT # _____ DEFENSE ATTORNEY RH

The Defendant avers that the Defendant desires to plead guilty to CSC 2nd Degree Burglary 2nd (U) and certifies to the Court that the answers to the following are true:

1. The Penalty(ies) for my charge(s) are: 0-15, 0-20

2. The maximum sentence I could get is: 0-35

3. Has anyone threatened you or put any pressure on you to get you to plead guilty? No If so, who and what? _____

4. Has the State agreed to recommend a sentence to the Judge? No

(a) If so, what is the recommendation? N/A

(b) If so, has anyone promised you anything else to get you to plead guilty or assured you as to a particular sentence? No

(c) If not, has anyone promised you anything to get you to plead guilty? No

5. No Are you under the influence of any drugs or alcohol today? If yes, explain _____

6. If your charge(s) has/have NOT been presented to the Grand Jury, do you understand that you give up that right when you plead guilty? True B.M.

7. Do you understand that if you plead NOT GUILTY, you have the right to have the help of a lawyer at all stages of the proceedings, even if you cannot afford to pay a lawyer, and that a lawyer will be appointed to represent you if you cannot afford to employ one? YES NO _____

8. Do you understand when you plead guilty you give up your right to a jury trial? yes

9. Do you understand when you plead NOT GUILTY you will be presumed innocent until the State has proved you guilty beyond a reasonable doubt and all jurors unanimously agree on your guilt? YES _____ NO _____

Do you understand that if you plead NOT GUILTY you have the right to and hear all witnesses called to testify against you and to confront, cross-examine and question them? YES NO

Do you understand that if you plead NOT GUILTY you have the right to take the witness stand and testify or not to take the witness stand as you choose, and that you cannot be required to take the witness stand? YES NO

Do you understand that if you plead NOT GUILTY and do not take the witness stand the jury cannot take that as evidence against you? YES NO

Do you understand that if you plead NOT GUILTY you have the right to use the subpoena power of the Court to get the attendance of any witnesses on your behalf, whether they want to come or not? YES NO

Do you know if you plead GUILTY you will be found guilty without a trial and you will have given up all the rights mentioned in questions (8) (13) along with your right to present any defense(s)? YES NO

Have you made any statements in which you admitted all or any part of a crime(s) to which you want to plead guilty? YES NO
If yes, would you plead guilty if you knew the statement(s) could not be used against you? YES NO

If you are on parole or probation, do you know that this plea could result in a revocation? YES NO MA

Has your lawyer gone over all your rights and all circumstances of the charge(s) with you? YES NO

Are you satisfied with your lawyer? YES NO

Do you understand what you are doing and all the rights that you are giving up? YES NO

Are you pleading guilty freely and voluntarily? YES NO

Are you pleading guilty because you are guilty? YES NO *Alford or Berg guilty or CC*

Do you understand you have the right to appeal this guilty plea within 30 days? YES NO

J Long
Defendant's Signature

7-14-11
Date

Advised PCR

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Lonzie J. Fox, #346956,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-03938

ORDER OF DISMISSAL

2013 JAN 28 PM 4:54
 JEANETTE W. McGRIDE
 C. J. P. & C. S.
 RICHLAND COUNTY
 FILED

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed June 8, 2012. An evidentiary hearing into the matter was convened on Thursday, January 17, 2013, at the Richland County Courthouse before this Court. Applicant was present at the hearing with counsel, Ely Grote, Esquire¹. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former plea counsel, J. Rhodes Bailey, Esquire (hereafter "counsel"). This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the July 2010 term of the Richland County

¹ At the start of the January 2013 hearing, Applicant voiced his desire to have Mr. Grote relieved as his PCR counsel. After an in-depth colloquy on the record with Applicant and PCR counsel about the preparations taken for the case, this Court, out of an abundance of caution, granted Applicant additional time to discuss the matter off the record in private with Mr. Grote. Upon returning to the courtroom, Applicant withdrew his opposition to PCR counsel's representation and noted he had no objection to proceeding with Grote as his PCR counsel.

SCANNED

Grand Jury for Criminal Sexual Conduct – First Degree, Burglary – Second Degree, Kidnapping, and Knowingly Infecting Another with a Sexually Transmitted Disease (2010-GS-40-0615, -0616, -0617; -2353). Applicant was indicted at the January 2011 term for Assault with Intent to Commit Criminal Sexual Conduct – First Degree (2011-GS-40-0847). On July 14, 2011, Applicant appeared with counsel, Rhodes Bailey, Esquire, and Jennifer Davis, Esquire, before the Honorable L. Casey Manning, where he pled guilty to Burglary – Second Degree as indicted pursuant to North Carolina v. Alford, as well as pled to the lesser included Attempted Criminal Sexual Conduct – Second Degree. Applicant was sentenced to fifteen (15) years imprisonment suspended to service of seven (7) years on each charge, to run concurrently. The remaining Kidnapping, Criminal Sexual Conduct – First Degree, and Knowingly Infecting charges were *nolle prossed* by the state as part of the plea negotiations. No direct appeal was filed.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

10.	State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
	(a) <u>Innocent and pled guilty on advice of my lawyers only</u>
	(b) <u>ineffective assistance of counsel</u>
	(c) <u>was not given a competency test to prove</u>

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating 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." 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).

Erroneous Sentencing Advice

Applicant alleges his guilty plea was entered involuntarily as a result of counsel's erroneous advice concerning the sentence that would be imposed upon entry of his plea. Specifically, Applicant contends counsel, after meeting in chambers with the solicitor and the plea judge, informed him the judge would likely impose a sentence of around three-and-a-half (3 ½) years imprisonment. But for this erroneous advice, Applicant contends, he would not have entered the plea as he did that day.

At the PCR hearing, Applicant testified he and counsel were able to discuss the potential sentences carried by the charges he was facing, and stated he understood he could receive up to thirty-five (35) years imprisonment upon entry of a guilty plea. Applicant recognized he told the plea judge he wanted to proceed with his plea after being advised as to the potential thirty-five (35) year sentence that could be imposed as a result. Applicant stated counsel "never came out" and explicitly promised him a particular sentence to induce entry of the plea, but "lead [Applicant] to believe" he would receive a three-and-a-half (3 ½) year term of imprisonment if he pled guilty. Specifically, Applicant testified, counsel told him because the State was requesting an eight (8) year term of imprisonment and he would request a sentence for time-served, the plea judge was likely to impose a sentence somewhere down the middle. On cross-examination, Applicant recognized he never requested a jury trial on the charges from counsel, and said there was nothing he had asked counsel to do which counsel had failed to in preparation for the case. When asked, Applicant merely noted he likely would not have entered the plea on that day as he did had he known he was not going to receive a three-and-a-half (3 ½) year sentence.

Counsel testified he took over representation of Applicant in January of 2010, in his capacity as an Assistant Public Defender for Richland County. He stated he met with Applicant to discuss the charges, the elements of the offenses contained in the indictments, and the potential sentences carried by each charge. Counsel noted Applicant was originally charged with Burglary – First Degree and Criminal Sexual Conduct – First Degree, but that through plea negotiations the charges were reduced to the lesser offenses eventually pled to. Counsel also provided this Court with a copy of an advisement of rights form signed by Applicant in which the potential sentences and Applicant's constitutional rights were set forth. Counsel testified that based on their discussions, Applicant was never interested in taking the case to trial. Counsel noted there was an eye-witness that would be very hard to overcome in attempting to challenge the state's case at trial. Further, counsel said, Applicant had no memory of the incident as he was highly intoxicated at the time; therefore, counsel said, Applicant would be unable to refute any of the state's evidence through his own testimony.

Regarding the in-chamber discussions with the plea judge prior to the plea hearing, counsel recalled he and the prosecuting solicitor briefly reviewed the case with the judge as it was set on the trial roster at the time. Counsel testified that as a result of that meeting, he informed Applicant the state would be requesting an eight (8) year term of imprisonment if a plea were entered. Counsel told Applicant he would request a time-served sentence, and in his experience it was common for judges to "split the difference" between the two requests. Counsel went on to say he made it "pretty clear" to Applicant that the ultimate decision on sentencing was made by the judge; further, counsel stated he "made sure" Applicant was aware Judge Manning had not promised any particular sentence if Applicant pled guilty. Counsel said he advised Applicant he believed it was likely in his best interest to enter a plea because the facts

and evidence were not favorable for a trial. Counsel explicitly stated he made Applicant well aware the decision of whether to plead or proceed to trial was ultimately Applicant's. Counsel finished by noting he never gave Applicant any estimation as to the number of years he should expect to receive under a plea, and reiterated he did not assure or promise Applicant that he would receive any particular sentence if he pled.

Based on a thorough review of the record and testimony presented, this Court finds the current application for post-conviction relief must be denied and dismissed. First, this Court finds counsel's performance was not deficient or objectively unreasonable. Counsel testified he made it abundantly clear to Applicant there was no guaranteed sentence set forth by the state, the judge or by counsel himself that Applicant should expect to receive upon entry of the plea. This Court finds that testimony to be credible. Applicant's testimony to the extent that it contradicts with that finding is not credible. Further, the record is clear in showing Applicant was well aware the judge potentially could have sentenced him up to thirty-five years upon entry of the plea, and Applicant made the voluntary decision to enter the plea with full knowledge of that risk. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made." Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997). The record and credible testimony presented firmly convince this Court Applicant's plea was entered freely, voluntarily and intelligently with full knowledge of the risks and potential sentences that realistically could be imposed.

Further, this Court finds Applicant has failed to prove resulting prejudice resulting from that alleged deficiency. Namely, Applicant failed to convince this Court that, but-for counsel's alleged erroneous advice concerning sentencing, Applicant would not have pled but rather would

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have proceeded to trial on the charges. Again, the credible testimony before this Court is clear in showing Applicant never had any interest in pursuing a jury trial as the state had more than sufficient evidence to convince a jury of Applicant's guilt beyond a reasonable doubt. When asked directly whether he would have pled guilty but-for counsel's alleged erroneous sentencing advice, Applicant merely stated he likely would not have "pled guilty that day". As set forth above in referencing Hill v. Lockhart, the standard for proving resulting prejudice from a guilty plea is a "reasonable probability that, but for counsel's alleged errors, Applicant would not have pled guilty and would have insisted on going to trial." Applicant has failed to make even the bare assertion that he would have insisted upon going to trial had he known he would receive a sentence higher than three-and-a-half (3 ½) years. Further, no credible evidence has been presented to this Court to support and/or prove such an allegation. Accordingly, Applicant has also failed to prove resulting prejudice as required by Strickland v. Washington, supra.

For the reasons set forth above, this Court finds the current application for post-conviction relief must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may

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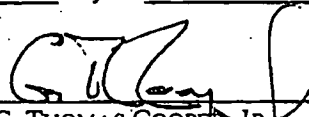
be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed:

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed **with prejudice**; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 28 day of January, 2013.



 G. THOMAS COOPER, JR.
 Presiding Judge
 Fifth Judicial Circuit

Columbia, South Carolina.

WITNESSES

(S) Stephen Faust - Richland County Sheriff

DOCKET NO. 2011-GS-40-0847

The State of South Carolina

County of

Richland

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

January TERM 2011

42

THE STATE

vs.

Lonzie Joseph Fox

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

DP11015

ACTION OF GRAND JURY

TRUE BILL

Mona H. Gardner

Foreperson of Grand Jury JAN 20 2011

Date:

OVERDICT

Indictment for
ASSAULT W/1 COMMIT CSC (ADULT)
1ST DEG

SC Code: 16-03-0656
CDR Code: 0253

FILED
OFFICE OF CLERK OF COURT
RICHLAND COUNTY
C.C.C. PLS. AND G.S.
SOUTH CAROLINA
RECEIVED
JAN 20 2011
Clerk of Richland County
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on January 19, 2011, the Grand Jurors of Richland County present upon their oath:

ASSAULT WITH INTENT TO COMMIT
CRIMINAL SEXUAL CONDUCT, FIRST DEGREE

CDR: 0253 16-03-0656, 0652 ✓

That Lonzie Joseph Fox did in Richland County on or about December 30, 2009, assault Minnie Peters with the intent to engage in sexual battery with Minnie Peters while using aggravated force and/or the victim submitted to such sexual battery under circumstances where the victim was also the victim of forcible confinement, kidnapping, burglary, or any other similar offense or act, all in violation of Section 16-3-652, 16-3-656, S. C. 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.



DAN JOHNSON, SOLICITOR

WITNESSES

(S) Stephen Faust - Richland County Sheriff

AMENDED
DOCKET NO. 2010-GS-40-616

The State of South Carolina

County of

Richland

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.
Lonzie Joseph Fox
Defendant

COURT OF GENERAL SESSIONS

July TERM 2010

Lonzie Joseph Fox
hereby appear in my own proper person and plead guilty to the within indictment or to
Burglary 1st Degree

Lonzie Joseph Fox
Defendant

42

THE STATE
vs.

LONZIE JOSEPH FOX

Witness:
[Signature]
C.C.G. S. AND G.S.

ACTION OF GRAND JURY

RETURN

Maura H. Greenlee

Foreperson of Grand Jury JAN 20 2011
Date:

VERDICT

Indictment for
BURGLARY 1ST DEGREE

SC Code: 16-11-0311
CDR Code: 0079

Foreperson of Petit Jury
Date:

