

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

MAY 23 2014

S.C. Supreme Court

DAVID COLTER, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000309

APPENDIX

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Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

CASE NO. 08-GS-38-0820

versus

TRANSCRIPT OF RECORD

DAVID COLTER, JR.,

DATE:

DEFENDANT

AUGUST 6, 2009

BEFORE:

HONORABLE EDGAR DICKSON, PRESIDING JUDGE

APPEARANCES:

TOMMY SCOTT, ESQUIRE

ASSISTANT SOLICITOR

FOR THE STATE

C. BRADLEY HUTTO, ESQUIRE

ATTORNEY AT LAW

FOR THE DEFENDANT

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

DATE:

AUGUST 6, 2009

SOLICITOR SCOTT: YOUR HONOR,
STANDING BEFORE YOU IS DAVID COLTER, JUNIOR,
REPRESENTED BY MR. BRAD HUTTO. HE'S PLEADING GUILTY
TO ONE COUNT OF FELONY DUI INVOLVING DEATH. IT'S
INDICTMENT NUMBER 2008-GS-38-820.

CLERK: SIR, RAISE YOUR HAND.
(Whereupon, David Colter, Jr.,
is duly sworn.)

THE COURT: ALRIGHT, SIR, MR.
COLTER, YOU CAN STEP UP BESIDE MR. HUTTO IF YOU DON'T
MIND.

(NOTE: Blank lines on this page do not indicate any
part of record has been omitted. Headers on testimony
pages and hard page breaks between testimony are now
required by the Court. See next ensuing page for
sequential continuation of record.)

EXAM - DAVID COLTER, JR., BY THE COURT

4

EXAMINATION OF DAVID COLTER, JR.,

BY THE COURT:

Q. LET'S SEE, MR. COLTER, I'VE BEEN TOLD THAT YOU
ARE HERE TO PLEAD GUILTY TO FELONY DRIVING UNDER
THE INFLUENCE.

A. YES, SIR.

Q. ALRIGHT, SIR. AND YOU ARE REPRESENTED BY MR.
HUTTO?

A. YES, SIR.

Q. OKAY. MR. HUTTO HAS GONE OVER YOUR
CONSTITUTIONAL RIGHTS WITH YOU?

A. YES, SIR.

Q. DO YOU UNDERSTAND YOU HAVE THE RIGHT TO A JURY
TRIAL?

A. YES, SIR.

Q. OKAY. DO YOU WANT A JURY TRIAL?

A. NO, SIR.

Q. OKAY. DO YOU WISH TO GO FORWARD WITH THIS PLEAD?

A. YES, SIR.

Q. HAS ANYBODY PROMISED YOU ANYTHING TO GET YOU TO
PLEAD GUILTY HERE TODAY?

A. NO, SIR.

Q. HAS ANYBODY THREATENED YOU TO GET YOU TO PLEAD
GUILTY HERE TODAY?

A. NO, SIR.

1 Q. ALRIGHT. DO YOU UNDERSTAND IF I ACCEPT YOUR PLEA
2 HERE TODAY YOU'D HAVE TEN DAYS FROM TODAY'S DATE
3 IN WHICH TO FILE NOTICE OF INTENT TO APPEAL IN
4 THE CLERK OF COURT'S OFFICE, DO YOU UNDERSTAND
5 THAT?

6 A. YES, SIR.

7 Q. ALRIGHT, SIR. NOW, HAS MR. HUTTO EXPLAINED
8 EVERYTHING TO YOUR SATISFACTION?

9 A. YES, SIR.

10 Q. OKAY. AND YOU'RE SATISFIED WITH HIS SERVICES AS
11 YOUR ATTORNEY?

12 A. YES, SIR.

13 Q. ALRIGHT. OKAY. THE INDICTMENT THAT I HAVE, MR.
14 COLTER, IS INDICTMENT NUMBER 2008-GS-38-820. IT
15 IS AN INDICTMENT AGAINST YOU, AS I SAID, FOR
16 FELONY DUI. IT WAS TRUE BILLED BY THE GRAND JURY
17 ON OCTOBER THE FIFTEENTH, TWO THOUSAND AND EIGHT.
18 AND MR. COLTER, IT ALLEGES THAT YOU DID, IN
19 ORANGEBURG COUNTY, ON OR ABOUT APRIL FOURTH, TWO
20 THOUSAND AND EIGHT, WHILE DRIVING UNDER THE
21 INFLUENCE OF ALCOHOL, COMMITTED -- AND THAT YOU
22 WERE MATERIALLY -- YOUR FACULTIES WERE MATERIALLY
23 AND APPRECIABLY IMPAIRED, AND THAT YOU DID
24 IMPROPERLY DRIVE OUTSIDE THE LANE OF TRAVEL, AND
25 THAT SUCH ACT CAUSED THE DEATH OF FREDDIE

EXAM - DAVID COLTER, JR., BY THE COURT

6

1 MCMICHAEL, IN VIOLATION OF THE LAWS OF THE STATE
2 OF SOUTH CAROLINA. DO YOU UNDERSTAND THE FACTS
3 ALLEGED IN THIS INDICTMENT?

4 A. YES, SIR.

5 Q. ALRIGHT, SIR. HOW DO YOU PLEAD TO THE CHARGE OF
6 FELONY DUI, GUILTY OR NOT GUILTY?

7 A. GUILTY.

8 THE COURT: OKAY. ALRIGHT, MR.

9 SCOTT.

10 SOLICITOR SCOTT: THANK YOU, YOUR
11 HONOR. YOUR HONOR, THIS INCIDENT TOOK PLACE ON APRIL
12 THE FOURTH OF TWO THOUSAND AND EIGHT. IT HAPPENED
13 ABOUT ONE O'CLOCK IN THE AFTERNOON. THE VICTIM IN
14 THIS CASE, YOUR HONOR, WAS MR. FREDDIE MCMICHAEL, HE
15 LIVED AT [REDACTED] MR.
16 MCMICHAEL, YOUR HONOR, WAS SEVENTY YEARS OF AGE. HE
17 ROUTINELY, YOUR HONOR, RODE HIS BICYCLE TO WORK. HE
18 WORKED AT A PLANT NURSERY ON HIGHWAY THREE O ONE. ON
19 THE INCIDENT DATE, YOUR HONOR, HE WAS RETURNING BACK
20 TOWARDS HIS HOUSE. HE WAS TRAVELING ON HIS BICYCLE ON
21 THE SHOULDER OF THE ROAD. HE HAD PASSED, YOUR HONOR,
22 THE -- HE WAS TRAVELING SOUTH, HE HAD PASSED THE
23 ORANGEBURG ATHLETIC CLUB. THIS DEFENDANT, YOUR HONOR,
24 WHO JUST BY HAPPENSTANCE ALSO LIVES ON THE SAME STREET
25 AND IS ACTUALLY FRIENDS WITH THE VICTIM, HE WAS

1 DRIVING HIS VEHICLE, I THINK IT WAS A WHITE CHEVROLET
2 PICKUP TRUCK. THE DEFENDANT, YOUR HONOR, WENT OUTSIDE
3 OF THE RIGHT LANE. HE ACTUALLY DROVE ONTO THE
4 SHOULDER OF THE ROAD STRIKING MR. MCMICHAEL, WHO WAS
5 ON HIS BICYCLE, FROM BEHIND. MR. MCMICHAEL, YOUR
6 HONOR, DIED AS A RESULT OF THOSE INJURIES THAT HE
7 SUFFERED. YOUR HONOR, THE DEFENDANT WAS INTOXICATED
8 AT THE TIME, I BELIEVE HIS BLOOD ALCOHOL LEVEL WAS
9 AROUND POINT TWO ZERO.

10 HIS ONLY PRIOR RECORD, YOUR HONOR,
11 I THINK ELEVEN YEARS AGO HE HAD A FAILURE TO STOP FOR
12 A BLUE LIGHT.

13 YOUR HONOR, THERE ARE THREE FAMILY
14 MEMBERS HERE ON BEHALF OF MR. MCMICHAEL. WE HAVE A
15 HATTIE LEGREE, WHO IS A SISTER OF MR. MCMICHAEL,
16 SHANNON LEGREE, WHO IS A NEPHEW, AND WANDA MCMICHAEL,
17 WHO IS A NIECE. THEY'RE SITTING ON THE FRONT ROW NEXT
18 TO OUR VICTIM'S ADVOCATE, MS. TAMMY CRAVEN. I TOLD
19 THEM, - - -

20 THE COURT: DID THEY WISH - - -

21 SOLICITOR SCOTT: --- I TOLD THEM
22 THEY WOULD HAVE THE OPPORTUNITY TO ADDRESS YOUR HONOR
23 IF THEY WISHES, AND THEY DID NOT CARE TO SAY ANYTHING.

24 THE COURT: OKAY. THANK YOU, SIR.

25 ALRIGHT, SIR, HIS ONLY PRIOR

1 RECORD WAS A FAILURE TO STOP FOR A BLUE LIGHT ABOUT
2 ELEVEN YEARS AGO?

3 SOLICITOR SCOTT: THAT'S CORRECT,
4 SIR.

5 THE COURT: OKAY.

6 Q. ALRIGHT, MR. COLTER, YOU'VE HEARD WHAT THE
7 SOLICITOR HAS TOLD ME ABOUT THESE CHARGES, ABOUT
8 THE INCIDENT, AND YOU'VE HEARD WHAT HE'S TOLD ME
9 ABOUT YOUR PRIOR RECORD, WHICH I'M GLAD IT'S NOT
10 ANYTHING WORSE THAN IT IS, YOU KNOW.

11 UNDERSTANDING THAT, DO YOU STILL WISH TO GO
12 FORWARD WITH THIS PLEA?

13 A. YES, SIR.

14 Q. ARE YOU DOING IT FREELY AND VOLUNTARILY?

15 A. YES, SIR.

16 THE COURT: OKAY. I FIND THAT
17 YOUR DECISION TO PLEAD GUILTY IS FREELY, VOLUNTARILY
18 AND INTELLIGENTLY MADE. I FIND THAT YOU'VE HAD THE
19 ADVICE AND COUNSEL OF A COMPETENT ATTORNEY WITH WHOM
20 YOU'VE TOLD THIS COURT YOU'RE SATISFIED. I FIND THAT
21 THERE IS A FACTUAL BASIS FOR YOU TO PLEAD GUILTY TO
22 THIS CHARGE, AND I WILL ACCEPT YOUR PLEA.

23 ALRIGHT, SIR, MR. HUTTO.

24 MR. HUTTO: YOUR HONOR, THIS IS A
25 REAL TRAGEDY, AS MOST OF THESE CASES ARE. DAVID HAD

1 KNOWN FREDDIE MCMICHAEL HIS WHOLE LIFE. IN FACT, AS
2 THE SOLICITOR TOLD YOU, THEY WERE NEIGHBORS. HE
3 CERTAINLY WOULD HAVE NEVER INTENTIONALLY DONE ANYTHING
4 TO KNOWINGLY DO THIS, EXCEPT, YOU KNOW, WHEN YOU USE
5 ALCOHOL, IN A SITUATION LIKE THIS BAD THINGS CAN
6 HAPPEN. AND WHAT WAS GOING ON BASICALLY WAS THAT
7 DAVID WAS GOING TO TURN THE SAME PLACE THAT FREDDIE
8 WAS EVENTUALLY GOING TO TURN BECAUSE THEY LIVE ON THE
9 SAME STREET, AND SOME VEHICLES WERE STOPPED, AND ONE
10 SWITCHED LANES AND HE MOVED TO ADJUST, AND WHEN HE
11 DID, THE WAY THE TRAFFIC WAS STOPPING IN FRONT OF HIM,
12 HE WENT OFF THE SIDE OF THE ROAD. AND UNDER NORMAL
13 CIRCUMSTANCES IT WOULD BE ONE OF THOSE THINGS WHERE
14 YOU JUST KIND OF -- TRAFFIC WAS STOPPING AND HE RAN
15 OFF THE ROAD. IN THIS CASE HE RAN OFF THE ROAD RIGHT
16 WHERE FREDDIE HAD PULLED OFF ON HIS BICYCLE AND HE HIT
17 HIM, AND OF COURSE, HE JUMPED OUT IMMEDIATELY, SAW IT
18 WAS FREDDIE, AND FREDDIE DIED IN HIS ARMS, AND IT WAS
19 A REAL TRAGEDY.

20 DAVID'S GOT NO PRIOR RECORD EXCEPT
21 FOR A TRAFFIC OFFENSE THAT HAPPENED OVER A DECADE AGO.
22 HE SPENT HIS LIFE FOR THE MOST PART AS A TRUCK DRIVER.
23 HE'S GOT SIGNIFICANT FAMILY, AND I APOLOGIZE TO HIM, I
24 DIDN'T -- I TOLD HIM HE HAD TO BE UP HERE TODAY
25 BECAUSE HIS TRIAL WAS ON THE SCHEDULE AND WE HAD TO

1 MAKE A DECISION. I DON'T THINK THAT HE KNEW UNTIL WE
2 GOT HERE TODAY; OTHERWISE, -- AND HE WANTS YOU TO KNOW
3 THAT HIS CHILDREN AND HIS SISTERS AND OTHER FOLKS
4 WOULD HAVE BEEN HERE. I'VE EXPLAINED TO HIM THAT HIS
5 CHARACTER IS NOT IN QUESTION, IT'S NOT LIKE HE NEEDS
6 SOMEBODY TO COME UP HERE AND SAY THAT HE'S LIVED A
7 GOOD LIFE -- HE HAS OTHER THAN HE'S HAD THIS TRAGEDY,
8 BUT HE HAS COME BEFORE THE COURT AND ACCEPTED
9 RESPONSIBILITY FOR IT. AND IT JUST REALLY IS A
10 TERRIBLE SITUATION. HE WOULD -- HE UNDERSTANDS, YOUR
11 HONOR, THAT THERE'S A MINIMUM SENTENCE INVOLVED AND
12 OBVIOUSLY HE'S GOING TO HAVE TO DO SOME JAIL TIME. HE
13 WOULD ASK YOU TO CONSIDER, AS YOU DETERMINE WHAT THE
14 APPROPRIATE SENTENCE WOULD BE, THAT HE DOES HAVE NO
15 REAL BAD PRIOR DRIVING RECORD, AND NO OTHER TYPE OF
16 CRIMINAL RECORD. HE'S BEEN GAINFULLY EMPLOYED. HE'S
17 GOT TWO CHILDREN THAT WILL BE GOING OFF TO COLLEGE.
18 HE'S GOT A MOTHER WHO'S NOT DOING WELL. AND I BRING
19 THAT TO YOUR ATTENTION BECAUSE HE DOES MAKE THIS ONE
20 SPECIAL REQUEST THAT I HAD MENTIONED TO THE SOLICITOR,
21 WHICH IS THAT HE'S GOT TO WRAP A FEW THINGS UP. HE
22 NEEDS TO SAY GOODBYE TO HIS CHILDREN AND HIS MOTHER.
23 HE DOESN'T THINK, YOU KNOW, SHE -- UNFORTUNATELY, HER
24 HEALTH IS SUCH THAT, DEPENDING ON WHAT YOUR SENTENCE
25 IS, THAT HE MAY NEVER SEE HER AGAIN. HE WOULD ASK

1 THAT HE BE ABLE TO REPORT MONDAY AFTERNOON AND
2 UNDERSTANDS THAT HE HAS A SIGNIFICANT ABSOLUTE
3 OBLIGATION TO NOT DO ANYTHING TO JEOPARDIZE REPORTING
4 ON MONDAY, AND TO STAY OUT OF TROUBLE, AND OBVIOUSLY,
5 UNDERSTANDS THAT SHOULD HE FAIL TO REPORT ON MONDAY
6 THAT YOU COULD REVISIT HIS SENTENCE AND SENTENCE HIM
7 TO A SIGNIFICANTLY LONGER PERIOD OF TIME. I DON'T
8 THINK -- THERE'S NOTHING TO SUGGEST TO ME THAT HE
9 WON'T BE HERE ON MONDAY, IT'S JUST REALLY A MATTER OF
10 HIM WRAPPING THINGS UP AND SAYING GOODBYE TO HIS
11 FAMILY MEMBERS. AND SO, WE WOULD ASK YOU TO TAKE THAT
12 INTO CONSIDERATION AS YOU MAKE YOUR, GIVE YOUR
13 SENTENCE.

14 THE COURT: ALRIGHT, SIR. MR.
15 COLTER, ANYTHING -- DOES MR. COLTER WANT TO SAY
16 ANYTHING?

17 MR. HUTTO: DO YOU WANT TO SAY
18 ANYTHING?

19 DEFENDANT COLTER: YES, SIR.

20 THE COURT: YES, SIR, I'LL BE GLAD
21 TO HEAR FROM YOU.

22 DEFENDANT COLTER: I'M VERY SORRY
23 FOR WHAT HAPPENED, AND SPECIALLY TO FREDDIE'S FAMILY.

24 THE COURT: OKAY. AND I KNOW THEY
25 APPRECIATE THAT. OKAY.

1 HE'S ON BOND, OUT ON BOND RIGHT
2 NOW, MR. HUTTO?

3 MR. HUTTO: AND HE'S BEEN AT ALL
4 HIS APPEARANCES AND EVERYTHING HE'S HAD TO DO UP UNTIL
5 NOW.

6 THE COURT: ALRIGHT, SIR. MR.
7 HUTTO, YOU INDICATED THAT HE WANTED TO REPORT ON
8 MONDAY AFTERNOON? I NEED A TIME.

9 MR. HUTTO: THREE O'CLOCK.

10 THE COURT: OKAY.

11 ALRIGHT, MR. COLTER, I AM, I'M SORRY
12 FOR MR. MCMICHAEL AND HIS FAMILY, WHAT THEY'VE BEEN
13 THROUGH, AND I'M SORRY FOR WHAT YOU'RE GOING TO HAVE TO
14 DO, BUT YOU'VE GOT TO BE RESPONSIBLE FOR YOUR ACTIONS,
15 AND I KNOW YOU UNDERSTAND THAT.

16 DEFENDANT COLTER: YES, SIR.

17 SENTENCE OF THE COURT:

18 ALRIGHT, SIR. THE SENTENCE OF THIS
19 COURT IS THAT YOU'RE COMMITTED TO THE STATE DEPARTMENT
20 OF CORRECTIONS FOR A PERIOD OF EIGHT YEARS.

21 I WILL ALLOW YOU TO REPORT MONDAY
22 AFTERNOON AT THREE P.M. YOU'RE GOING TO REMAIN ON BOND
23 UNTIL THAT TIME, UNTIL YOU REPORT. AND IF YOU FAIL TO
24 REPORT I WILL RE-SENTENCE YOU. DO YOU UNDERSTAND THAT?

25 DEFENDANT COLTER: YES, SIR.

13

1 THE COURT: OKAY. ALRIGHT, SIR,
2 GOOD LUCK TO YOU.

3 MR. HUTTO: YOUR HONOR, AND JUST SO
4 THAT WE'RE CLEAR HERE, HE'LL GO DIRECTLY TO THE
5 DETENTION CENTER OUT ON ELLIS AVENUE, IS THAT WHERE YOU
6 WANT HIM TO REPORT?

7 THE COURT: YEAH.

8 SOLICITOR SCOTT: YES, YOUR HONOR.

9 THE COURT: DO YOU WANT ME TO PUT
10 THAT IN HERE?

11 MR. HUTTO: I JUST WANTED TO BE ABLE
12 TO TELL HIM WHERE TO GO.

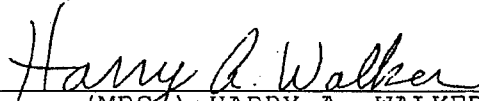
13 THE COURT: OKAY. THANK YOU.

CERTIFICATE

I, THE UNDERSIGNED, MRS. HARRY A. WALKER, OF ROWESVILLE, SOUTH CAROLINA, OFFICIAL COURT REPORTER FOR THE FIRST 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 CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE SIXTH DAY OF AUGUST, 2009.

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

DATE: MAY 10, 2010


(MRS.) HARRY A. WALKER

FORM 5

STATE OF SOUTH CAROLINA)

County of Richland)David Colter, Jr.; *336366)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2009-CP-38-2022
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEF

2009 DEC 16

A 11:35

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 Manning Correctional Inst.
522 Backman Rd, Columbia SC 29203
2. Name and location of Court which imposed sentence Orangeburg County
Court of General Sessions, Orangeburg, South Carolina
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-38-820; Felony Driving Under the Influence (Death)
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 6, 2009; 8 years committed to the
- (b) South Carolina Department of Corrections
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. None
- ii. None
- iii. None
- (b) the result in each such Court to which you appealed:
- i. None
- ii. None
- iii. None
- (c) the date of each such result:
- i. None
- ii. None
- iii. None
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. None
- ii. None
- iii. None
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Unable to contact Attorney after sentencing within 10 days
- (b) _____

(c) _____

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

(a) Ineffective Assistance of Counsel
 (b) Bias By Trial Judge
 (c) Denial of Preliminary Hearing

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

(a) See Attachment 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. None
 ii. None
 iii. None
 iv. None

(c) the disposition thereof:

- i. None
- ii. None
- iii. None
- iv. None

(d) the date of each such disposition:

- i. None
- ii. None
- iii. None
- iv. None

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

- i. None
- ii. None
- iii. None
- iv. None

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. None
- ii. None
- iii. None

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

- i. None
- ii. None
- iii. None

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

(a) No prior Appeal filed

(b) _____

(c) _____

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

(a) your arraignment and plea? yes

(b) your trial, if any? none

(c) your sentencing? yes

(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. C. Bradley Hutto, Esquire, P.O. Box 1084, Orangeburg,
South Carolina 29116

ii. _____

iii. _____

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

i. Plea Hearing and Sentencing

ii. _____

iii. _____

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

Reverse and Remand for new trial

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

No

STATE OF SOUTH CAROLINA)

County of Sumter)

VERIFICATION

I, David Cotter Jr, 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.

David Cotter Jr

SWORN to and subscribed before me this 7th day of December, 2003.

Samela D. Hatfield (L.S.)
Notary Public

My Commission Expires: 3/15/2004

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

I, David Cotter Jr, 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.

David Cotter Jr
Applicant

SWORN or affirmed to and subscribed before me this
11th day of December 2003.

Pamela D. Heston
Notary Public

My Commission Expires: 3/15/2004

2003 DEC 16 A 11:39
FILED
CLERK OF COURT
CLERK OF COURT

Ineffective Assistance of Counsel

The Applicant alleges that Counsel (Hutto) was ineffective which is a violation of the United States Constitution, Bill of Rights, Amendment VI, effective assistance of counsel.

The Applicant alleges Counsel failed to properly investigate the case lodged against Applicant. See Wiggins v. Smith, 123 S.Ct. 2527 (2003).

The Applicant alleges ^{Counsel} failed to investigate and challenge the State's charge of Felony Driving Under The Influence against the Applicant. The Applicant alleges that he was not issued a citation in regards to a cause of the accident in which he was charged with Felony Driving Under the Influence.

The Applicant alleges he did not receive his "Brady", Rule 5, Motion For Discovery, which is a violation of his United States Constitution, Bill of Rights, Amendment VI, right to be confronted with the evidence and witnesses against him.

The Applicant alleges his guilty plea resulted from ineffective assistance of counsel. See Hill v. Lockhart, 474 U.S. 52 (1985).

Bias By Trial Judge

Page 2 of 2

The Applicant alleges that the Sentencing Judge worked in the same law firm, and at the same time as Applicant's Counsel, which is a conflict of interest, and possibly bias against sentencing Judge, depending on the relationship between Sentencing Judge and Applicant's Attorney, as well as the reason the Sentencing Judge left the law firm. The Applicant alleges bias by the Judge. See Litky v. U.S., 510 U.S. 540 (1994); Arizona v. Fulminate, 499 U.S. 279 (1991).

Denial of Preliminary Hearing

The Applicant alleges he was denied his right to a Preliminary Hearing. In State v. Brown (S.C. 1902) 62 S.C. 374, 40 S.E. 776, it states in part: Magistrates are required to hold a preliminary investigation on the issue of a warrant charging a crime at the demand of the defendant.

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

David Colter, Jr., #336366,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2009-CP-38-2022

RETURN

(Appointment of Counsel Requested)

The Respondent, making its Return to the application for post conviction relief (PCR) filed December 16, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was represented by C. Bradley Hutto, Esquire. On August 6, 2009, the Applicant pled guilty to Felony Driving Under the Influence Resulting in Death before the Honorable Edgar W. Dickson. Applicant was sentenced to eight (8) years. Applicant did not appeal his conviction and sentence.

Attached herewith and incorporated herein are the records of the Orangeburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.¹ The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

¹ As of the date of this return, neither the Clerk's records nor the transcript have been received by Respondent. The same will be forwarded upon receipt.

II.

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

1. Ineffective Assistance of Counsel.
 - a. Failure to investigate.
2. "Bias by Trial Judge."
 - a. Trial judge and attorney had worked in same law firm.
3. "Denial of Preliminary Hearing."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

For purposes of this Return, Respondent interprets Applicant's allegations to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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 the record does not conclusively refute. Accordingly, 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).

IV.

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

V.

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

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

May 5, 20 10.

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

DAVID COLTER, 336366

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

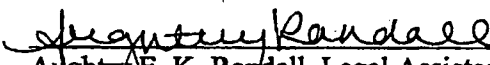
2009-CP-38-2022

AFFIDAVIT OF SERVICE BY MAIL

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

Andrew J. Brown, Esquire
Culler & Brown, LLP
1540 Russell Street, SE
Orangeburg SC 29115

DATED this 18th day of May, 2010.


Aughtry E. K. Randall, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF ORANGEBURG

CIRCUIT COURT
2009-CP-38-02022

3 DAVID COLTER, JR.,
4 Applicant,

5 -vs-

TRANSCRIPT OF RECORD

6 STATE OF SOUTH CAROLINA,
7 Respondent.

8 Post Conviction Relief Hearing

9 Heard on Thursday, December 1, 2011

10 Saint George, South Carolina

11 BEFORE:

12 THE HONORABLE DIANE S. GOODSTEIN
13

14
15 APPEARANCES:

16 Counsel on Behalf of the Applicant:
17 Andrew J. Brown, Esq.

18 Counsel on Behalf of the Respondent, State of SC:
19 Rob D. Corney, Esq.
20 Mary S. Williams, Esq.

21 Cheri L. Young, RPR
22 Circuit Court Reporter
23 P O Box 5232
24 Aiken, SC 29803-5232
25

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(NO EXHIBITS IDENTIFIED/INTRODUCED.)

1 ON THURSDAY, DECEMBER 1, 2011 AT 2:35 P.M.:

2 THE COURT: All right. We are now on the record
3 regarding the PCR application with Mr. David Colter. And
4 Mr. Brown, you said that there's a motion?

5 MR. BROWN: Yes. I believe my client has informed me
6 he'd like to make a motion in front of the Court.

7 THE COURT: Yes, sir. What is that motion?

8 THE APPLICANT: May I confer with my counsel?

9 THE COURT: Okay.

10 (Applicant conferring with counsel.)

11 MR. BROWN: Your Honor, I think at this point he does
12 not want me to make the motion. If proper, I would like
13 to put it on the record, possibly after the hearing or
14 just make the Court aware of it --

15 THE COURT: Okay.

16 MR. BROWN: -- whenever you think I should.

17 THE COURT: All right.

18 MR. BROWN: I'll question him about it.

19 THE COURT: All right. And -- very well. And were
20 you all anticipating going forward on just the motion or
21 the PCR in its entirety?

22 MS. WILLIAMS: We're ready for either scenario.

23 THE COURT: Very well. Call your first witness.

24 MR. BROWN: Your Honor, I'd like to call at this point
25 my client, Mr. David Colter, Jr.

1 DAVID COLTER, JR., having been duly sworn, was
2 examined and testified as follows:

3 THE COURT: Very well. If you would be seated and
4 state your full name for the record and spell your last
5 name.

6 THE APPLICANT: David Colter, Jr., C-O-L-T-E-R.

7 THE COURT: Thank you. Now, do you want to give me
8 the procedural background, Mr. Corney?

9 MR. CORNEY: Yes, ma'am. I will.

10 THE COURT: All right.

11 MR. CORNEY: I apologize. Your Honor, as you know,
12 this is David Colter. Docket Number 2009-CP-38-2022.

13 Mr. Colter was true-bill indicted October 15th, 2008, by
14 the Orangeburg County Grand Jury for felony driving under
15 the influence resulting in death.

16 Mr. Colter pled guilty August 6, 2009, before Judge
17 Dickson to the same charge, I believe, felony driving
18 under the influence resulting in death, and was sentenced
19 to eight years imprisonment. Mr. Colter didn't have a
20 direct appeal but filed a timely PCR application December
21 16th, 2009, and is represented by Mr. Andrew Brown today.

22 THE COURT: All right. Very well. Yes, sir. You may
23 proceed.

24 MR. BROWN: Thank you, Your Honor.

25 THE COURT: Uh-huh.

DAVID COLTER, JR - DIRECT

DIRECT EXAMINATION

BY MR. BROWN:

Q. Mr. Colter, just for the Court's record, what's your date of birth?

A.

Q. How old does that make you today?

A. That makes me 49.

Q. And where did you live prior to the date of the plea back in 2000- I think it was -six?

A. , Orangeburg, South Carolina.

Q. And have you lived in Orangeburg your whole life?

A. Yes, sir.

Q. And let me just take you back to the date. There was a plea. You pled guilty in Orangeburg County; is that correct?

A. Correct.

Q. And you were in front of Judge Dickson; is that correct?

A. Correct.

Q. And before that date -- and this was in 2006, or, I'm sorry, 2009. That plea arose after a charge that allegedly happened back in 2008; is that correct, an accident?

A. I don't quite understand, sir.

Q. You were charged with a crime back in 2008; is that

DAVID COLTER, JR - DIRECT

1 correct?

2 A. The crime of DUI.

3 Q. Felony DUI. And the accident date was,
4 approximately -- was April 4th, 2008?

5 A. Correct, sir.

6 Q. Okay. And after you were charged with that crime, did
7 you retain counsel?

8 A. Yes, sir.

9 Q. You hired an attorney or were you appointed an
10 attorney?

11 A. I hired an attorney.

12 Q. Okay. Who did you hire?

13 A. Mr. Brad Hutto, Senator Hutto.

14 Q. Okay. And did you have any other attorneys during
15 that time?

16 A. No, I did not.

17 Q. Okay. And he was present with you when you entered
18 the plea back in 2009; is that correct?

19 A. Correct.

20 Q. Okay. How many times do you feel that you met with --
21 do you believe you met with Mr. Hutto?

22 A. I think I met with Mr. Hutto twice, I think.

23 Q. Twice?

24 A. Yes.

25 Q. And did you -- did he go over the evidence in your

DAVID COLTER, JR - DIRECT

1 case with you?

2 A. Not all of the evidence.

3 Q. Okay.

4 THE COURT: Now -- what, now?

5 THE APPLICANT: I don't think he went over all the
6 evidence with me.

7 BY MR. BROWN:

8 Q. Okay. And do you have today -- do you know why you're
9 here today?

10 A. Yes, sir.

11 Q. And we've met; is that correct?

12 A. Correct.

13 Q. And we've met at a prior hearing that didn't take
14 place, it was continued. So we've met in this courthouse
15 before?

16 A. Correct.

17 Q. And I actually met you where you're staying now which
18 I believe is at Manning Correctional Facility?

19 A. Correct.

20 Q. And you're here today for what purpose, as you
21 understand?

22 A. I'm here on, for, to talk to Mr. Brad Hutto or talk to
23 the Court about the felony DUI that I was charged with.

24 Q. And what are you asking the Court to do?

25 A. I was charged for felony, I mean, for DUI. And I

DAVID COLTER, JR - DIRECT

1 thought during the time that Mr. Hutto was waiting for the
2 results to come on, of about, what my alcohol contents
3 were and the level of alcohol and who caused the accident
4 because it was a three-car violation (verbatim) that
5 happened during the accident when a car run me off the
6 road. And I was waiting, waiting for the results of the
7 accident (verbatim), see what MATE said about the accident
8 but I was never informed of any information of anything on
9 what's going on with Mr. Brady really until the plea.

10 Q. Okay. And we'll get to that. And that's kind of the
11 long and short of it. But, what are you asking the Court
12 to do today? And we're here in court for a post-
13 conviction relief action that you filed. What are you
14 asking the Court to do today?

15 A. I'm asking the Court to vacate.

16 Q. Pardon me?

17 A. To be vacate.

18 Q. To vacate your conviction?

19 A. Yes.

20 Q. And we've discussed that. You and I have discussed
21 that. And we've discussed that the only possible outcome
22 or the only thing the Court can do for you is order a new
23 trial; do you understand?

24 A. Correct.

25 Q. And you understand that the Court cannot reduce your

DAVID COLTER, JR - DIRECT

1 sentence, cannot mitigate it in any way or change the
2 sentence, it would simply be a new trial?

3 A. New trial.

4 Q. Okay. And we've discussed that and you want to go
5 forward today?

6 A. Yes.

7 Q. And I've explained to you you'd be facing more time,
8 it would be one to 25 years --

9 A. Yes, sir.

10 Q. -- if you went back to trial and were convicted;
11 correct?

12 A. Yes, sir.

13 Q. We've discussed that?

14 A. Yes, sir; but at the same time -- well, I'll let you
15 continue, sir.

16 Q. Just that you understand --

17 A. Yes.

18 Q. -- what you'd be facing. And your sentence was eight
19 years?

20 A. Eight years, yeah.

21 Q. So the sentence you're serving from the plea back in
22 2009 was eight years?

23 A. Yes, sir.

24 Q. Okay. In your application for post-conviction relief
25 you set forth three elements or three different complaints

DAVID COLTER, JR - DIRECT

1 as to why you had ineffective assistance of counsel?

2 A. Correct.

3 Q. And let's just start. It's ineffective assistance of
4 counsel, bias by the trial judge and denial of a
5 preliminary hearing; correct?

6 A. Correct.

7 Q. Well, let's start with the last one first. Tell me
8 about the preliminary hearing. Did you ever have a
9 preliminary hearing?

10 A. I did not, sir.

11 Q. Okay. Did you request one?

12 A. Yes, sir.

13 Q. How did you request it?

14 A. I asked Mr. Brad Hutto when we're going to get the
15 information saying that I caused the accident and the lane
16 violation that the tickets that was supposed to be given.
17 They said that I caused the accident.

18 Q. As far as the preliminary hearing did you ask -- who
19 did you ask for the preliminary hearing? Who did you
20 request that of? Did you ask Mr. Hutto to request a
21 preliminary hearing or did you request one yourself or?

22 A. No, sir. I didn't ask Mr. Hutto. I don't think I
23 did.

24 Q. Okay.

25 A. Because I -- with the law and everything was done

DAVID COLTER, JR - DIRECT

1 through Mr. Hutto.

2 Q. And you didn't submit a form asking for it?

3 A. No, sir.

4 Q. And explain to the Court why you feel that not getting
5 a preliminary hearing or not requesting it, how that was
6 Mr. Hutto being, ineffectively assisting you with your
7 defense?

8 A. Because when he kept asking, I mean, Mr. Hutto had
9 asked me about the plea of taking the eight years, I told
10 him that I never caused the accident. And he kept
11 insisting that I take the plea or they was going to give
12 me 25 to 30 years if they found me guilty. And I told him
13 that I didn't feel that I caused the accident because I
14 didn't have any violations or anything that I caused the
15 accident.

16 Q. Okay. But your testimony today, am I correct, I just
17 wanted to clarify it for the Court because I may have
18 misheard it. Did you ever ask Mr. Hutto for a preliminary
19 hearing or ask him to request one?

20 A. Yes, sir -- no, sir. I never asked him for one.

21 Q. Okay. Was that ever discussed?

22 A. No, sir.

23 Q. Okay. Let's go to the second one which is trial --
24 bias by the trial judge, okay, or the judge that took the
25 plea. Who was the judge again? Do you know the name of

DAVID COLTER, JR - DIRECT

1 the judge that took your plea?

2 A. It was a Judge Dickson.

3 Q. And what about him -- what about that did you feel was
4 unfair or was it -- created a situation where Mr. Hutto
5 could not be effective as your counsel?

6 A. Well at first Mr. Hutto -- I wanted to -- he wanted --
7 he said, Mr. Hutto said that we will wait to go to trial
8 to whenever his judge come in. And when his judge come
9 in, I said Mr. Hutto, I said, we got to go to trial. I
10 said, I haven't been charged for this DUI. I haven't been
11 charged for the death of the accident yet and he said
12 we'll just wait until my judge come, and then we'll go
13 from there.

14 Q. Okay. Well, what your allegations are, are you saying
15 that somehow the judge was biased against you because
16 Mr. Hutto was your attorney, or was there a conflict, or
17 what are you saying?

18 A. Yes, sir. Yeah, Mr. Hutto and I feel that -- the only
19 time that -- I feel that Mr. Hutto and the Judge Dickson
20 were at the same firm and I just thought that I didn't get
21 a fair shake during the time.

22 Q. So because they worked together before --

23 A. Yes.

24 Q. -- that it was unfair for you?

25 A. Right.

DAVID COLTER, JR - DIRECT

1 Q. Let's go on to the first allegation which is kind of
2 more broad which is basic ineffectiveness as your
3 counsel. One of the first things we talked about, or that
4 we talked about, or one of your complaints was that there
5 was a failure to investigate the case. How do you believe
6 that Mr. Hutto should have investigated the case or what
7 did he not do to investigate your case properly, in your
8 opinion?

9 A. Well, I felt that I was charged for DUI. And I
10 thought, the second plea that we was going to take that we
11 was waiting to see the result of who caused the accident,
12 you know, because, see, as I explained to Mr. Hutto, the
13 car that ran me off the road hit me. I didn't do any lane
14 violations or anything. The car hit me. And I never, and
15 I never got, got any violations for, like, lane violations
16 or anything saying I caused the accident.

17 Q. So, what you're saying is that you never got a
18 separate citation for violating a traffic law?

19 A. Yeah, well, yes, that's what I'm saying.

20 Q. So something like speeding or failure to yield you
21 never got a separate citation?

22 A. Or crossing a lane or anything; yes, sir.

23 Q. And in your opinion you feel that should have been
24 part of this to properly --

25 A. Yes. I didn't hit the car. The car hit me. I never

DAVID COLTER, JR - DIRECT

1 went off the highway to hit Mr -- the car that was driven
2 hit me.

3 Q. And did you explain that to Mr. Hutto?

4 A. I tried to explain that to Mr. Hutto; yes, sir.

5 Q. Okay. Did you request anything from Mr. Hutto that
6 you feel he should have given you or done for you that
7 wasn't done?

8 A. Yes, sir. I, I send for my motion of discovery, made
9 my motion of discovery so I could go over my evidence.
10 And I got a copy of that stuff, you know, had this
11 breakdown.

12 Q. Pardon me?

13 A. I got a copy of the information right here.

14 Q. Okay. Information being your discovery?

15 A. For my motion; yes, sir.

16 Q. So you have your motion currently?

17 A. Yeah. That I sent to Mr. Brad, Mr. Hutto asking for
18 my motion of discovery, five and six, and never been sent
19 to me.

20 Q. Let me just be clear. Do you have the discovery now
21 or you don't have the discovery?

22 A. I do not have the discovery now. It was never sent to
23 me.

24 Q. You have paperwork saying that you asked for it?

25 A. Yes, sir.

DAVID COLTER, JR - DIRECT

1 MR. BROWN: Your Honor, would the State be able to
2 stipulate to it or we can maybe enter it into evidence?
3 I'm going to enter it into evidence.

4 THE COURT: Okay.

5 THE APPLICANT: (Looking through documents.)

6 BY MR. BROWN:

7 Q. Let's move forward and maybe when we come back, you
8 can take a look for it. Was there anything else that you
9 feel was lacking as far as discovery information or other
10 investigations that could have been or should have been
11 provided by Mr. Hutto that weren't and that would have
12 aided you in your decision?

13 A. Yes, sir. I would have never took the plea knowing
14 that I didn't cause the accident.

15 Q. Okay. Now, let me ask you. A plea was entered. Why
16 did you make the plea? Why do you feel you entered into
17 the plea?

18 A. Mr. Hutto, well, he say that if I didn't take a plea
19 and I go to trial it would be 25 to 30 years. And I just
20 didn't know. Scared. Just didn't know what to do. Never
21 been in trouble before.

22 Q. Okay. Were you under duress? Did you make -- do you
23 feel that your plea was freely and voluntarily made and
24 fully informed?

25 A. No. I was, I was under a little stress during the

DAVID COLTER, JR - DIRECT

1 time that I was going through some family issues, other
2 things besides that because having that trial in my head
3 and everything. So I wasn't really thinking clearly.

4 Q. Okay. Now, we've gone over -- I beg the Court's
5 indulgence, Your Honor.

6 THE COURT: Sure. (Pause.)

7 BY MR. BROWN:

8 Q. One last thing. In your attachment to your filing,
9 and just to make sure we've gone over it, you said that
10 counsel, that Mr. Hutto failed to properly investigate
11 your case. Is there a specific instance you would want to
12 point out for the Court?

13 A. Well, my understanding was, I think, I thought when
14 before a DUI could be enhanced, I thought it would be the
15 death was being charged, was the cause of the accident and
16 that's what I, I, I thought many times from talking to
17 Mr. Hutto that's the impression that I had until, until,
18 until the plea time and then he said that he thought he'd
19 put 25 to 30 years but, see, they never went through the
20 process of finding out who was wrong in the accident.

21 Q. Are you saying that you didn't know what you were
22 charged with?

23 A. Correct. That I was charged with -- well, it was the
24 DUI.

25 Q. Okay.

DAVID COLTER, JR - DIRECT

1 A. But I didn't know I was charged with DUI with death.

2 Q. You weren't aware of the nature of your charges?

3 A. Yeah. Right.

4 Q. You thought you were only charged with DUI?

5 A. Right.

6 Q. And at the time of the plea, did you not understand
7 what you were charged with or pleading to at the time?

8 A. Yeah, because I didn't, I didn't get the indictment
9 papers, none of that. I got the indictment paper and all
10 of that was sent after I got my sister to come in to
11 Mr. Brad Hutto office and he sent, he sent the indictment
12 paper.

13 Q. Okay.

14 A. And that's when I seen the indictment paper of DUI
15 with death.

16 Q. Okay.

17 A. And -- yes, sir.

18 Q. Is there anything else, any other allegations or
19 anything else you can think of that you want to make the
20 Court aware of that you're concerned with about how you
21 were representing and that would indicate that Mr. Hutto
22 provided ineffective assistance to you?

23 A. Yes, sir. Mr. Hutto, I don't think he was quite
24 candid with me on a lot of issues, you know what I'm
25 saying. He -- I felt like he was paying money (verbatim)

DAVID COLTER, JR - CROSS

1 for -- to sign the game with him, you know. I didn't get
2 the whole details of everything, what was supposed to be
3 going on until after the fact of a lot of stuff.

4 Q. Okay.

5 A. Yes, sir.

6 Q. Anything else?

7 A. That's it, sir.

8 MR. BROWN: I have no further questions, Your Honor.

9 THE COURT: Very well. Cross-examination?

10 MR. CORNEY: Just very briefly, Your Honor.

11 THE COURT: All right.

12 CROSS-EXAMINATION

13 BY MR. CORNEY:

14 Q. Mr. Colter, I'm going to hand up something to you. If
15 I may approach the witness, Your Honor?

16 THE COURT: You may.

17 MR. CORNEY: This is part of the Court's packet.

18 THE COURT: All right.

19 MR. CORNEY: Attached to the back of the indictments
20 from the clerk of court. It's already made part of the
21 record.

22 THE COURT: Okay.

23 BY MR. CORNEY:

24 Q. I just want to hand this up to you. And take a look
25 at it and see if that's something you've seen before or

DAVID COLTER, JR - CROSS

1 are familiar with.

2 A. Yes, sir.

3 Q. Okay. That's a copy of a citation issued April 4th,
4 2008, by an officer or a Trooper Daniels?

5 A. Not all of it, sir.

6 Q. Okay. But that's what that is in front of you that I
7 just handed up to you; right?

8 A. Yes.

9 Q. And you said you've seen that before; right?

10 A. Not the whole portion of it. I seen no affidavit
11 because the person, Mr. Daniel had -- the thing I got from
12 Mr. Daniel at first didn't have the bottom part, this part
13 right here (indicating), the thing on the bottom part of
14 it.

15 Q. The rest of that was filled out, where it's signed by
16 Judge Dickson on the bottom, that wasn't filled out yet
17 when you saw it?

18 A. Right.

19 Q. Okay. And that citation, that traffic citation is for
20 a felony DUI; correct?

21 A. That's what it says.

22 Q. Okay. Now, on the night of this incident were you,
23 did you submit to a breathalyzer test?

24 A. No.

25 Q. You didn't do a breathalyzer of any sort?

DAVID COLTER, JR - CROSS

1 A. No, sir.

2 Q. But at the plea they mentioned that your blood-alcohol
3 level at that point was about .20 during the plea; right?

4 A. I never got the results of it.

5 Q. Okay. You didn't hear them say at the plea that your
6 blood-alcohol level had been tested at .20?

7 A. No.

8 MR. CORNEY: I just direct the Court's attention to
9 page seven, lines eight through nine where that's
10 discussed.

11 THE COURT: Thank you.

12 BY MR. CORNEY:

13 Q. And in regards to this allegation that Judge Dickson
14 and Mr. Hutto worked together before and that he wanted to
15 bring you before Judge Dickson in particular to do this
16 plea, if that were true and if that was the case, wouldn't
17 you think that he would have sentenced you even lighter
18 being a friend or a colleague of Mr. Hutto?

19 A. I don't know, sir.

20 Q. Okay. But Judge Dickson let you go after the plea to
21 go home and tie up some loose ends before you started your
22 sentence; correct?

23 A. Excuse me. Could I get some water?

24 Q. Sure. Take your time. Sure thing. (Pause.)

25 Judge Dickson let you leave after your plea, go home,

DAVID COLTER, JR - CROSS

1 tie up some loose ends before you started the sentence
2 that he gave you?

3 A. Yes, sir, because during the time of, as I was telling
4 Mr. Hutto, I didn't want to take the plea then when I was
5 talking with him. And I told him I didn't want to take
6 the plea because I didn't, I didn't know all of what was
7 going on. He told me that, uh, to go ahead and take the
8 plea and go home. He'd see that I'd go home and then and
9 then, and then, and then I could come back and start up my
10 time.

11 But I told him I didn't left my -- I just came -- just
12 be honest with you. I came up there, and I didn't let my
13 wife, my ex-wife and my son and my mother or nobody know
14 where I was at. I just came to the office to see
15 Mr. Hutto. Mr. Hutto came, walked in and told me that I'm
16 going to see the judge now. And then he told me if you
17 take a plea now and you leave now and, and, you can leave
18 now and see what we can get, get something a couple years
19 less, three or four years less. I told him, I can't take
20 no plea when I don't even know what's going on. I ain't
21 talked to my wife, I mean, my mother, my sons or anybody
22 about a plea. And I said --

23 Q. Okay. But you would agree that Judge Dickson was
24 pretty understanding with you in letting you go home, tie
25 up your loose ends before you started your sentence. I

DAVID COLTER, JR - REDIRECT

1 mean, he could have sent you to the Department of
2 Corrections right at that point. He said, go home, take
3 care of your issues and come back and serve your sentence
4 after you finished those things; right?

5 A. Yes.

6 Q. So he was pretty reasonable and understanding with you
7 after he sentenced you; correct?

8 A. I think that's probably why he left me go home.

9 MR. CORNEY: Beg the Court's indulgence for one
10 moment.

11 THE COURT: Okay. (Pause.)

12 MR. CORNEY: That's all the questions I have.

13 THE COURT: Redirect?

14 MR. BROWN: I just have one question.

15 THE COURT: Okay.

16 REDIRECT EXAMINATION

17 BY MR. BROWN:

18 Q. When you came in the courtroom today we talked about
19 going forward with your PCR. And you did indicate to me
20 that you wanted me to represent you and go forward in this
21 PCR; correct?

22 A. Yes.

23 MR. BROWN: I have no further questions, Your Honor.

24 THE COURT: All right. Any recross?

25 MR. CORNEY: No further questions, Your Honor.

CHARLES BRADLEY HUTTO - DIRECT

1 THE COURT: Very well. You may come down. Call your
2 next witness please.

3 MR. BROWN: I'm going to go ahead at this point and
4 call the State's witness. I call him as mine. I call
5 Brad Hutto, Senator Brad Hutto.

6 CHARLES BRADLEY HUTTO, having been duly sworn, was
7 examined and testified as follows:

8 THE COURT: Thank you so much. And when are you
9 seated, if you would please state your name for the
10 record.

11 THE WITNESS: Charles Bradley Hutto.

12 THE COURT: Your witness.

13 MR. BROWN: Thank you, Your Honor.

14 THE COURT: Yes.

15 DIRECT EXAMINATION

16 BY MR. BROWN:

17 Q. Attorney Hutto, how long have you been practicing law?

18 A. Uh.

19 Q. About?

20 A. About 30 years.

21 Q. And where do you practice?

22 A. In Orangeburg.

23 Q. How long have you practiced in Orangeburg?

24 A. About 30 years.

25 Q. And this is a driving-under-the-influence case. Have

CHARLES BRADLEY HUTTO - DIRECT

1 you practiced in that area of law for very long?

2 A. My whole career.

3 Q. Okay. And have you handled DUIs that deal with death
4 or felony DUIs?

5 A. I've handled thousands of DUI cases and probably close
6 to a hundred or, between a hundred and 200 felony DUIs.

7 Q. You'd say you're pretty familiar with the procedure
8 that you have to go through with charging felony DUI and
9 with how they investigate a felony DUI?

10 A. Yes.

11 Q. And as far as practicing in Orangeburg, one of the
12 accusations is bias by the trial judge. Do you know Judge
13 Dickson?

14 A. I've known him for probably at least 20 years. He was
15 my law partner for about 15 years or so.

16 Q. And he's the judge in Orangeburg. He's the resident
17 judge of Orangeburg?

18 A. He is the resident judge of Orangeburg and because of
19 the recent restrictions on travel over, say, the last
20 three years usually Judge Goodstein or Judge Dickson who
21 are both our resident judges who we have most of the
22 time. Occasionally we'll get judges to travel in. More
23 often than not, particularly for criminal court, if we
24 don't get Judge Dickson, Judge Goodstein, we'll get Judge
25 Cothran. Really that's about all we've had in recent

CHARLES BRADLEY HUTTO - DIRECT

1 times.

2 THE COURT: In recent memory.

3 BY MR. BROWN:

4 Q. So what you're saying is that if you're in Orangeburg
5 the judge you're generally going to be in front of in
6 general sessions is Judge Dickson; is that correct?

7 A. I'd say most of the time, yeah.

8 Q. But other judges do come through there once in a
9 while?

10 A. They do. They do. Of course, we don't always get to
11 pick which judge we want to go in front of but, yeah,
12 there are other judges that come through. If there was a
13 particular reason that I knew that we had a conflict, we
14 could get another judge. But I didn't know of any
15 conflict in this case.

16 Q. Did you explain to him that you did have a prior
17 business relationship at least with Judge Dickson?

18 A. I don't know that I did. I told him that he was our
19 normal judge and I was familiar with his demeanor in the
20 courtroom, his prior sentences. I had had discussions
21 with him and appeared before him in other felony DUI cases
22 and sort of had a sense for the range of which he might
23 sentence if it were a plea.

24 And in this particular case, the solicitor and I both
25 had talked to the judge. That's how I was able to tell

CHARLES BRADLEY HUTTO - DIRECT

1 Mr. Colter what I thought he was going to get as the judge
2 was able to give us a range.

3 We were scheduled to go to trial on August the 10th.
4 So this case was, it was going to trial that following
5 Monday. As I recall, it was a two-week term and so
6 basically if we didn't enter into a plea that first week
7 we were going to trial that next week. I believe Judge
8 Dickson was going to be the judge both of those weeks.

9 Q. Okay. Let's move on to the preliminary hearing. What
10 do you recall about whether a preliminary hearing was
11 requested or if it wasn't requested?

12 A. I was in the back of the courtroom just now and
13 checked. And my records indicate that this happened in
14 April and I didn't get retained until May. So the date --
15 the time would have gone by to request a preliminary
16 hearing.

17 However, I do believe that I got all the information I
18 would have received at a preliminary hearing because,
19 quite frankly, this was a MATE team case. At a
20 preliminary hearing probably the arresting officer would
21 have showed up and he would have said, I'm waiting on the
22 MATE team report. So I'm not sure I would have gotten
23 really anything that I didn't get from the MATE team
24 report at a preliminary hearing. I think -- to answer
25 your question, I think it was too late to ask for one.

CHARLES BRADLEY HUTTO - DIRECT

1 Q. As far as the warrant or the ticket, one of the things
2 my client, Mr. Colter, testified to is that it was
3 actually signed by Judge Dickson. Do you know why that
4 was? Or, what the procedure was there?

5 A. You'd have to show that to me because I don't...

6 Q. (Document handed to witness.)

7 A. I don't know that that's actually Judge Dickson's
8 signature. But be that as it may, I think this is the
9 copy that goes into Columbia for driver's record
10 purposes. It's not the sentencing sheet but that's all --
11 to be honest with you, I don't know.

12 This is an administrative thing that's handled after,
13 after the plea or a trial. It was -- the trooper issues
14 the ticket but there's also, what we're coming into court
15 on is the indictment. I would imagine that the clerk
16 signed this off, but I don't know that for sure.

17 Q. As you just mentioned this was indicted, though;
18 correct?

19 A. Right.

20 Q. So there was no waiver of a true bill?

21 A. My recollection is not. You may have that in front of
22 you also, but I know we were going to court that next week
23 so I assume it had been indicted.

24 Q. (Document handed to witness.)

25 A. Yes. True billed.

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1 Q. And, did you discuss or deliver upon Mr. Colter a copy
2 of the indictment? Did you discuss the indictment with
3 him?

4 A. I don't know that I actually discussed that piece of
5 paper with him. I did explain to him on numerous
6 occasions because he came to my office quite a bit, you
7 know, what he was facing and this was -- I'll have to say,
8 this was a very tragic situation that the man that was
9 killed was a friend of his. He was on a bicycle. It
10 happened very near his home. And all the testimony of
11 everybody is that he jumped out, very concerned and his
12 friend died in his arms. It was a very tragic situation
13 and he was very upset about it as was his family. And
14 they were virtually next-door neighbors to one another.

15 So we had a lot of discussions about that. And he had
16 a lot of questions. I believe we answered them all over
17 time, but as far as discussing the actual piece of paper,
18 the indictment, I don't have any independent recollection
19 of that.

20 Q. Well then, and one of the accusations is that he
21 didn't know what he was pleading to or what he was charged
22 with at the time of the plea. Did you discuss with him
23 what he was charged with, the elements of the charge?

24 A. I did. And, you know, from the beginning he had
25 contended that there was -- and there was -- another car

CHARLES BRADLEY HUTTO - DIRECT

1 involved in the accident, directly involved. Another car
2 was struck. There may yet have been other vehicles in the
3 roadway that were changing lanes and depending on who you
4 talked to, somebody moved lanes causing him to move
5 lanes. That would be one version of the facts.

6 Another version of the facts was somebody in front of
7 him put on brakes suddenly. He switched lanes to avoid
8 them. And yet another version of the facts would be that
9 the other car hit him first causing him to leave the
10 roadway. There were a lot of possibilities.

11 However, I did talk to the, directly to the driver and
12 the passenger in the other car that was struck to find out
13 what they were going to say. And they were going to say
14 that they always were on the traveled portion of the
15 roadway and that he was the one that changed lanes
16 improperly, striking them and then striking the bicycle.

17 And, quite frankly, the physical evidence, the tire
18 marks and where they went off the roadway, more supported
19 that version of the facts than the other version which we
20 could try to construct which is that somebody shifted into
21 him. We didn't have any damage to his vehicle that we
22 could show that he was struck first.

23 We could have tried the case. I mean, we could have
24 tried the case. And that would have been the issue; could
25 we have created some doubt over whether he initiated this

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1 chain of events that led to him striking his good friend
2 on the bicycle?

3 But -- and I explained to him, too, with a .22
4 blood-alcohol content, nearly three times people would
5 call the legal limit, and the other witnesses, the other
6 independent witnesses at the scene not supporting his
7 version of the facts, you know, if we went to trial and
8 lost he was going to get substantially more than if he
9 took a plea and got what we believed to be, was going to
10 be around an eight-year sentence which I think it was. I
11 think we agreed with the solicitor, something between six
12 and 15, something around that. I don't think we knew for
13 sure what it was going to be, but we knew he was facing
14 25.

15 Q. And as far as the reconstruction, different versions
16 of what could have happened and how the accident went
17 down, did you discuss that there could be different
18 versions? And did you discuss the fact that that could be
19 something attacked at trial?

20 A. Well, I think every time that David and I had any
21 detailed discussions about this it always came down to
22 that issue. That really was -- I mean, I did not feel
23 like we had a chain-of-custody issue with the blood. I
24 didn't feel like we had any reason to get the blood
25 results suppressed.

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1 So I thought the only real chance we had was going to
2 be back to whether they could show an element, in essence,
3 bad driving or some other traffic violation, an improper
4 lane change and/or driving too fast for conditions or
5 whatever, however they were going to characterize it. It
6 was going to be what was involved, and that's what the
7 issue would have been.

8 I mean, we talked about that. In fact, I wrote him a
9 letter a couple weeks, I guess, before the trial just
10 confirming that we had the conversation about what the
11 witnesses in the other car were going to say. And there
12 was yet another witness who I could not find but that --
13 based on what other people said she said wasn't going to
14 be positive for us, either. In fact, I had no incentive
15 to find her because what I believed she was going to say
16 wasn't going to be good, so ...

17 Q. And did you ever receive an autopsy report?

18 A. I can't recall that I did.

19 Q. Okay.

20 A. I mean, I may have. I just can't recall that right
21 now.

22 Q. Was that unusual or is that something you'd need
23 before advising somebody whether to plead guilty or take a
24 trial?

25 A. I'd say, I guess if usual means more often than not

CHARLES BRADLEY HUTTO - DIRECT

1 you get one, I'd say yes, but not every time.

2 Q. Is it something you think would be necessary in this
3 type of case to be able to advise your client whether to
4 plead guilty or not?

5 A. I didn't think so at the time, no.

6 Q. Okay.

7 MR. BROWN: Beg the Court's indulgence for just one
8 moment.

9 THE COURT: All right.

10 MR. BROWN: (Conferring with Applicant.)

11 BY MR. BROWN:

12 Q. Mr. Hutto, were you aware or are you aware at what
13 point in time the alleged victim, the friend of my client,
14 passed away? Was it at the scene or was it sometime after
15 that at the hospital?

16 A. I don't believe he died instantly. Whether it was
17 there or in the ambulance or at the hospital, at one time
18 I might have known that. I -- unfortunately, I thought
19 maybe this was going to be easy for me to put this on the
20 computer. It might be harder to go through than if I had
21 the papers right in front of me. I don't know that right
22 now as I sit here.

23 Q. And I think the original warrant was just DUI felony.
24 It didn't specify whether it was death or great bodily
25 injury; is that right?

1 A. I think that's right. I never had any question. And
2 what I'm telling you is, I guess I don't know as I'm
3 sitting here where I believe that belief came from, but I
4 don't have any question that his death wasn't caused by
5 the accident, but I believe that it happened fairly,
6 fairly shortly in time wise after he was struck.

7 MR. BROWN: I have no further questions, Your Honor.

8 THE COURT: All right. Cross-examination?

9 MR. CORNEY: The State has no questions of this
10 witness, Your Honor.

11 THE COURT: Very well. Is this witness free to
12 leave?

13 THE WITNESS: Not yet.

14 THE COURT: You got more?

15 THE WITNESS: I think so.

16 THE COURT: Call your next witness, please.

17 MR. BROWN: No further witnesses, Your Honor. We
18 rest.

19 THE COURT: Very well. All right. Will there be any
20 witnesses on behalf of the State?

21 MR. CORNEY: No witnesses from the State, Your Honor.

22 THE COURT: Very well. Thank you all so much.

23 I will consider these matters and, by letter, inform
24 one of you to please draft for me a proposed order. Thank
25 you all so much.

1 MR. CORNEY: Thank you, ma'am.

2 END OF CASE: 3:17 P.M.

3 * * * *

4 CERTIFICATE OF REPORTER

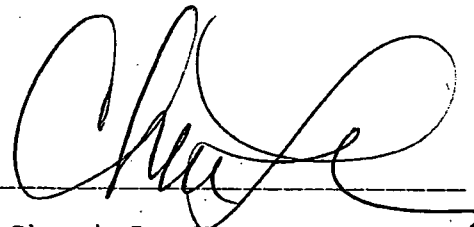
5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7 I, Cheri L. Young, Registered Professional Reporter
8 and Official Court Reporter for the State of South
9 Carolina, Second Circuit-At Large, do hereby certify that
10 the foregoing is a true, accurate and complete transcript
11 of record of the proceedings had and evidence introduced
12 in the hearing of the captioned case, relative to appeal,
13 in the Court of Common Pleas for Orangeburg County, heard
14 in Dorchester County, on the 1st day of December, 2011.

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

17 I have hereunder set my hand this 29th day of January,
18 2013.

19
20 
21 Cheri L. Young, RPR
22 Official Court Reporter
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

David Colter, Jr., #336366,
Applicant,

Case No. 2009-CP-38-2022

v.

ORDER OF DISMISSAL

State of South Carolina,
Respondent.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed December 16, 2009. The Respondent made its Return on May 5, 2010. An evidentiary hearing into the matter was convened on December 1, 2011, at the Dorchester County Courthouse. The Applicant was present at the hearing and was represented by Andrew J. Brown, Esquire. The Respondent was represented by Assistant Attorney general Robert D. Corney of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted during the October 2008 term of the Orangeburg County Grand Jury for Felony Driving under the Influence (Death) (2008-GS-38-0820). On August 6, 2009, Applicant appeared before the Honorable Edgar W. Dickson, where he pled guilty as indicted. Judge Dickson sentenced Applicant to eight years imprisonment. Applicant did not appeal his guilty plea or sentence.

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

1. Ineffective Assistance of Counsel.
 - a. Failure to investigate

2. "Bias by Trial Judge"
 - a. Plea judge and attorney had worked in the same law firm.
3. Denial of preliminary hearing

In its Return, Respondent interpreted Applicant's claims to be three various allegations of ineffective assistance of counsel. At the evidentiary hearing, Applicant presented his claims are three allegations of ineffective assistance of counsel.

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from plea counsel, C. Bradley Hutto, Esquire (herein "Counsel"). This Court also had before it a copy of the Applicant's guilty plea transcript, the records of the Orangeburg County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified that that he retained Counsel to represent him for this charge and that he met with Counsel twice prior to his guilty plea. Applicant testified that he received a sentence of eight years imprisonment and he knew he could receive a possible sentence of one to twenty-five years imprisonment. Applicant testified that he did not receive a preliminary hearing and that he feels Counsel was ineffective for failing to ensure he had a preliminary hearing. However, Applicant testified that he never discussed a preliminary hearing with Counsel or asked Counsel to request a preliminary hearing.

Additionally, he testified that he feels Counsel was ineffective for failing to review all of the evidence with him. Specifically, Applicant testified that he wanted Counsel to review the results of his blood alcohol test, the accident report, and the MAIT team report with him. Applicant testified that Counsel failed to review his indictment with him and that he was unaware he had been charged with "felony DUI." However, Applicant acknowledged that he

had previously seen a copy of his traffic citation stating he was cited for "Felony Driving Under the Influence." Applicant testified that he did not cause the accident giving rise to this charge, but that another driver hit his car, causing him to strike and fatally injure the victim.

Furthermore, Applicant testified that he feels Counsel was ineffective because he allowed Applicant to plead guilty before Judge Dickson. Applicant elaborated that "Mr. Hutto and the Judge Dickson were at the same firm and I just thought that I didn't get a fair shake during the time." However, Applicant testified that Judge Dickson allowed him to report for his incarceration a few days after sentencing to allow him time with his family and to ensure his affairs were in order, and that he believes Judge Dickson was so understandable because of Counsel's prior relationship with him.

Following Applicant's testimony, Counsel was called to testify by Applicant. Counsel testified that he has been practicing law for approximately thirty years and the entirety has been in Orangeburg. Counsel testified that he has handled "thousands of DUI cases and probably close to a hundred, or, between a hundred and 200 felony DUIs." Counsel testified that he has known Judge Dickson for twenty years and that they practiced law together for fifteen years. Counsel stated that he did not believe that there was any conflict of interest in Judge Dickson hearing this matter. He elaborated that Judge Dickson is one of two resident judges in Orangeburg, so he often appears before Judge Dickson without incident. He stated that "if there was a particular reason that I knew we had a conflict, we could get another judge. But I didn't know of any conflict in this case."

Counsel testified that he did not request a preliminary hearing because he was not immediately retained by Applicant and it was "too late" to request a hearing by the time he became involved with the case. Counsel testified that he did not think a preliminary hearing

would have been any benefit to Applicant, as he received all information that would have been presented at such a hearing. He testified that Applicant was true bill indicted by the Orangeburg County Grand Jury. Counsel testified that while he has no independent recollection of showing Applicant the physical indictment, he is certain that he discussed the charge of Felony DUI - Death with Applicant, as well as the elements of the charge and possible sentences. He elaborated that Applicant "had a lot of questions" and he believes he "answered all over time."

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. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not credible. 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).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 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). 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, 385 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).

After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action. Specifically, this Court finds that Counsel's testimony is credible while Applicant's testimony is not credible. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel failed to investigate

This Court finds that the Applicant's allegation that he was denied effective assistance of trial counsel due to Counsel's lack of investigation is without merit. This Court finds that the guilty plea transcript, along with Counsel's credible testimony, reveals the proficient competency of counsel. Applicant alleges that Counsel should have investigated the results of the blood alcohol test, the accident report, and the MAIT team report, and reviewed this information with

Applicant prior to his guilty plea. However, Counsel testified that he reviewed Applicant's case extensively with Applicant and answered all of Applicant's questions. At the evidentiary hearing, Applicant failed to produce any witnesses or evidence to show what additional information might have been gleaned from additional investigation. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). This Court finds that the Applicant's attorney demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel failed to object to a biased trial judge

This Court finds that the Applicant's allegation that Counsel was ineffective for allowing him to plead guilty before Counsel's former law partner is without merit. Applicant testified that he felt he "didn't get a fair shake" during his guilty plea because the plea judge, Judge Dickson, is a former law partner of Counsel. However, he acknowledged that Judge Dickson allowed him to return home for a few days to get his affairs in order and spend time with his family before starting his prison sentence and testified that he believes Judge Dickson was so understandable because of his prior relationship with Counsel. Counsel testified that he appears before Judge Dickson regularly, as he is one of two resident judges for Orangeburg and that he does not believe any conflict existed. Based on the foregoing, this Court finds that Counsel's performance was reasonable and effective in regards to this allegation.

Furthermore, Applicant failed to meet his burden of showing he was prejudiced by Counsel's alleged deficiency. Applicant testified that he believes Judge Dickson was

understandable and afforded him additional time with his family and to put his affairs in order before starting his sentence. Additionally, this plea was entered without any negotiation or recommendation and Applicant received significantly less than the maximum sentence of twenty-five years imprisonment. This Court holds that the Applicant has failed to meet his burden of proof in regards to this allegation, which must be denied and dismissed with prejudice.

Counsel failed obtain a preliminary hearing for Applicant

This Court finds that the Applicant's allegation that Counsel was ineffective for failing to secure a preliminary hearing for Applicant is without merit, as Applicant was true bill indicted by the grand jury prior to the convening of the preliminary hearing. Under Rule 2(b), SCRCrimP, a preliminary hearing "shall not be held...if the defendant is indicted by a grand jury...before the preliminary hearing is held." Further, "any delay in holding the preliminary hearing is not a ground for delay in prosecution of the case in the court of general sessions." State v. Hawkins, 310 S.C. 50, 55, 425 S.E.2d 50, 53 (Ct. App. 1992). Applicant's charge was true bill indicted by the Orangeburg County Grand Jury on October 15, 2008. Therefore, Applicant was no longer entitled to a preliminary hearing on the charges after October 15, 2008.

Additionally, in the context of Strickland v. Washington, Applicant has failed to carry his burden in proving resulting prejudice from any alleged deficiency on Counsel's part in this regard. Applicant testified that he never requested a preliminary hearing or discussed his desire for such with Counsel. The charge was presented to the Orangeburg County Grand Jury where sufficient probable cause was found, as evidenced by the true bill indictments returned October 15, 2008. Therefore, this Court can find no reasonable probability that had counsel demanded such a preliminary hearing be held, the charge would have been dismissed by the presiding magistrate judge. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of

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sufficient prejudice, which...will often be so, that course should be followed." Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069 (1984). For all of the reasons stated above, this allegation is denied and dismissed with prejudice.

CONCLUSION

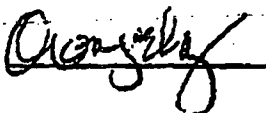
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

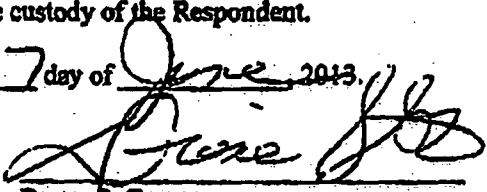
This Court notes that that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant 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 17 day of June, 2013.

 South Carolina


DIANE S. GOODSTEIN
Presiding Judge
First Judicial Circuit

WITNESSES

D Daniels

S C Highway Patrol

ARREST WARRANT NUMBER
D235624

Arrested: April 4, 2008

ACTION OF GRAND JURY

TRUE BILL

May 15, 2008

OCT 15 2008

Foreperson of Grand Jury

Date: October 15, 2008

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008GS38-0820

The State of South Carolina

County of ORANGEBURG

COURT OF GENERAL SESSIONS

October 13, 2008 TERM

THE STATE
vs.

David Colter, Jr.

Indictment for

FELONY DRIVING UNDER THE
INFLUENCE (DEATH)

SC Code: 56-5-2946

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

Defendant

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

Defendant

Witness:

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

2008 OCT 15 P 12:05

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

INDICTMENT
2008GS38-0820

At a Court of General Sessions, convened on October 13, 2008 the Grand Jurors of Orangeburg present upon their oath:

FELONY DRIVING UNDER THE INFLUENCE (DEATH)

That in Orangeburg County, South Carolina, on or about April 4, 2008, the Defendant, David Colter Jr., while driving a vehicle under the influence of alcohol, drugs, or a combination thereof, to the extent that his faculties to drive were materially and appreciably impaired, committed an act forbidden by law or did neglect a duty imposed by law while driving the motor vehicle, to wit: Defendant did improperly drive outside of his lane of travel, which act or neglect proximately caused the death of Freddy McMichael, this offense being a violation of Section 56-5-2945, of the South Carolina Code of Laws, as amended.

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

Thomas B. Scott, III

Thomas Scott, III, Solicitor