

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Spartanburg County  
J. Derham Cole, Circuit Court Judge

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**RECEIVED**

OCT 20 2014

**S.C. Supreme Court**

THOMAS EDWARD PORTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014000551

---

APPENDIX

---

KATHRINE H. HUDGINS  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
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PO Box 11589  
Columbia, SC 29211-1589

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ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA )  
2 COUNTY OF SPARTANBURG ) COURT OF GENERAL SESSIONS

3  
4 STATE OF SOUTH CAROLINA, ) TRANSCRIPT  
5 PLAINTIFF, ) OF  
6 VS. ) RECORD  
7 THOMAS PORTER, ) 08-GS-42-7535(A)  
8 DEFENDANT. )

10 February 4<sup>th</sup>, 2010  
11 June 8<sup>th</sup>, 2011  
12 Spartanburg, South Carolina

13 B E F O R E :  
14 THE HONORABLE ROGER L. COUCH, Judge.  
15

16 A P P E A R A N C E S :  
17 BARRY BARNETTE  
18 SOLICITOR  
19 Attorney for the State  
20 ROBERT HALL  
21 ASSISTANT PUBLIC DEFENDER  
22 Attorney for the Defendant

23  
24 PAMELA E. GREEN  
25 Circuit Court Reporter  
Seventh Judicial Circuit

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>State's Exhibits</u>		
S-1	Statement		3

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P R O C E E D I N G S

(WHEREUPON, a statement was marked as State's Exhibit No. 1 and received into evidence at this time.)

SOLICITOR BARNETTE: May it please the Court?

THE COURT: Yes, sir, Mr. Barnette.

SOLICITOR BARNETTE: May it please the Court, Your Honor.

THE COURT: Yes, sir.

SOLICITOR BARNETTE: This is The State versus Thomas Porter. He's pleading guilty to 08-GS-42-7535(A), Your Honor. Indictment -- he's just pleading to Count One of the indictment. The indictment is attempted armed robbery. Has been true billed by the Grand Jury.

We are just asking for the plea to be taken today, Your Honor, and the sentencing be delayed. There's some other matters involving the codefendant that will be taken up. He is checked with his bondsman. I understand his bondsman is willing to continue on his bond. So, we ask that he remain on the same bond---

THE COURT: All right.

SOLICITOR BARNETTE: ---if that's okay, with the Court's permission, and I'll go more into the facts of the case in this situation.

THE COURT: All right. He'll need to be sworn

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1 don't believe he's been qualified.

2 (WHEREUPON, the defendant was placed under oath at this  
3 time.)

4 THE COURT: Your name is Thomas Edward Porter?

5 DEFENDANT: Yes, sir.

6 THE COURT: Mr. Porter, you're before me on a charge of  
7 attempted armed robbery, which is Count one of the  
8 indictment.

9 what's the potential sentence on that, Mr. Barnette?

10 SOLICITOR BARNETTE: Zero to twenty years, Your Honor.

11 THE COURT: Do you understand that charge and the  
12 potential penalty?

13 DEFENDANT: Yes, sir.

14 THE COURT: Now, sir, I will also tell you that this  
15 particular offense is classified as a violent and most  
16 serious offense. That means it qualifies as a strike under  
17 the law, as what's commonly called a strike. And, of  
18 course, in the future, if you had similar cases where you  
19 were found guilty of, by a jury or pled guilty for other  
20 crimes so classified, that your plea in this case could be  
21 used in conjunction with those cases and it could result in  
22 a sentence of life imprisonment without the possibility of  
23 parole eventually.

24 Do you understand that, sir?

25 DEFENDANT: Yes, sir.

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1 THE COURT: All right. The plea's being offered to me  
 2 without negotiation or recommendations. So, I think I've  
 3 covered how the plea is going to be handled. That means I  
 4 have the authority to sentence you to the full extent  
 5 allowed by law even though sentencing will be deferred.  
 6 whoever the sentencing judge might be would have that same  
 7 opportunity.

8 Do you understand that?

9 DEFENDANT: Yes, sir.

10 THE COURT: All right. Now, Mr. Porter, do you suffer  
 11 from any mental, physical, or nervous condition that would  
 12 prevent you from understanding what you're doing today?

13 DEFENDANT: No, sir.

14 THE COURT: Are you able to make good decisions?

15 DEFENDANT: Yes, sir.

16 THE COURT: Have you taken or used any drugs or other  
 17 substances that would, in any way, impair your, impair your  
 18 ability to make good decisions?

19 DEFENDANT: No, sir.

20 THE COURT: You know what this process is about, is  
 21 that right?

22 DEFENDANT: Yes, sir.

23 THE COURT: Now, you're here today with Mr. Hall. He's  
 24 your lawyer, I would assume.

25 Is that true?

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A.

1 DEFENDANT: Yes, sir.

2 THE COURT: And have you had an opportunity to consult  
3 with him?

4 DEFENDANT: Yes, sir.

5 THE COURT: Are you satisfied with the legal assistance  
6 you've received?

7 DEFENDANT: Yes, sir.

8 THE COURT: Is there anything else that you want Mr.  
9 Hall to do for you or anything else you need to consult with  
10 him about before we proceed with taking your plea?

11 DEFENDANT: No, sir.

12 THE COURT: All right, sir. Now, your case has been  
13 indicted by the Grand Jury. A true bill has been issued in  
14 the case.

15 Do I need to read the charges to you?

16 DEFENDANT: No, sir, I understand them.

17 THE COURT: All right, sir. You understand what  
18 they've alleged that you did in Count One of this  
19 indictment?

20 DEFENDANT: Yes, sir.

21 THE COURT: To that count, how do you plead, guilty or  
22 not guilty?

23 DEFENDANT: Guilty.

24 THE COURT: Mr. Hall, I would assume you've discussed  
25 this matter with Mr. Porter.

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1 Is that true?

2 MR. HALL: That is correct, Your Honor.

3 THE COURT: Are you satisfied he understood your  
4 discussions?

5 MR. HALL: Yes, I am.

6 THE COURT: He tells me that he's made this decision to  
7 plead guilty. I want to be sure though, in your discussions  
8 with him, you covered such things as the charges that he's  
9 facing, the elements of those crimes, the potential  
10 penalties that are involved, the effect in the future that  
11 this could have such as I've already indicated about the  
12 strike, and also the, the affect that this particular  
13 classification would have on his eligibility for future  
14 parole, and things of that nature. I would assume you've  
15 discussed the defenses that he might have as well as his  
16 rights under the Constitution.

17 Did I cover some of the things that you talked about?

18 MR. HALL: Yes, sir, we've covered those things  
19 including with the violent offense, the fact that it carries  
20 20 years is substantially different from one that carries  
21 lesser as far as parole eligibility and he understands those  
22 things.

23 THE COURT: He understands all that?

24 MR. HALL: Yes, sir.

25 THE COURT: Now, he tells me he's made the decision to

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1 plead in this case.

2 Are you in agreement with his decision?

3 MR. HALL: Yes, I am, Your Honor.

4 THE COURT: And you are pleading guilty in this case,  
5 is that correct?

6 DEFENDANT: Yes, sir.

7 THE COURT: You agree that your lawyer covered all  
8 those things with you?

9 DEFENDANT: Yes, sir.

10 THE COURT: Is that the advice that you're satisfied  
11 with?

12 DEFENDANT: Yes, sir.

13 THE COURT: You're 25?

14 DEFENDANT: Yes, sir.

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

16 DEFENDANT: I went to eleventh grade, but I did go back  
17 and get my GED though.

18 THE COURT: Are you married?

19 DEFENDANT: No, sir.

20 THE COURT: Any children?

21 DEFENDANT: Four.

22 THE COURT: What ages are the children?

23 DEFENDANT: Seven, five, four, and two.

24 THE COURT: Do they live with you?

25 DEFENDANT: No, sir, they live with their mother.

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M. HOBBS

(13)

1 THE COURT: Do you have a job or have you had a job?

2 DEFENDANT: I have a job, but I'm not paid with a pay  
3 check. I work for Ray's Recycling. He owns his own scrap  
4 metal company and he pays me in cash every week.

5 THE COURT: Okay. Has anyone done anything to you  
6 whatsoever, tried to threaten you, coerce you, put pressure  
7 on you, done anything to try to get you to offer a plea in  
8 this matter?

9 DEFENDANT: No, sir.

10 THE COURT: So, is your plea offered freely and  
11 voluntarily?

12 DEFENDANT: Yes, sir.

13 THE COURT: Have you had enough time to think about  
14 your case and prepare for court if that's what you wanted to  
15 do?

16 DEFENDANT: Yes, sir.

17 THE COURT: And has anyone made any promises,  
18 guarantees, or assurances to you about anything including,  
19 but not limited to, such things as pardon, parole,  
20 probation, early release, or length of sentence---

21 DEFENDANT: No, sir.

22 THE COURT: ---to try to get you to plead?

23 DEFENDANT: No, sir.

24 THE COURT: I have to be sure that you understand your  
25 rights under the Constitution. When you plead guilty, you

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1 give up those rights. I have to be sure that you do that  
2 knowingly and intelligently. So, I'll explain the rights to  
3 you. When I finish, if you don't understand anything about  
4 them, I'll give you a chance to ask questions.

5 You have a right to have your case considered by the  
6 Grand Jury. That's already happened.

7 You have a right to have your attorney's assistance and  
8 Mr. Hall is here. He's able to assist you if you need  
9 assistance.

10 You have a right to demand or request a trial by jury,  
11 and at that trial you'd be presumed to be innocent until and  
12 unless the state proved your guilt beyond a reasonable  
13 doubt. The state has the only burden of proof in a criminal  
14 case. You would have no burden of proof at a trial.

15 At the trial, you could do several things. You could  
16 subpoena witnesses, have them come to court to testify for  
17 you. You could confront or question anyone who testified  
18 against you. You would have the right, at a trial, to  
19 present any defense that you have to the charges, and you'd  
20 be given the opportunity to try to suppress any and all  
21 evidence the state has in its possession against you  
22 including any statements you may have made prior to trial.

23 You always have the right to remain silent now, and at  
24 any stage of the proceedings. And, at a trial, if you chose  
25 to remain silent, the judge would instruct the jury that

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1 your silence could not be used against you.

2 Now, do you understand the rights I just explained?

3 DEFENDANT: Yes, sir.

4 THE COURT: Do you have any questions about any of  
5 them?

6 DEFENDANT: No, sir.

7 THE COURT: Now, by pleading guilty, if I decide to  
8 accept the plea, you will have waived, that means you would  
9 of given up, all of the rights I just went over with you  
10 with the exception of the right of having an attorney assist  
11 you during your plea.

12 Now, do you understand that fact?

13 DEFENDANT: Yes, sir.

14 THE COURT: Does that fact affect your plea?

15 DEFENDANT: No, sir.

16 THE COURT: So, you're still pleading guilty?

17 DEFENDANT: Yes, sir.

18 THE COURT: Is that right?

19 DEFENDANT: Yes, sir.

20 THE COURT: And is that because you are guilty?

21 DEFENDANT: Yes, sir.

22 THE COURT: The facts please, Mr. Barnette.

23 SOLICITOR BARNETTE: Okay. Thank you, Your Honor.

24 This occurred on April 1<sup>st</sup>, 2008, Your Honor, at  
25 approximately Three Oaks Road and Fourth, Goforth Street in

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1 Cowpens, South Carolina in Spartanburg County, Your Honor.  
2 The Sheriff's Department, Your Honor, received a tip that  
3 was given to them by a CI, Your Honor, and basically it was  
4 concerning an armed robbery and home invasion that was  
5 suppose to take place at [REDACTED], Apartment  
6 Number 2 in Cowpens.

7 Basically they stopped Cherry Smith, the defendant, and  
8 Frederick Geterman after receiving information the trio  
9 would be traveling to the incident location in a green Buick  
10 Skylark with a North Carolina license plate, and Mr.  
11 Geterman was the driver, Your Honor.

12 They made a traffic stop based off that information.  
13 They found Ms. Smith had a .38 in her pocketbook. There's  
14 also a shotgun and ski mask that was inside of the car, Your  
15 Honor. They made an arrest. They did receive statements  
16 from Mr. Porter and from Mr. Smith, Ms. Smith.

17 Your Honor, I bring in State's Exhibit No. 1. I've  
18 already showed this to the defense. It's his waiver as well  
19 as his statement. I'd like to make that part of the record  
20 and part of the facts in this case, Your Honor, and they  
21 were charged with attempted armed robbery as well as  
22 possession of a weapon during a violent crime.

23 Once he -- the rest of this case and taking care of the  
24 co-defendants case are taken care of, Your Honor, we'll be  
25 dismissing Count Two. But Count One will be a

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1 straight up plea at a later time, and we'll address that at  
2 the sentencing in front of the appropriate judge, Your  
3 Honor, or whoever that may be down the road. We would ask  
4 that be left open. So, we don't know if this gentleman will  
5 be a witness. So, we ask that part be open.

6 THE COURT: All right. So, you're anticipating his  
7 cooperation in future prosecution at this time?

8 SOLICITOR BARNETTE: Yes, sir, we are.

9 THE COURT: Okay. Now, Mr. Porter, did you hear the  
10 solicitor go over with me the facts about this incident?

11 DEFENDANT: Yes, sir.

12 THE COURT: Did you understand what he said?

13 DEFENDANT: Yes, sir.

14 THE COURT: Is that information true?

15 DEFENDANT: Yes, sir.

16 THE COURT: Have you told me the truth?

17 DEFENDANT: Yes, sir.

18 THE COURT: Anybody tell you how to answer my  
19 questions?

20 DEFENDANT: No, sir.

21 THE COURT: So, all the answers you've given me, those  
22 have been your answers?

23 DEFENDANT: Yes, sir.

24 THE COURT: Any part of what we discussed today would  
25 you like to go back and reconsider anything I told me?

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1 DEFENDANT: No, sir.

2 THE COURT: So, you stand by all the responses I've  
3 received?

4 DEFENDANT: Yes, sir.

5 THE COURT: Still pleading guilty?

6 DEFENDANT: Yes, sir.

7 THE COURT: All right. I'll accept the pleas as having  
8 been freely and voluntarily given. The defendant is aware  
9 of the charges, the penalties, had the advice of a lawyer.  
10 He's satisfied with that advice. I find there's a factual  
11 basis for the plea.

12 At this time, we'll hold the matter in abeyance.

13 Mr. Barnette, has there been any problem with this  
14 defendant appearing when requested?

15 SOLICITOR BARNETTE: No, sir, as far as I know, he  
16 has -- I think Mr. Hall knows better than I do.

17 MR. HALL: I can get in touch with him. He doesn't  
18 have a cell phone. He doesn't have a cell number he can  
19 give me, and I've talked with -- his mom's been here for the  
20 last half hour. I've talked to Carolina Bail Bonding and he  
21 said he's had no problem with him out on bond.

22 THE COURT: All right. Then I will allow the bond to  
23 remain in effect. I assume nothing else has happened that  
24 would increase his risk to society other than what we have  
25 learned about when the bond was original?

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(13)

1 MR. HALL: That's correct.

2 SOLICITOR BARNETTE: And I've explained to him, Your  
3 Honor, obviously he doesn't want to do anything else.

4 THE COURT: You're on a very short leash, I will tell  
5 you. Anything that -- any run-in with the law will result  
6 in your bond being revoked.

7 Do you understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: So, you're on your best behavior?

10 DEFENDANT: Yes, sir.

11 THE COURT: Thank you very much.

12 MR. HALL: Thank you, Your Honor.

13 (WHEREUPON, this case was in recess at this time.)

14 THE COURT: All right. Mr. Porter, you're in front of  
15 me now. I think there's an arrest warrant out for your  
16 arrest. It's been served it appears.

17 DEFENDANT: Yes, sir.

18 THE COURT: On a probation violation. Actually a  
19 Y.O.A. supervision violation.

20 Does Mr. Hall represent you on this?

21 MR. HALL: We will, Your Honor.

22 DEFENDANT: Yes, sir.

23 THE COURT: Thank you.

24 All right. First of all, let me hear from the agent as  
25 to what's going on.

1           PROBATION AGENT: Okay. Your Honor, before you is  
 2 Thomas Porter on Indictment 05-GS-11-0987. It is for the  
 3 offense of, excuse me, burglary second nonviolent. He  
 4 received a Y.O.A. sentence in December of 2005. He has been  
 5 revoked twice on this Y.O.A. parole warrant, on this Y.O.A.  
 6 case, Your Honor.

7           The violations today are failing to report on 8/18/09,  
 8 8/25/09, and 9/01/09 after being advised to report weekly,  
 9 failing to work, failing to complete his job search, failing  
 10 to pay his supervision fee, and failing to follow advice and  
 11 instructions of the supervising agent.

12           It appears as though he was released on his second  
 13 revocation two months prior to absconding supervision again.  
 14 The State is requesting a \$100,000 surety bond at this time  
 15 based on the fact that this will be his third violation, and  
 16 that we were unable to find him for 118 days.

17           MR. HALL: Please the Court, Your Honor.

18           You know his situation. He cooperated with the State.  
 19 We've got a current address for him. He explained to me  
 20 about this violation was he was trying to take care of his  
 21 kids and he didn't have anybody to watch after them and  
 22 that's what he was doing. He didn't have money to pay.  
 23 It's the type of thing we hear all the time with probation.

24           But, Your Honor, I ask you to consider a recognizance  
 25 bond, personal recognizance since he is basically on short

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1 leash with the State. If he, as we went over earlier, if he  
2 does anything, particularly anything of a serious nature,  
3 he's looking at life in prison as the only sentence for him.  
4 I think he's gonna do it, what he's suppose to do now. As I  
5 said, he is cooperating with the solicitor's office in the  
6 case that we were here on before, and we -- I think he's a  
7 good candidate for that since he's basically on their leash  
8 right now. They have control over him.

9 THE COURT: Well, I'm not gonna set it as a PR bond.  
10 what's his current bond?

11 MR. HALL: 5,000.

12 THE COURT: 5,000.

13 All right. I'm gonna set this one as a 10,000 surety.

14 PROBATION AGENT: Yes, sir.

15 THE COURT: Thank you very much.

16 MR. HALL: Thank you, Your Honor.

17 PROBATION AGENT: Thank you.

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19 (WHEREUPON, this case was in recess at this time.)

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wednesday, June 8<sup>th</sup>, 2011

THE COURT: Yes, sir, Mr. Hall.

MR. HALL: Your Honor, we had the, a sentencing on Thomas Edward Porter who pled guilty in front of you back in February of 2010, and I have used all the numbers that I had, that probation has, and have left at least one message for him. I sent letters to him. The last one being May 9<sup>th</sup> when this was put on a plea docket, and I have heard nothing from him.

I've also contacted the bondsman as late as this morning. They're looking for him. I don't know what the issue is, but I've not heard from him.

THE COURT: All right. Mr. Barnette, what's the situation, sir?

SOLICITOR BARNETTE: Your Honor, we've asked for a bench warrant. He pled in front of Your Honor on February 4<sup>th</sup>, 2010, on Indictment 08-GS-42-7537 which was attempted armed robbery. He had offered to cooperate against his codefendant. We've scheduled him for sentencing before, and we've waited. I know Mr. Hall's been working very hard. So, we decided we needed to just schedule it, and if he didn't appear, ask for a bench warrant, Your Honor.

Ms. Camp, if you would, please

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THE COURT: ATTY. GENERAL  
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instruct the clerk that I'm issuing a bench warrant for his arrest.

CLERK: Yes, sir.

THE COURT: If you'll prepare the necessary paperwork and submit it to me please.

CLERK: Yes, sir.

THE COURT: Thank you very much.

SOLICITOR BARNETT: Thank you, Your Honor.

THE COURT: Thank you.

\* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 4<sup>th</sup> day of February, 2010, and the 8<sup>th</sup> day of June, 2011.

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

July 15<sup>th</sup>, 2011

*Pamela E. Green*

PAMELA E. GREEN, Court Reporter

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STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG ) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA, ) TRANSCRIPT  
PLAINTIFF, ) OF  
VS. ) RECORD  
THOMAS PORTER, ) 2008-GS-42-7535(A)  
DEFENDANT. )

November 8<sup>th</sup>, 2011  
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

BARRY BARNETTE  
SOLICITOR  
Attorney for the State

ROBERT HALL  
ASSISTANT PUBLIC DEFENDER  
Attorney for the Defendant

PAMELA E. GREEN  
Circuit Court Reporter  
Seventh Judicial Circuit

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
	<u>Court's Exhibits</u>		
C-1	Transcript	3	4
C-2	Photographs	3	4

## P R O C E E D I N G S

1  
2  
3 (WHEREUPON, a transcript was marked as Court's Exhibit  
4 No. 1. A group of photographs was marked as Court's Exhibit  
5 No. 2. Both exhibits were for identification purposes only  
6 at this time.)

7 SOLICITOR BARNETTE: May it please the Court, Your  
8 Honor?

9 THE COURT: Yes, Mr. Barnette.

10 SOLICITOR BARNETTE: This is The State versus Thomas  
11 Porter, Your Honor. He pled guilty on Indictment  
12 08-GS-42-7535(A) in front of Your Honor back on  
13 February 4<sup>th</sup>, 2010, Your Honor. He pled to Count One,  
14 which is attempted armed robbery. He was released on bond.  
15 He was suppose to cooperate with the State and maintain  
16 contact. He did not, Your Honor.

17 Several times I think Mr. Hall had tried to contact  
18 him. We'd sent out information. Found on June 8<sup>th</sup>, 2011.  
19 We appeared in front of Your Honor again. At that time he  
20 did not appear and we asked for a bench warrant for his  
21 arrest. He is been -- we asked the warrants Division to  
22 pick him up. They searched for quite a while, and they  
23 finally found him, Your Honor. He was brought in this  
24 past -- I think on this past Friday, Your Honor.

25 THE COURT: All right. Pass up the information on the

1 case.

2 SOLICITOR BARNETTE: Your Honor, I did enter -- I did  
3 Court Exhibit 1, which is actually the transcript from the  
4 plea. Mrs. Green did that, and the well -- the request for  
5 a bench warrant. There was State Exhibit 1, which was his  
6 actual written statement of his involvement. They're trying  
7 to search for that now. It was made part of the record, and  
8 Court Exhibit 2, Your Honor, is pictures taken from the car  
9 that him and Charity Smith were beside before they're  
10 getting ready to do the home invasion, Your Honor.

11 THE COURT: All right. Any objection to the admissions  
12 of the documents as exhibits to the plea?

13 MR. HALL: No objection, Your Honor.

14 THE COURT: All right. They'll be admitted as exhibits  
15 and as marked.

16 (WHEREUPON, Court's Exhibit Nos. 1 and 2 were received  
17 into evidence at this time.)

18 THE COURT: Mr. Solicitor, it's been some time since I  
19 took the plea, and so I'm going to ask you to recap for me  
20 the facts that the State's alleging in the case please.

21 SOLICITOR BARNETTE: Yes, sir.

22 This occurred on April 1<sup>st</sup>, 2008, Your Honor. It  
23 happened on Three Oaks Road and Goforth Street in Cowpens,  
24 South Carolina, which is in Spartanburg County, Your Honor.  
25 The Spartanburg County Sheriff's Department acted on a tip

1 they were provided by a confidential informant. It was for  
2 an attempted armed robbery and home invasion that was taking  
3 place at [REDACTED], Apartment [REDACTED] in Cowpens, South  
4 Carolina, Your Honor.

5 Investigators was able to apprehend Charity Smith and  
6 the defendant, Thomas Porter, Your Honor, and Freddie Gergin  
7 after receiving information the trio would be traveling in  
8 the incident location in a green colored Buick Skylark,  
9 North Carolina license plate, Your Honor, being driving by  
10 Frederick Gergin, Your Honor. Investigators was able to  
11 spot the vehicle traveling toward the incident location, and  
12 managed to conduct a traffic stop of the green Buick Skylark  
13 at the incident location, Your Honor.

14 During this traffic stop, investigators was able to  
15 recover a .38 caliber revolver and a black purse that  
16 belonged to Charity Smith. This purse was located in the  
17 front passenger floorboard where Smith had been seated in  
18 the vehicle. At that same time a ski mask and shotgun was  
19 found in the driver's side back seat that belonged to Thomas  
20 Edward Porter, Your Honor.

21 All three subjects were detained and taken to the  
22 Sheriff's Office for an interview. While at the Sheriff's  
23 Office, Your Honor, investigators spoke with Thomas Porter  
24 and Charity Smith. Both of them initially waived their  
25 Miranda rights and provided confirmation they did plan to

1 commit the home invasion and robbery at [REDACTED],  
2 Apartment [REDACTED] in Cowpens, South Carolina, Your Honor. Both  
3 Smith and Porter further stated their intent was to rob the  
4 victim of illegal drugs and money and meth. Frederick  
5 Gergin was clueless about their interest to commit the  
6 crimes. Gergin was asked to drive the subjects to the  
7 incident location. Both Smith and Porter was transported to  
8 the Spartanburg County Detention and arrested on these  
9 charges, Your Honor.

10 The picture that, that I handed up to the Court was  
11 showing one of the shotguns and the gun loaded in this case,  
12 Your Honor.

13 THE COURT: All right. Please swear the defendant for  
14 me.

15 (WHEREUPON, the defendant was placed under oath at this  
16 time.)

17 THE COURT: Mr. Porter, were you listening to the  
18 solicitor recite the alleged facts in this case to me?

19 DEFENDANT: Yes, sir.

20 THE COURT: Are those the same facts that were, were  
21 given to the Court at your previous plea?

22 DEFENDANT: Yes, sir.

23 THE COURT: And are the facts that he told me, are  
24 those facts true?

25 DEFENDANT: Yes, sir.

1 THE COURT: All right. Now, at this time I've accepted  
2 your plea previously. I'll hear from your attorney and then  
3 from you and any other witnesses in mitigation concerning  
4 the sentencing.

5 Mr. Hall, you may speak for your client.

6 MR. HALL: If it please the Court, Your Honor.

7 As I understand it, the other cases were taken care of  
8 without him having to -- I was never contacted about coming  
9 to testify. So, I assume the, that that, the fact that he  
10 said he would testify against them helped resolve those  
11 cases. I did have trouble finding him.

12 From what he tells me this morning, his mother is  
13 suffering from osteoarthritis. Her back bones are  
14 deteriorating. He was trying to help her before he goes  
15 back to prison, and he's trying to get her stable, and it  
16 looks like she's going to have to be in a nursing home  
17 pretty much becoming an invalid, and that was what his  
18 concern was, Your Honor, there.

19 I know of no other explanation of why he didn't respond  
20 in the spring when we tried to get him to come in and go  
21 ahead and get the sentencing that he was concerned for his  
22 mother. And, Your Honor, the -- he cooperated from, you  
23 know, pretty much from the start. The guns were to the  
24 front of the car. He was in the back of the car, and, Your  
25 Honor, he's asking you for whatever consideration you can

1 give him in mercy in sentencing him on this charge.

2 Your Honor, I think there was a parole issue that was  
3 still around. I think they served a warrant on him at the  
4 plea.

5 THE COURT: Is that still the case?

6 SOLICITOR BARNETTE: Your Honor, I think his parole was  
7 revoked.

8 You want me to go through his prior record right now,  
9 Your Honor?

10 THE COURT: well, let's -- let me go ahead and hear  
11 from him and then I'll come back to you.

12 SOLICITOR BARNETTE: Yes, sir.

13 THE COURT: what's the situation?

14 PROBATION AGENT: Your Honor, he's on YOA. He's on YOA  
15 parole. Once something happens to him today, we'll take  
16 that paperwork and---

17 THE COURT: Okay. All right. Now, is there anyone  
18 that wishes to speak on his behalf, Mr. Hall?

19 MR. HALL: Your Honor, I did not -- I was not able to  
20 get anybody just with the---

21 THE COURT: All right. Now, Mr. Porter, is there  
22 anything you'd like to say to the Court at this time?

23 DEFENDANT: Yes, sir.

24 THE COURT: All right.

25 DEFENDANT: well, Your Honor, back when he was, when I,

1 when he was trying to find me, like I told him, my mother  
2 has osteoporosis, and I think -- she's fixing to be put in a  
3 nursing home, and I was around her most of the time, and I  
4 have a child on the way. So, I got -- I just panicked a  
5 little bit, you know. I didn't know what to do with my  
6 mother. I hate for her to go in that home, you know. But  
7 I'm the oldest boy, and I don't really know what's gonna  
8 happen to her, you know.

9 THE COURT: All right. Mr. Barnette, prior record and  
10 any other information you think the Court should be aware  
11 of.

12 SOLICITOR BARNETTE: Yes, sir, he got convicted of  
13 possession of crack or cocaine in 2004, Your Honor.

14 He was convicted of burglary second in 2005. That's  
15 the YOA sentence that he received, Your Honor, and it just  
16 shows that it was, shows a revocation, but I guess that will  
17 be taken care of once the plea is done. That's his record,  
18 Your Honor.

19 THE COURT: All right. Now, Mr. Hall indicated that  
20 his absence did not prevent the prosecution of the other  
21 individual or individuals involved.

22 Can you give me some information about that?

23 SOLICITR BARNETTE: Your Honor, Charity Smith, I went  
24 back and looked at yesterday or whatever. There's been a  
25 bench warrant issued for her. She has not been picked up.

1 She did give a statement also in that case. I guess she'll  
2 be prosecuted at that point.

3 THE COURT: So, she's not been prosecuted?

4 SOLICITR BARNETTE: No, sir.

5 THE COURT: I believe that sentencing range is zero to  
6 twenty on this, is that right?

7 SOLICITR BARNETTE: That's correct, Your Honor.

8 MR. HALL: That's correct, Your Honor.

9 THE COURT: All right. Mr. Porter, that Sentence of  
10 the Court is you be confined in the State Department of  
11 Corrections for a period of 15 years.

12 Good luck to you, sir.

13 MR. HALL: Thank you, Your Honor.

14 SOLICITR BARNETTE: Thank you, Your Honor.

15

16 \* \* \*END OF REQUESTED TRANSCRIPT OF RECORD\* \* \*

17

18

19

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24

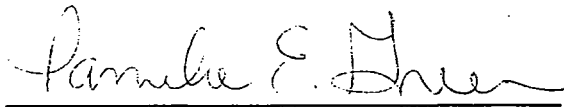
25

## C E R T I F I C A T E

1  
2  
3 I, Pamela E. Green, Official Court Reporter for the  
4 Seventh Judicial Circuit of the State of South Carolina, do  
5 hereby certify that the foregoing is a true, accurate and  
6 complete Transcript of Record of the proceedings had and  
7 evidence introduced in the trial of the captioned case,  
8 relative to appeal, in the Court of General Sessions for  
9 Spartanburg County, South Carolina, on the 8<sup>th</sup> day of  
10 November, 2011.

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

13  
14 June 18<sup>th</sup>, 2012

15  
16   
17

18 PAMELA E. GREEN, Court Reporter  
19  
20  
21  
22  
23  
24  
25



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )

## INDICTMENT

At a Court of General Sessions, convened on NOV 21 2008 the

Grand Jurors of Spartanburg County present upon their oath:

**COUNT ONE-ATTEMPTED ARMED ROBBERY**

That Thomas Porter did in Spartanburg County on or about April 1, 2008, while armed with a deadly weapon, feloniously attempt to take from the person or presence of Sean Sluggs, by means of force or intimidation, a sum of money with intent to deprive the owner permanently of such property, in violation of §16-11-330 (B), *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

**COUNT TWO-POSSESSION OF FIREARM DURING COMMISSION OF  
 VIOLENT CRIME**

That Thomas Porter did in Spartanburg County on or about April 1, 2008, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Attempted Armed Robbery, all in violation of Code § 16-23-490, *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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

  
 ASSISTANT SOLICITOR

Cases

Stevens vs State 617 8 E<sup>2d</sup> 366  
Counsel's failure to properly  
investigate -

Inadequate investigation

April 1 2008 #11 July 4, 2009

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG  
STATE VS.

Thomas Edward Porter

AKA:

Race: Sex: Age:

DOB: SS#:

Address: 4'

City, State, Zip:

DL#: SID#:

\*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

IN THE COURT OF GENERAL SESSIONS

35

INDICTMENT/CASE#: 2008GS4207535

A/W#: M021267

Date of Offense: 04/01/2008

S.C. Code § : 16-11-0330(B)

CDR Code #: 0026

SENTENCE SHEET

TO: Robbery / Attempted armed, or allegedly armed, robbery - COUNT ONE

CONVICTED OF or PLEADS

in violation of § 16-11-0330(B) of the S.C. Code of Laws, bearing CDR Code # 0026

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: BARNETTE, BARRY 13039 SC Bar# THOMAS E. PORTER Defendant Attorney for Defendant 2596 SC Bar#

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

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

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

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP Total: \$ plus 20% fee: \$ Payment Terms: Set by SCDPPPS Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other:

Table with columns for Recipient, \*Fine, and various assessment codes (e.g., § 14-1-206, § 14-1-211(A)(1), § 14-1-211(A)(2), § 56-5-2995, § 56-1-286, § 47.12, § 14-1-212, § 14-1-213, § 50-21-114, § 56-5-2942(J), § 90.7) and their corresponding amounts.

Clerk of Court/ Deputy Clerk T. Camp Court Reporter: Pam Green SCCA/217 (11/2009)

Presiding Judge Judge Code: 2135 Sentence Date: 11/8/11

Plea accepted 2/4/10

2012-CP-42-0911

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Spartanburg

Thomas Edward Porter, 38797

Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible 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 indicate on 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 Kirkland Reception and Evaluation Center
2. Name and location of Court which imposed sentence Spartanburg County
3. Name(s) of co-defendant(s) (if any) Charity Smith
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2008 GS-42-07535

(b) Attempted Arm Robbery-16-11-330(CB)

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SPARTANBURG COUNTY  
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(c) \_\_\_\_\_ X \_\_\_\_\_

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

(a) 11-8-11

(b) 15 years violent - most serious

(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. (Not by Counsel)

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

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) the date of each such result: N/A

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

(a) \_\_\_\_\_

(b) \_\_\_\_\_

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(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, lawyer
- (b) didn't investigate, lied, plea improper
- (c) \_\_\_\_\_

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

- (a) See Sheet Attached
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) any petition in a State Court under South Carolina Law? \_\_\_\_\_
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? \_\_\_\_\_
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? \_\_\_\_\_
- (d) any other petitions, motions or applications in this or any other Court? NA

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

- (a) the specific nature thereof:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed: NA
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

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(c) the disposition thereof: *N/A*

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(d) the date of each such disposition: *N/A*

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

*N/A*

15. If you answered "yes" to (14) identify: *N/A*

(a) which grounds have been presented:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised: *N/A*

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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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) Entered plea of Guilt.
- (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? N/A
- (c) your sentencing? yes.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO.

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

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

- i. Robert Hall, see South  
Carolina BAR # 2596

- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

- i. plea
- ii. sentencing.
- iii. \_\_\_\_\_

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

I want A Evidentiary Hearing to prove errors in my case by my lawyer, ect.

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

NONE

STATE OF SOUTH CAROLINA )

County of Spartanburg )

VERIFICATION

I, Thomas Edward Porter, # 318797, 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.

Thomas Porter

SWORN to and subscribed before me this 13<sup>th</sup> day of February, 2012.

[Signature] (L.S.)  
Notary Public, Commission Expires

October 8, 2014

My Commission Expires: \_\_\_\_\_

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SPARTANBURG COUNTY  
M. HOPE BLACKLEY  
2012 FEB 27 AM 8:52

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

I, Thomas Edward Porter #18797, 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.

Thomas Porter  
Applicant

SWORN or affirmed to and subscribed before me this  
13<sup>th</sup> day of February, 2012.

[Signature]  
Notary Public

My Commission Expires  
My Commission Expires: October 8, 2014

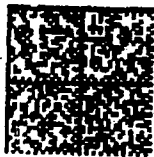
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CLERK OF COURT  
SPARTANBURG COUNTY  
2012 FEB 27 AM 8:52  
M. HOPE BLACKLEY

My lawyer Mr. Robert Hall was ineffective and did not have my best interest at hand when he represented me. My lawyer did not investigate my case or speak with any witness on my behalf and had only met with me 3 times and each time told me my only option was to plead to a crime the evidence proves I just could not have committed. I was told to sign some papers he pushed in front of me. I was promised one thing, lied to by my Attorney and not given the lower sentence or time promised. Had my lawyer conducted a reasonable investigation into my case, I would not be in prison with the sentence I now have for the crime of Attempt Arm Robbery. I'm asking for an Attorney be assigned to me on PCR so I may fully discuss other facts not stated in this Application which he or she would get a copy of. I ask that an Evidentiary Hearing be held so I can argue along with my PCR lawyers the errors made in my case. As it stands an Appeal is filed in this court order that my PCR be preserved pending the Appeal, I'd truly appreciate it, even if the court decides PCR is currently my best or proper remedy. Thank you,

Thomas Porter

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Thomas E. Porter # 318197 F-3-115-Rside  
MILFORD  
Kirkland Correctional Institution  
4344 Broad River Road  
Columbia, S.C. 29210



UNITED STATES POSTAGE  
02 1M  
0008001088  
MAILED FROM ZIP CODE 29210  
\$00.650  
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2012

M. HOPE BLACKBELL  
CHECK OF COURT, SPARTANBURG COUNTY

P.O. BOX 3483

~~SPARTANBURG~~ SPARTANBURG, SOUTH CAROLINA  
LEGAL MAIL ONLY

*Branney In  
atty Cindy*

THE DEPARTMENT OF COMMERCE  
HAS RECEIVED THIS ITEM  
THEREFORE THE DEPARTMENT DOES  
NOT ASSUME RESPONSIBILITY FOR  
ITS CONTENTS.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 Thomas Edward Porter, #318797 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0911

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 27, 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 Spartanburg County Clerk of Court. The Applicant was indicted at the November 2008 term of the Spartanburg County Grand Jury for attempted armed robbery and possession of firearm during commission of a violent crime (08-GS-42-7535, count 1 and 2). He was represented by Robert Hall, Esquire. On February 4, 2010, the Applicant pled guilty as indicted to attempted armed robbery. The prosecution dismissed count two for possession of a firearm during commission of a violent crime. Pursuant to a plea agreement, Applicant was released on bond to cooperate with authorities on other matters. Upon information and belief, Applicant failed to abide by the terms of his plea agreement. He was sentenced by the Honorable Roger L. Couch, on November 8, 2011, to confinement for a period of fifteen (15) years. The Applicant did not appeal his guilty plea or sentence.

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

## 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, in that:
  - a. Counsel "did not have my best interest at hand when he represented me."
  - b. Counsel "did not investigate my case or speak with any witness on my behalf."
  - c. Counsel "only met with me [three] 3 times and each time told me my only option was to plead to a crime the evidence proves I just couldn't have committed."
  - d. "I was promised one thing, lied to by my attorney and not given the lower sentence or time promised."
  - e. "Had my [lawyer] fully conducted a reasonable investigation into my case, I wouldn't be in prison with the sentence I now have"

## III.

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

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

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

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

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By:   
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January 30, 2013.

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STATE OF SOUTH CAROLINA	)	
COUNTY OF SPARTANBURG	)	IN THE COMMON PLEAS COURT
Thomas Edward Porter,	)	
Applicant,	)	TRANSCRIPT OF RECORD
-vs-	)	2012-CP-42-0911
The State.	)	October 3, 2013
	)	Spartanburg, South Carolina

B E F O R E :

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S :

HATTIE D. BOYCE, ESQUIRE  
Attorney for the Applicant

SUZANNE H. WHITE, ESQUIRE  
Attorney for the State

Linda D. Moffitt  
Circuit Court Reporter

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
A-1	Voluntary statement		9
A-2	Voluntary statement		9
A-3	Copy of sentencing sheet		9
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1 MS. WHITE: Thank you, Your Honor.

2 This is the case of Thomas Porter vs. the State. It's  
3 case No. 2012-CP-42-0911. He's represented today by  
4 Ms. Hattie Boyce.

5 Mr. Porter was indicted November of '08 for an  
6 attempted armed robbery charge and possession of a weapon  
7 during the commission of a violent crime.

8 Ultimately, he pled on February 4th of 2010 to the  
9 attempted armed robbery charge. The possession of a weapon  
10 was dismissed. However, according to the plea agreement he  
11 was released on bond to assist authorities.

12 He ultimately was sentenced November 8th of 2011 and  
13 received a sentence of 15 years.

14 He has alleged ineffective assistance of counsel in  
15 that counsel did not have his best interest at hand,  
16 counsel did not investigate the case or speak with any  
17 witnesses on his behalf, counsel only met with him three  
18 times and only discussed a plea, and that he says he was  
19 lied to and did not receive a lower sentence as promised.

20 So I will turn it over to Ms. Boyce at this time.

21 THE COURT: Ms. Boyce.

22 MS. BOYCE: Your Honor, I'd like to call Mr. Thomas  
23 Porter to the stand.

24 THE COURT: Okay. Ms. White, let me see you and  
25 Ms. Boyce just a minute, please.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 (Bench conference held off the record.)

2 THOMAS EDWARD PORTER, having  
3 been first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MS. BOYCE

5 MS. BOYCE: May it please the Court.

6 Q would you state your full name for the record, please?

7 A Thomas Edward Porter.

8 Q And, Mr. Porter, where did you live prior to your  
9 incarceration?

10 A Pacolet.

11 Q Okay. That's Spartanburg County.

12 A Yes, ma'am.

13 Q And can you tell us about the incident that you were  
14 charged with in 2008?

15 A Well, on April the 1st of 2008 me and three other  
16 people was pulled over by the Spartanburg County Sheriff's  
17 office. They said they had a tip that we had planned a  
18 robbery.

19 And from there we went to the sheriff's office, and  
20 they was questioning us about the robbery. And during that  
21 day I tell them -- I told them about a plan. They asked  
22 only about my plan.

23 when I gave my statement I gave them only on a plan,  
24 not on intent to do the robbery. But I did give them what  
25 they asked me. They asked me what my plan was but --

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 Q Are you stating that it was only a plan and no attempt  
2 was involved?

3 A Yes, ma'am. It was just only a bunch of talk, is what  
4 the informant told them. It was a plan. It was just only  
5 a bunch of talk. It was nothing nobody got together and  
6 said, yes, we're going to do this. It was none of that.

7 And it was also three people in the car. As the tip  
8 said trio, but only two people was apprehended.

9 Q And were the other two codefendants sentenced to  
10 anything?

11 A One of them was never apprehended, never -- the driver  
12 of the car never come -- never was apprehended. And my  
13 other codefendant was only charged with a gun. And the  
14 attempted armed robbery charge was throwed out.

15 Q Okay. And what did the codefendant that was charged  
16 with the gun, what sentence did she receive?

17 A I think like five years probation, zero to five years  
18 probation, something like that.

19 Q Okay. And you were in this car and the same  
20 circumstances. And you got how much time?

21 A I got 15 years violent, 85 percent violent, most  
22 serious.

23 Q Okay. It's stated that you pled to attempted robbery.  
24 But the gun charge was dropped?

25 A Yes, ma'am. And on the day when I did I signed off on

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 the plea when the gun charge was going to get dismissed, I  
2 was thinking the other charge would be, because without the  
3 gun how would it be attempted armed robbery? And in their  
4 tip, no crime was ever done at all. They pulled the car  
5 over. The crime -- the attempt, crime, was never done.

6 Q Everyone was still seated in the car --

7 A In the car.

8 Q -- at the time of your arrest.

9 A In the car.

10 Q Okay. And you filed this P.C.R. Can you tell the  
11 Court what is the nature of why you filed this?

12 A Yes, "Because Mr. Hall adequately failed to  
13 investigate and research the issues of my case and  
14 misinformed me of the charge. He failed to tell me just  
15 planning it was not a crime. He only told me that I was  
16 guilty of the charge. Three people ride in a car where the  
17 police had a tip about a robbery, but two people get  
18 charged with attempted armed robbery and weapons  
19 possession. And the driver of the car wasn't charged.  
20 Later in the case the state dismissed the second person's  
21 attempt armed robbery charge and dropped my weapons charge  
22 and then had me plead guilty to the attempt armed robbery,  
23 because had Mr. Hall adequately investigated and researched  
24 the issue, the hands of one, the hands of all, that the  
25 state would have to drop the attempt on me as well. And

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 then before the dismissal of the gun charge that possibly  
2 would have been the charge I would have pled to to get a  
3 lesser sentence, but for counsel's errors I would not have  
4 pled guilty but would have went to trial. Counsel Robert  
5 Hall prejudiced me when he failed to inform me that  
6 although my codefendant, Charity Smith, and I had talked  
7 about robbery, that we or I did not have a specific intent,  
8 or nor did we or I intend on completing the robbery. And  
9 when we were stopped the police stated that they had  
10 information that we had planned a robbery. And when I gave  
11 my statement to the police that is only what the police  
12 wanted to hear, our plan. We or I did not have an intent  
13 on completing the robbery."

14 At this time if possible I want to put up statements,  
15 mine and my codefendant's statements, because when we was  
16 arrested that night they only asked what our plan was.  
17 They knew they had a tip from somebody who had a plan. And  
18 mine and her statement was only on a plan. It was never  
19 said that this is what we was going to do. It was never  
20 said that's what they were going to do. It was only on a  
21 plan. So if possible I want to put this up to evidence if  
22 I can.

23 MS. BOYCE: May I do that, Your Honor?

24 THE COURT: I'll leave it up to you. You're the  
25 lawyer.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 (Voluntary statement marked Applicant's Exhibit No. 1;  
2 voluntary statement marked Applicant's Exhibit No. 2.)

3 Q Now, Mr. Porter, in your statements you gave to the  
4 police, the codefendant's statement and your statement, you  
5 are alleging that it only was something that y'all were  
6 talking about and never intended to carry out.

7 A It was -- it was only on what they asked us that  
8 night. Nobody like from the codefendant telling them, gave  
9 them a tip it was a robbery planned. It was never on  
10 nothing that we just got together and say tonight are we  
11 going to do something, we're going to do. It was never one  
12 of those occasions.

13 Q And you both were in the vehicle and had not tried to  
14 exit the vehicle to do anything concerning this plan.

15 A Yes, ma'am. We was pulled over in a vehicle.

16 MS. BOYCE: Your Honor, I'd like to have marked the  
17 codefendant's sentencing sheet, as well as Mr. Porter's  
18 sentencing sheet.

19 THE COURT: Okay.

20 (Copy of sentencing sheet marked Applicant's Exhibit  
21 No. 3; copy of sentencing sheet marked Applicant's Exhibit  
22 No. 4.)

23 Q Mr. Porter, your codefendant served I believe 87 days  
24 and got a 5-year probation --

25 A Yes, ma'am.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 Q -- concerning that. Now, did you serve some time  
2 prior to your actual plea that you did?

3 A Yes, ma'am. From -- the day I caught the charge was  
4 on April the 1st of 2008. And then I bonded out on  
5 July the 4th of 2009. And at the time of my sentencing  
6 Mr. Hall never brought up none of that time, so. And I  
7 have filed motions about that time, and I haven't heard  
8 anything back about it.

9 Q And you did not get any credit for time served.

10 A No, ma'am.

11 Q And how much time was that total?

12 A I'm not sure. Like right at close to 16 months or  
13 somewhere in there.

14 Q Okay. You're asking for that credit.

15 A If possible. It wasn't asked for at the time of my  
16 sentencing. But if possible if I could ask the Court right  
17 now to look into it and maybe give me that time that I  
18 done.

19 Q Now, you're stating that Mr. Hall was ineffective in  
20 what he had you to plead to. Is that what you're stating?

21 A Yes, ma'am.

22 Q And can you tell us why you're stating that?

23 A I'm stating that because it was never inadvertent act  
24 in attempt armed robbery, and also because my gun charge  
25 was dismissed. And I was thinking once the gun charge

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 dismissed the other crimes should drop down to something.

2 The victim was never robbed.

3 Q Now, is it your statement the gun charge was dismissed  
4 and should not have been on violent and most serious?

5 A I'm thinking the gun would have made the crime violent  
6 if I'm not mistaken. The gun is what makes the crime  
7 violent. I don't -- I'm not armed with anything, but I'm  
8 charged with attempted armed robbery.

9 Q Okay. And the codefendant under these same  
10 circumstances only served 87 days and got probation.

11 A And got a possession of a firearm charge. That's the  
12 only thing.

13 Q Did you contact Mr. Hall prior to your plea asking him  
14 to do a thorough investigation of this case?

15 A Yes, ma'am. If possible could I continue on until I  
16 get?

17 "Counsel prejudiced me when he misinformed me that he  
18 could not attack the alleged confidential informant's  
19 credibility and reliability."

20 I told my attorney to investigate the driver of the  
21 car. And at this time I have a letter that I wrote to the  
22 public defender's office to Mr. Hall in 2008, received at  
23 the public defender's office October 28th of 2008. I wrote  
24 him explaining to him what happened that night, how I  
25 didn't have a gun, no crime wasn't done, and also what was

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 the minimum and the max they could do to me with just  
2 talking about something, because they only asked me what my  
3 plan was. They only asked what the plan was. And I gave  
4 them my plan. And to investigate the driver of the car  
5 because he was not charged at all. And I have this letter  
6 right here. If possible I want to put that in evidence  
7 too.

8 Q Was that letter ever answered?

9 A No, ma'am.

10 Q And you wrote that letter to Mr. Hall?

11 A Yes, ma'am.

12 MS. BOYCE: I'd like to have this marked as  
13 Defendant's 5.

14 (Copy of letter marked Applicant's Exhibit No. 5.)

15 Q Mr. Porter, in that letter you asked Mr. Hall to  
16 thoroughly investigate the case including the driver who  
17 you thought was the confidential informant.

18 A Yes, ma'am, because he wasn't charged. I wanted him  
19 to investigate so he can find out where the so-called tip  
20 come from, and also who is the informant.

21 Q Okay. And to your knowledge was that ever done? Did  
22 he contact you about any investigation that he did for you?

23 A No, ma'am. The times when I did meet with Robert  
24 Hall, the only thing he was talking about was my statement.  
25 He only put my statement up in my face, and the audio and

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 the video that you couldn't hear anything, you couldn't see  
2 anything that was thrown out.

3 He was saying basically you and your codefendant told  
4 them that y'all was going to do a crime. The only thing he  
5 seemed to offer me was the plea going to trial, would not  
6 be good. I could get up to 20 years. And I ain't  
7 understand the law. I know enough to know to attempt. I  
8 had to attempt. But I never attempted. I never told them  
9 I was going to attempt this crime. I only told them what  
10 the police asked me, and that was my plan.

11 Q And in -- meaning that, that's what you or the other  
12 codefendants had discussed.

13 A It was only a bunch of talk. It was never nothing  
14 that said we was going to put this in existence.

15 Q Right.

16 A It was just a bunch of talk.

17 Q And you were not apprehended in the middle of doing  
18 anything.

19 A No, ma'am. We was pulled over and taken out of a car.

20 Q Okay. Was your plea intelligently and voluntarily  
21 made?

22 A No, ma'am. But if possible could I keep on going  
23 through?

24 Q would you just tell me why it was not intelligently  
25 made first?

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 A It -- "Because Mr. Hall failed to adequately  
2 investigate and research the issues of my case and  
3 misinformed of the charge. He failed to tell me just to  
4 plan, it was a crime. He only told me that I had to plea  
5 because of my statement. And my guilty plea was not  
6 voluntarily, knowingly, intelligently made due to my lack  
7 of the understanding of the elements of the charge. And  
8 Mr. Hall never explained the elements of the charge. Once  
9 again, he told me based on my statement, only told me I had  
10 to plea."

11 Q Was conspiracy ever mentioned as a possible plea for  
12 you --

13 A No, ma'am.

14 Q -- or abandonment of the crime?

15 A No, ma'am. Never. Nothing else was never a choice  
16 for me besides --

17 Q Or entrapment.

18 A Nothing.

19 Q Any of those that appear lesser sentences were never  
20 discussed with you?

21 A Was never, was never.

22 Q Now, tell us why you think that you should get some  
23 relief under this P.C.R.

24 A Once again Mr. -- I feel that Mr. Hall failed to  
25 investigate my case, misinformed me of the charge. And due

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 to my lack of the understanding of the elements of the  
2 charge that he never explained to me, if I knew the  
3 elements of the charge I would've never pled to it.

4 I would've went -- I would have insisted on going to  
5 trial, because they charged me. I was charged with  
6 possession of a weapon during a violent crime and attempted  
7 armed robbery.

8 I knew from day one, like I was telling them in my  
9 statement, and the letter I wrote him. I'm not worried  
10 about a gun. I never had a gun. And the crime wasn't  
11 done.

12 Everything was just talk. There was nothing that was  
13 put in existence that we was going to do it. And the gun  
14 charge was threw out and the other charge was never dropped  
15 down to nothing lesser or nothing.

16 And I was thinking I plead to the gun charge the  
17 other -- if I -- the gun charge throwed out and I plead to  
18 the other it'll drop down to -- drop down to something  
19 else. It should. I was never told anything else.

20 Q Now, you also stated Mr. Hall never explained the  
21 elements of what you were pleading to.

22 A Yes, ma'am.

23 Q Okay. So what was your understanding of what you were  
24 pleading to?

25 A To my understanding once the gun charge was throwed

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 out the attempt no longer existed because it was not a  
2 crime that was acted on. And the gun charge what would  
3 keep -- would have it armed. So if the gun charge was  
4 throwed out, I didn't understand.

5 Q Now, but for Mr. Hall talking to you -- and how did  
6 you come to plea, do that plea?

7 A Well, I just felt he kept telling me by my statement.  
8 I guess I was telling him I was going to do it. That's  
9 what he said me and my codefendant did. I felt like my  
10 back was up against the wall. I had no other -- any other  
11 choice, you know.

12 So and when I signed off on the plea, like I said, I  
13 was thinking if the gun charge was dropped, the other  
14 charge was dropped down to a lesser charge, that I wouldn't  
15 be serving 15 years violent, most serious, that amount of  
16 time that I'm serving right now.

17 Q And that gun charge was dropped.

18 A Yes, ma'am. The guns was to the front of the car. As  
19 it was stated in my plea transcript, it was to the front of  
20 the car. Since day one of the charge I been saying that  
21 the gun was not mine.

22 Q And did you later find out that the attempt without  
23 you actually putting it into action was not an attempt and  
24 should not have been something that was pled to?

25 A Yes, ma'am. Later I did find that out from studying,

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 that just planning and preparation as I was telling him to  
2 ask what my plan was, that it's not attempt because it  
3 wasn't inadvertent act on the attempt.

4 I know they had a tip from the informant, but it was  
5 nothing that was never put in existence. They pulled the  
6 car over and arrested, said they had a tip from somebody  
7 that the crime was going to go on. The crime was never  
8 done.

9 Q Now, what did Mr. Hall tell you that made you go ahead  
10 with the plea?

11 A At the time when I signed off on the plea he was just  
12 really telling me I was guilty by my statement.

13 I'm lacking understanding because I didn't know what  
14 was going on. I don't study law. I don't know what was  
15 going on. So I put my trust and was hoping everything was  
16 going to be straight. And now that I've studied it I see  
17 if I'd knew what I know I would have insisted on going to  
18 trial. I would have had a better option. I might would  
19 have had got a lesser sentence if I would have went to  
20 trial.

21 Q You feel like you were misinformed.

22 A Yes, ma'am.

23 Q And you are asking this court to withdraw that plea.

24 A If possible, yes, ma'am.

25 Q Is there anything else you'd like to tell the Court

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 concerning your P.C.R.?

2 A Yes, ma'am. I'd like to continue with my -- with my  
3 notes.

4 "Counsel Robert Hall prejudiced me when he failed to  
5 inform me and properly investigate the offense of  
6 entrapment. And the C.I., Fredrick Drummond, was the one  
7 who came to Charity Smith and me with a plan, which I told  
8 my attorney that I strongly believed that the C.I. was the  
9 driver of the car, which was -- which who was never charged  
10 at all, which the idea of the C.I. was valid to my defense  
11 of entrapment and then was valid to show he was a known  
12 participant in the crime himself. The police report nor  
13 the state could lawfully state that the C.I. was only a  
14 mere tipster because he -- because he created entrapment  
15 and planned the crime himself, which denied me the right to  
16 confront this witness or C.I. But for counsel's errors I  
17 would have not pled guilty. I would have went to trial.  
18 Counsel failed to inform me that if the state had made a  
19 deal with my codefendant, just any witnesses that was going  
20 to testify against me, they or their credibility could have  
21 been attacked per rule 404, 607 and 608 and 609, also upon  
22 any bias. Counsel prejudiced me when he failed to inform  
23 me that my guilt could have been removed from my  
24 codefendant Charity Smith's statement and that if she did  
25 not testify against me her statement could not be used

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 against me. My guilty plea was not voluntarily nor  
2 intelligently made. Due to my arguments I would not have  
3 pled guilty but would have insisted on going to trial,  
4 therefore if it were not for counsel Robert Hall's acts  
5 and/or omissions, and my guilty plea was not voluntarily  
6 nor intelligently made due to my lack of the understanding  
7 of the elements of the charge, and Mr. Hall never explained  
8 the elements of the charge to me."

9 THE COURT: You're going to have to hold your head up  
10 and speak out because the court reporter can't understand  
11 what you're saying. Slow it down and speak up.

12 THE WITNESS: Okay. Sorry, Your Honor. I'm sorry  
13 about that.

14 A "My guilty plea was not voluntarily nor intelligently  
15 made. Due to my arguments, I would not have pled guilty  
16 but would have insisted on going to trial if it were not  
17 for counsel Robert Hall's acts and/or omissions. Also, my  
18 guilty plea was not voluntarily nor intelligently made due  
19 to my lack of understanding of the elements of the charge.  
20 And Mr. Hall never explained the elements, explained to me  
21 the elements. Mr. Hall only told me that by my statement  
22 and my codefendant's statements I had to plea because he  
23 told on what was going on, and I stated to him from day one  
24 that it was only about a plan, that's what the officers  
25 asked us that night, about our plan. That was all."

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 Q Now, the incident report does list that you had  
2 codefendants. You said one was never apprehended.

3 A The driver -- the driver of the car was never  
4 apprehended at all.

5 Q And Charity Smith was the other codefendant that  
6 received the five years probation?

7 A Yes, ma'am.

8 Q Now, and the gun charge you said was dropped against  
9 you.

10 A Yes, ma'am.

11 Q Ms. Smith did have the gun charge, and that's what she  
12 pled to.

13 A Yes, ma'am. As I state in my -- in the motion for  
14 discovery, was found in the pocketbook in between her legs.

15 Q Okay. Now, under these same circumstances of the  
16 attempted robbery that was not anything that she was  
17 charged with.

18 A Excuse me. Could you repeat that again?

19 Q Under the same circumstances in that vehicle, what was  
20 going on with you and her, was the exact same issues and  
21 circumstances. And she got five years probation.

22 A Yeah, everybody -- everybody except the driver who was  
23 driving the car was charged with possession of a weapon  
24 during a violent crime and attempted armed robbery. But at  
25 the end my gun charge was throwed out and I was charged

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 with attempted armed robbery. And it wasn't no crime of  
2 gun. And she was caught with her gun, and her attempted  
3 armed robbery was dismissed.

4 Q Okay.

5 MS. BOYCE: Your Honor, I'd like to have marked the  
6 incident report that has Mr. Porter and Ms. Charity in  
7 those circumstances that he's explained to the Court.

8 (Incident report marked Applicant's Exhibit No. 6.)

9 Q Mr. Porter, you were charged under the statute of  
10 16-11-0330, which is the robbery, attempted armed robbery,  
11 or alleged robbery. And you had no weapon that was charged  
12 you at the time of this plea.

13 A No, ma'am.

14 Q Okay.

15 A I never had a weapon at all in that car.

16 Q And there was a gun charge that was dropped.

17 A Yes, ma'am.

18 Q Tell us why you went ahead and pled to attempted  
19 robbery of a violent nature. Why did you do that?

20 A Because I was thinking once the gun charge was thrown  
21 out, thrown out, if I did plead to it, it would be a  
22 lesser charge and it would be nonviolent, because the gun  
23 is what made the whole crime violent. That's the only  
24 reason.

25 Q Okay. And without the gun charge you felt that you

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 would have a lesser sentence.

2 A Yes, ma'am.

3 Q And Terrance Smith did get a lesser sentence and did  
4 not get the attempted robbery under those same  
5 circumstances you had.

6 A Yes, ma'am, under the same circumstances.

7 Q Do you believe that Mr. Hall's conduct is such that it  
8 made you go forward in doing the plea even though you were  
9 under the same circumstances as this other young lady that  
10 got probation?

11 A Well, like I said, I signed -- when I signed off on it  
12 from -- I was thinking that the charge was going to drop  
13 down. That's the only reason why I signed off on the plea.  
14 I was thinking it would a lesser charge.

15 Q Now, you said Mr. Hall would not question the  
16 confidential informant concerning it, or said he could not.

17 A In the letter I wrote him in 2008 I was asking him to  
18 investigate to find out where the tip came from, to find  
19 out who the informant was. And the times we met it was  
20 never anything that was brought up. He never tell me who  
21 the informant was. I still don't know, really know, to  
22 today. I could take a guess, because the driver was never  
23 charged, was never taken into custody.

24 Q You're the only one that got significant time for  
25 these same circumstances.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 A Yes, ma'am. I have -- this case where they had the  
2 informant and a tip, the police report said trio, and they  
3 pulled the car over. I'm the only one that is serving  
4 time.

5 Q Okay. Now, how many meetings did you have with  
6 Mr. Hall?

7 A Roughly, I'm going to say at least three or four.

8 Q Okay.

9 A And every time I did meet with Mr. Hall we never  
10 thoroughly went through my motion of discovery, or  
11 basically it was just my statement and her statement, what  
12 was put up, saying we told them that's what we was going to  
13 do. And I been telling them since day one that it was just  
14 a plan. It was never nothing. That's what the police  
15 asked me.

16 And he would put -- put the audio and video up and say  
17 they couldn't use it, they was going to throw it out. The  
18 only evidence he sees is my statement and my codefendant's  
19 statement. That's what he was telling me. But I'm  
20 explaining to him that my statement was only based on what  
21 they wanted to know and that was my plan. It was never on  
22 anything that I was going to do.

23 Q So Mr. Hall was aware that the gun charge had been  
24 thrown out, that there was no weapon involved in what you  
25 were pleading to.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1 A Yes, ma'am. He was aware of all of this.

2 Q Okay. And that the audio and video of whatever was  
3 going on was not usable, is that correct?

4 A Yes, ma'am. They had dismissed it. You couldn't hear  
5 anything; you couldn't see anything.

6 Q And with all of that combined you thought that what  
7 you were pleading to was going to be a lesser amount of  
8 time.

9 A Was going to be a lesser amount of charge.

10 Q But are you saying that still Mr. Hall -- saying that  
11 you had to do the plea? What was his statement to you that  
12 made you do it?

13 A It was based -- just based on my statement and my  
14 codefendant's statement that I was telling them I was  
15 guilty just based on that. That's why I signed off on it.  
16 I was thinking they had a tip from confidential informant,  
17 really just on talk, just on a mere plan and just planning  
18 something. You got three people. I'm thinking maybe it  
19 might would have been something more like conspiracy.

20 I didn't have a gun. He didn't investigate, didn't  
21 give me no other options but to plea -- but to plea. And  
22 when I come and the gun charge was dismissed and him and  
23 also Barry Barnette had me in Barry's office and they  
24 wanted me to come and testify that the guns was in the car,  
25 yes, I did tell him I was.

Thomas Edward Porter  
Direct examination by Ms. Boyce

1           But at the time I was going to go to court on the  
2 attempted armed robbery charge too. I'm not going to lie.  
3 I was a little shook, a little scared. And I took that as  
4 opening to get back to my family, the things I love,  
5 because I wasn't going to come and get on the stand and  
6 testify and say the guns was in the car, that they was  
7 somebody's guns they wasn't.

8           only two peoples apprehended outta the car. So, man,  
9 if I was going to come and get on the stand and say they  
10 was in the car, it was going to be my codefendant.

11          The driver was never apprehended, and the shotgun was  
12 beside him on the front passenger door right beside him. I  
13 was in the back passenger seat.

14          I wasn't going to come and get on the stand and put my  
15 hand on the Bible and lie. I wasn't going to do that for  
16 him. So I ran. I did run. But I wasn't going to get on  
17 the stand and lie for them.

18 Q       But none of the guns were associated with you, with  
19 that charge that was dropped.

20 A       No, ma'am, no, ma'am.

21 Q       So did you think your sentence should have not come  
22 under the violent and most serious as it was?

23 A       I don't think it should have been violent because I  
24 have no weapon. Even if the crime -- even if it was  
25 attempt, it was going to be attempt. I had no weapon. It

Thomas Edward Porter  
Cross-examination by Ms. White

1 was no attempt at all, no crime at all, just a bunch of  
2 talk.

3 My gun charge was throwed out, and I still have 15  
4 years under violent and most serious. I think it shouldn't  
5 have been violent at all.

6 Q Is there anything else concerning this?

7 A No, ma'am.

8 Q Thank you.

9 CROSS-EXAMINATION

10 BY MS. WHITE

11 Q Mr. Porter, you pled on February the 4th of 2010, is  
12 that right?

13 A Yes, ma'am.

14 Q And you were sentenced November 8th of 2011.

15 A Yes, ma'am.

16 Q Isn't it true that they had trouble finding you and  
17 had to issue a bench warrant for your arrest?

18 A Yes, ma'am, that is true.

19 Q Okay. And on the day that you pled the Court told  
20 them that you were pleading to a count of attempted arm  
21 robbery. And they ran over the facts.

22 They also told you that it was a zero-to-20-year  
23 charge, that it was violent and most serious. And you said  
24 you understood that, is that right?

25 A Yes, ma'am, but I --

Thomas Edward Porter  
Cross-examination by Ms. White

1 Q And you also said when they asked you if you agreed  
2 with the facts and if your attorney had gone over with you  
3 all of these things in preparation for the plea, you said  
4 he had.

5 A He never explained to me the elements -- of my lack of  
6 understanding of the elements of the crime. He never  
7 investigated my case.

8 Q Okay. So when the Court asked you if you were  
9 pleading guilty because you were guilty and you said, "Yes,  
10 sir" --

11 A I pled guilty because the gun charge was dismissed.  
12 And I knew once the gun charge was dismissed the other  
13 crime should have dropped down.

14 Q Okay. You pled guilty to attempted armed robbery. So  
15 when you were pleading guilty you knew the charge wasn't  
16 being dropped down because you were pleading to the  
17 attempted armed robbery.

18 A The whole time he was telling me to plead I had asked  
19 him wasn't the other charge dropped down. On the day they  
20 asked me to work with them to come and testify, I asked him  
21 and Barry Barnette what -- when they asked me they would  
22 help me -- they told me it would help me if I come and  
23 testify the guns was in the car.

24 I asked them why would I need help when the gun charge  
25 was dismissed. There's no crime. And the other crimes

Thomas Edward Porter  
Cross-examination by Ms. white

1 dropped down. I asked him that. And I did say I was going  
2 to help them, but I wasn't going to help them. I wasn't  
3 going to lie. I wasn't going to help them.

4 Q Okay. So when the Court said -- when they said that  
5 they found a .38 in Ms. Smith's purse and found a shotgun  
6 and a ski mask actually in the back passenger side beside  
7 you, and you agreed with that at your sentencing, you're  
8 testifying that was a lie?

9 A I didn't agree to that, because in my plea transcript  
10 Robert Hall himself stated that the guns was to the front  
11 of the car. That's why the charge was getting dismissed in  
12 my plea transcript.

13 Q Have you looked at your sentencing transcript?

14 A My sentencing, yes, I have looked through it.

15 Q And when the Court said -- went through the facts with  
16 you on this, they said during the traffic stop  
17 investigators were able to recover a .38 caliber revolver  
18 and a black purse belonging to Charity Smith. "The purse  
19 was located in the front passenger floorboard where Smith  
20 had been seated. At that time a ski mask and shotgun was  
21 found in the driver's-side back seat that belonged to  
22 Thomas Edward Porter."

23 The Court asked you again, "Were you listening to the  
24 facts? Are those the same facts that were given at the  
25 plea and are those true?"

Thomas Edward Porter  
Cross-examination by Ms. White

1           And you said, "Yes, sir."

2   A     At the time, as I been telling Mr. Hall, he didn't  
3   investigate. I telling him I was only a passenger in the  
4   car. I was in the back seat.

5           I didn't have a gun. Fingerprints wouldn't have been  
6   lifted off a gun. I let him know that it wasn't mine. And  
7   as Mr. Hall stated in my plea transcript, when the gun  
8   charge was dismissed he was telling the courts that the gun  
9   was to the front of the car.

10   Q     So when you agreed with the facts that you had a  
11   shotgun and a mask in the back with you, was that a lie?

12   A     Mr. Hall misinformed me.

13   Q     No. You knew if there was a gun and a mask with you.  
14   Mr. Hall wasn't there with you.

15           Did you lie to the Court when you said that was true?

16   A     I didn't -- I did not lie to the Court. I never had a  
17   gun. It -- what they went on, what they fount [sic] in the  
18   car and said I had a gun, they had to do some kind of  
19   investigation, fingerprint or anything. I knew from day  
20   one -- I'm telling them I didn't have a gun. My  
21   fingerprints wasn't going to be lifted off of it. I was  
22   just a passenger.

23   Q     Did you also agree with the Court and say the facts  
24   were accurate when they said, "Both Smith and Porter  
25   further stated their intent was to rob the victim of

Thomas Edward Porter  
Cross-examination by Ms. White

1 illegal drugs and money and meth. Fredrick Drummond, the  
2 driver, was clueless about their interest to commit the  
3 crimes and was asked to drive them to the incident  
4 location."

5 A That is not what happened. I was telling Mr. Hall.

6 Q But I'm not asking you what you told Mr. Hall. I'm  
7 asking you what you swore to tell and swore and told the  
8 Court at your sentencing.

9 A At my sentence I never -- I don't remember that. I  
10 don't remember doing that.

11 Q You don't remember swearing to tell the truth?

12 A Because I didn't have -- I didn't have a firearm and I  
13 didn't have intent on robbing the victim that night. That  
14 has been my -- since my statement of day one of that  
15 night -- letters I wrote and meetings with him. I have --  
16 I have let them know that.

17 Q So when you said at your sentencing that your attempt  
18 was to rob, when you agreed with those facts, that was not  
19 true. You were telling the Court a story?

20 A On the day of my sentencing -- sentencing on November  
21 that day after they apprehended me, a week before that when  
22 I come -- the morning I talked to Robert Hall, before then  
23 I was asking him what was going to happen, did he know.  
24 And he was just mainly tell me it's up to the judge, he  
25 don't know what's going to happen. So I just felt like my

Thomas Edward Porter  
Cross-examination by Ms. White

1 back was up against the wall. I had no other -- I had no  
2 other choice.

3 Q So you felt like it was -- it was your only chance,  
4 was to lie to the Court and agree with them?

5 A No, no, ma'am. But I didn't state that like that, no,  
6 ma'am.

7 Q Okay.

8 A No, ma'am.

9 Q All right. They actually tried to get you to  
10 cooperate. As you stated, you actually had not planned to  
11 cooperate and did not cooperate with them, is that right?

12 A The only reason why I said that, because at the time I  
13 was trying to tell them to investigate things, get some  
14 confidential informant in the car.

15 The driver was not charged, and the gun was right  
16 beside him, beside his door running between -- running  
17 between the driver's side and passenger-side back door.  
18 I'm behind the passenger, not behind the driver.

19 And I wasn't going to come and take the stand and say  
20 the gun -- who -- who was I going to say the gun was? My  
21 codefendant has got caught with a gun, charged with it.  
22 The driver was not apprehended. So I didn't understand. I  
23 wasn't going to get up here and lie for them.

24 Q Did your attorney talk with you about the fact that if  
25 you did cooperate it might help you with your sentence?

Thomas Edward Porter  
Cross-examination by Ms. White

1 A Yes. He said something of that nature, but I stopped  
2 him and Barry Barnette and asked them why would I need help  
3 when the gun charge was throwed out, when the other charge  
4 dropped down. But they wanted me to help myself and come  
5 and testify that the gun was in the car.

6 Q My question to you is did anybody ever tell you they  
7 were dropping the attempted armed robbery charge down, or  
8 is that something that you thought ought to happen?

9 A No. When I asked him that morning when they asked me  
10 about pleading, yes, I tell him about the gun charge. He  
11 was telling me he didn't know whether it'd be zero to ten,  
12 or ten years and a lot of time or a little time.

13 He didn't only basically tell me help myself, help  
14 them come and testify. And once the gun was dropped the  
15 other charge should have been dropped down to a lesser  
16 offense.

17 Q And that's your opinion. That's what I'm saying.  
18 Nobody ever told you the charge was being dropped down.  
19 That's your opinion that it should have been dropped, is  
20 that right?

21 A would you repeat that?

22 Q when you say the charge should have been dropped down,  
23 that is your interpretation, your opinion, of what should  
24 have happened. No one ever promised you or told you that  
25 you were pleading to a lesser charge --

Thomas Edward Porter  
Cross-examination by Ms. White

1 A I didn't --

2 Q -- than attempted armed robbery.

3 A That day I didn't understand why I would have to come  
4 and testify that a gun was in a car that didn't belong to  
5 me. Why would that have to do with my charge, being  
6 helping me out, when the gun was already thrown out? Why  
7 would I need help?

8 Q I'm not asking. I'm not asking -- maybe you don't  
9 understand my question.

10 Did Mr. Hall ever tell you that you were pleading to  
11 any other charge other than attempted armed robbery? Yes  
12 or no?

13 A No, ma'am.

14 Q Okay.

15 A But at the time --

16 Q That's all I need.

17 MS. WHITE: Your Honor, that's all I have for this  
18 witness.

19 THE WITNESS: Could I say something, Your Honor?

20 THE COURT: No.

21 Do you have any other --

22 THE WITNESS: Could I say something, Your Honor?

23 THE COURT: No, sir.

24 Anything further, Ms. Boyce?

25 MS. BOYCE: I just have one question, Your Honor.

Thomas Edward Porter  
Redirect examination by Ms. Boyce

1 REDIRECT EXAMINATION

2 BY MS. BOYCE

3 Q In your communications with Mr. Hall did you have on  
4 the end of your letter that if he were not going to help  
5 your case to let him know?

6 A Yeah. I asked him.

7 THE COURT: Excuse me just a minute.

8 Ma'am, what did you just say? I'm talking to you.

9 Stand up. What did you just say?

10 UNIDENTIFIED PERSON: I was talking about him.

11 THE COURT: Oh, I understand.

12 Take her into custody. Put her in the back room,  
13 please.

14 UNIDENTIFIED PERSON: I didn't say nothing.

15 THE COURT: Oh, yes, ma'am. You most certainly did.  
16 I saw you.

17 UNIDENTIFIED PERSON: Oh, Lord.

18 THE COURT: And heard it too.

19 UNIDENTIFIED PERSON: I didn't say nothing.

20 THE COURT: You're not at your home. You're in court  
21 today. You act differently up here.

22 UNIDENTIFIED PERSON: I was just --

23 THE COURT: If anybody else has anything to say,  
24 you'll be taken into custody too. Would you like that?

25 All right. Remove those three off the back row.

Thomas Edward Porter  
Redirect examination by Ms. Boyce

1 Outside. Don't come back.

2 (Whereupon, unidentified persons were removed from the  
3 courtroom.)

4 THE COURT: All right. Ms. Boyce.

5 BY MS. BOYCE

6 Q I just have one follow-up question, Mr. Porter.

7 A Yes, ma'am.

8 Q Did you write in your letter to Mr. Hall anything  
9 concerning people not wanting to help you, that you wanted  
10 to change counsel or something of that nature?

11 A In a letter. I was explaining to him what happened  
12 that night, that I didn't have a gun and no crime was done.  
13 There was no crime done at all. And the driver wasn't  
14 charged.

15 And I also asked him at the end of the letter to find  
16 out where the tip came from, to investigate the driver of  
17 the car, and also if he wasn't going to help me would he --  
18 would he let me know if he wasn't going to help me, would  
19 he let me know.

20 Q Did you get any response to that letter?

21 A No, ma'am.

22 Q Thank you.

23 MS. BOYCE: I have no further questions.

24 MS. WHITE: Nothing further, Your Honor.

25 THE COURT: You may step down.

Robert B. Hall  
Direct examination by Ms. White

1 MS. BOYCE: That's the plaintiff's case, Your Honor.

2 MS. WHITE: Your Honor, the state would call Robert  
3 Hall.

4 ROBERT B. HALL, having been  
5 first duly sworn, testified as follows:

6 DIRECT EXAMINATION BY MS. WHITE

7 Q Could you please state your name for the record?

8 A Robert Hall.

9 Q And, Mr. Hall, in what capacity did you -- were you  
10 involved in Mr. Porter's case?

11 A I came to the public defender's office sometime in  
12 June of 2008, and this was one of the cases I had gotten  
13 from Josh Schultz.

14 And I represented him I think within a month or two.  
15 I found out that he was out of jail, because the first  
16 thing I did was try to find him. He wasn't in jail. He  
17 had gotten out.

18 And I got discovery I think in July. And I think I  
19 talked to his mother, and she said he was in Turbeville  
20 doing a sentence there.

21 Q And in your conversations with him -- Mr. Porter said  
22 y'all met maybe three or four times. Do you recall what  
23 you might have discussed at these meetings?

24 A Oh, yes. We discussed the charges, that he gave a  
25 statement. We did discuss the issue of the attempt and how

Robert B. Hall  
Direct examination by Ms. White

1 far you go in that.

2 And we talked about the likelihood of going to trial  
3 and what a jury could find based on what the state had,  
4 that his statement, that they intended to go in and rob the  
5 person at the apartment of drugs and money, and what his  
6 chances were.

7 He was -- once he got out of the Department of  
8 Corrections he was not easy to get, but he was a lot easier  
9 before we cut the -- got the offer from the solicitor's  
10 office and pled.

11 After that I couldn't get him. He just disappeared  
12 and never responded.

13 Q Tell me about the facts of the case as you heard them  
14 told by Mr. Porter and as were presented to the plea.

15 what was your understanding of what had happened that  
16 night?

17 A That the police -- and we did have a good surveillance  
18 video where they are sitting up near the apartment where  
19 the -- there was a target here. Sitting, waiting.

20 They had information from their informant that they  
21 would be coming I think in a particular type of car and an  
22 approximate time, and just a lot of chatter, the police  
23 officers and then more excited talk.

24 One of the surveillance vehicles said they had seen  
25 the vehicle headed that way. And they basically stopped

Robert B. Hall  
Direct examination by Ms. White

1 them. I think the video stopped before the actual stop.  
2 But they stopped the car going into the apartment complex.  
3 And as the police explained it, they wanted to stop them  
4 before they had a chance to get out with guns.

5 And there was a .38. And I think like he said in  
6 the -- Ms. Smith's pocketbook -- and a shotgun. This  
7 wasn't a large sedan, so a shotgun that's beside the driver  
8 is going to be in the back seat also. There's just no room  
9 for it to be otherwise.

10 Ms. Smith and Mr. Porter gave statements that night  
11 that they intended to go rob. And they were not just  
12 planning it. They had the guns. They had a mask. They  
13 were in the car and pulling into the parking lot when they  
14 got stopped.

15 Q And that was the parking lot of the intended victim?

16 A Yes.

17 Q Okay.

18 A I think the -- I think it was discussed with  
19 Mr. Porter that the video surveillance would be a little  
20 embarrassing I think from some of the language that the  
21 police officers were using. But I don't think it was going  
22 to help him a whole lot there.

23 When the case came up on the docket I was able to get  
24 in touch with Mr. Porter. Mr. Barnette said will he  
25 cooperate. He told me he was interested in cooperating.

Robert B. Hall  
Direct examination by Ms. White

1 We talked.

2 The gun charge per the agreement was that he would  
3 cooperate against the codefendant, that once he pled guilty  
4 to the attempted armed robbery the gun charge would be  
5 dismissed, which it was. And after he -- it's pretty  
6 standard in this circuit.

7 After he cooperated based on his testimony and did  
8 what he did, that would affect what sentence he would get.  
9 Basically, you do a good job, we're going to tell the judge  
10 you did a good job and ask for a better sentence for you.

11 Q And to your understanding did he ever cooperate? Were  
12 you able to -- were they able to get in touch with him to  
13 help?

14 A It was probably I think about a year after he pled  
15 Barry contacted me and said I want to do the plea.

16 We sent a standard letter. They wanted to plea in  
17 April of two thousand -- or be sentenced in April of 2011.

18 He sent that e-mail to me in March. The next day I  
19 tried all of the numbers I had for him and mailed another  
20 letter myself. The office sends one out any time  
21 somebody's on the docket. Before this one had got put on  
22 any kind of docket I mailed a letter.

23 One number the voice mail was full, another was  
24 disconnected. And I started doing all kinds of internet  
25 searches, looked for -- to see if he owns a car, get an

Robert B. Hall  
Direct examination by Ms. White

1 address, and if there's something different we exhausted  
2 those and tried all of the numbers I could find that way.  
3 I even contacted probation, pardon and parole since he was  
4 on parole.

5 As I recall, at the plea hearing they served a  
6 violation of parole warrant on him. I implored Judge Couch  
7 to allow a bond to be set on that. He let me represent him  
8 and set a bond.

9 And I think the -- we had already arranged for the  
10 bondsman to be present or close by to say that after he  
11 entered the plea he would remain on the bond. So I think I  
12 got his family hooked up with that so he could get out.

13 I couldn't get him. I didn't get response. I did get  
14 through probation and parole. I got a number that spoke  
15 with the brother of his that I asked -- I said he's got to  
16 call me, I've got to talk to him, we've got to get this  
17 sentencing set up.

18 I tried his -- the number I had from probation and  
19 parole on his mother. I got no answer.

20 I kind of got -- I did what I could do, and I think  
21 Barry kind of forgot about it or whatever, but he did not  
22 push the issue then. And I believe it was set again in May  
23 or June, and then or June. I tried every number I had to  
24 reach him.

25 I sent -- the office sent letters; I sent letters.

Robert B. Hall  
Direct examination by Ms. White

1 The two letters that I did myself -- the first one said if  
2 you don't appear, there's going to be a bench warrant. The  
3 second one I not only put that. I did it in bold type.

4 I had my direct line, special second number, I had it  
5 in bold type, this is my direct line we need to talk. And  
6 the first letter after -- in March, it was just in regular  
7 type. It had my direct line, not just the office line.

8 I addressed -- spoke with the brother all the way  
9 until June. His -- he had a -- basically the brothers told  
10 me, you know, quit bothering me. That was true even back  
11 before the plea, the one brother. But he was the one that  
12 had a number that I usually could get. But he did not want  
13 to take any other message; that occasionally I think he  
14 apparently told him that I had called but would not say  
15 anything else.

16 Q Tell me about real quick -- he's alleged that you  
17 didn't review with him any of the elements of the crime or  
18 talk with him about any possible conspiracy charges or  
19 anything. What -- what's your recollection?

20 A We did talk about the possibility of conspiracy. Mr.  
21 Barnette would not entertain that. He said -- and I told  
22 Mr. Porter this is -- this is your offer, and what kind of  
23 sentence you get on this ultimately depends on your  
24 cooperation. But Barry would not go to conspiracy.

25 You know, had we gone to trial, depending on how the

Robert B. Hall  
Direct examination by Ms. White

1 evidence was presented, what came in, might have gotten  
2 that charge, but you don't know until you go to trial.

3 Q Was there anything involving this C.I.? There's been  
4 several mentions that maybe the driver was the C.I. and  
5 that should have been investigated because he was never  
6 charged.

7 A Well, the driver could have been the C.I., but I think  
8 Barry Barnette made the assertion that that guy was  
9 innocent and that that was pretty much based on the C.I.  
10 gave the information that way.

11 They would not tell me who the C.I. was. To find the  
12 C.I. we would have had to have gone to trial. But what was  
13 laid on us -- laid in front of us was you plead to this,  
14 you'll be sentenced according to your cooperation, when you  
15 plead we drop the gun, that takes five years off the table.  
16 Mr. Porter understood that.

17 But in the long run we -- we could not find him. As I  
18 recall on the issuance of the bench warrant, I was in  
19 another court.

20 I can't remember if I was trying a case or what, but  
21 they took me from the other courtroom into judge's -- I  
22 think Judge Couch's courtroom. And they said, "Mr. Hall,  
23 have you been able to find your client," basically. And I  
24 said I called every number, I've sent letters, I've not  
25 been able to find him. And the judge says, well, there's a

Robert B. Hall  
Direct examination by Ms. White

1 bench warrant.

2 I was trying to find him, trying to delay that -- keep  
3 from getting a bench warrant issued because things would  
4 have been a lot better for him.

5 If he'd have come in I'm not -- I can't say that Barry  
6 necessarily would have said we're going to withdraw that  
7 plea and do a better one. He was going to cooperate.

8 But once we could not find him -- and I'd put Barry  
9 off for two or three months. You know, he -- he made his  
10 decision. He said his mother was sick and he needed to  
11 take care of her. But if he'd have come in I think things  
12 would have been a lot better.

13 Q And did you have any concerns over his -- whether or  
14 not he understood the situation, the plea agreement and  
15 what he was pleading to on the day of his plea and then the  
16 sentencing?

17 A Oh, I had no concerns. He understood it. We went  
18 over it. The judge went over it.

19 He understood that after he pled guilty, then the gun  
20 charge would be gone. And what that did is gave him five  
21 less years he was facing.

22 Q Okay. Thank you, Mr. Hall.

23 MS. WHITE: That's all I have at this time, Your  
24 Honor.

25 THE COURT: Ms. Boyce.

Robert B. Hall  
Cross-examination by Ms. Boyce

1 CROSS-EXAMINATION

2 BY MS. BOYCE

3 Q Mr. Hall, did you say what -- can you tell what  
4 evidence there was against my client at that time?

5 A We had the police setup, taking a video of them  
6 pulling up.

7 Q Was the video -- was it visible?

8 A Yeah.

9 Q You could see?

10 A Oh, you could see; you could hear.

11 Q Okay.

12 A The -- now, it's at night. I mean, you can't see a  
13 lot of details, but you can see a car pulling up. You can  
14 hear the police, the radio, the contact they're doing on  
15 the radio that, you know, we spotted the car, it's headed  
16 your way. Okay. It's pulling in the apartment complex.

17 And then they went and pulled them over. I think  
18 there was more than one car involved in that -- that in  
19 that car the informant had told the people that would be  
20 there. They had weapons.

21 Ms. Smith and Mr. Porter both gave statements and  
22 said, yeah, we had these weapons and we were going there to  
23 rob. We -- he's a dope dealer, we're going to go to steal  
24 dope and money from him basically.

25 The -- like I said, we discussed with him, you know,

Robert B. Hall  
Cross-examination by Ms. Boyce

1 the whole idea of planning's not enough but going, you  
2 know, depending on how close you come to it, it's more  
3 serious. And he -- I felt like he understood that.  
4 He's -- he's a fairly intelligent person.

5 Q Now, can you tell me why the most serious and violent  
6 was still on the sentencing sheet even though the gun  
7 charge was dropped?

8 A Because by law attempted armed robbery is a most  
9 serious, violent offense. The gun charge was not dropped  
10 until the plea was complete.

11 Q The same day? Is that what you're saying?

12 A I assume. I -- I don't know what day it was, but  
13 that's -- that's the way it was.

14 Q Okay.

15 A And I think since he didn't respond, I don't know that  
16 the state might not could even have brought that charge  
17 back up because he didn't complete his end of the  
18 agreement.

19 Q Okay. Do you agree with Mr. Porter's assessment that  
20 since the gun charge was dropped that he should have gotten  
21 to plead to something lesser like conspiracy, abandonment  
22 or entrapment?

23 A Entrapment, I don't understand, but if he had shown up  
24 when he was supposed to and hadn't been hiding and they  
25 didn't have to issue a bench warrant, could I have talked

Robert B. Hall  
Cross-examination by Ms. Boyce

1 Barry into doing something lesser? That may have happened,  
2 but that -- I didn't have that opportunity because I didn't  
3 have a client.

4 What I do agree -- I agree he deserves about 15 more  
5 months of credit than he got because he was arrested on  
6 this and was in custody for 15 months before he made bond,  
7 albeit some of it in the Department of Corrections.

8 But as far as -- there were guns involved. The charge  
9 was that they attempted, they had a plan and put that plan  
10 into motion to go rob somebody with a deadly weapon, all  
11 because they dropped the gun part. That doesn't change  
12 what the facts were, that there were guns present.

13 Q Okay.

14 A And they're in, you know, partially in the back seat  
15 with him.

16 Q Okay. Now, at any time do you recall telling  
17 Mr. Porter that since the guns were in the front of the  
18 car, is the reason why the gun charge was dropped against  
19 him?

20 A No. The gun charge was dropped against him as part of  
21 the plea to take five years off the table.

22 Q Okay. Would you agree in hindsight that Mr. Porter  
23 should have been allowed to plead to something lesser?

24 A Had he followed through maybe. If we had gone -- the  
25 question is if we'd gone to trial based on the evidence

Robert B. Hall  
Cross-examination by Ms. Boyce

1 they had could a jury have found him guilty of attempted  
2 armed robbery. I think so.

3 Had he cooperated like he agreed to could we have  
4 gotten a better sentence, I don't know that they would have  
5 somehow changed the charge, let him withdraw that plea and  
6 do another plea. But he would have gotten a much better  
7 sentence.

8 I think his failure to come in and respond when we  
9 tried to get him -- I think the bondsman tried to get  
10 him -- it's probably why he got the sentence he got. And  
11 I've explained that to his family several times.

12 And while we were -- I was trying to find him for  
13 those three or four months, I said if he doesn't come in  
14 they're going to hammer him, he needs to come in. And I  
15 never got to talk to him until he got arrested on the bench  
16 warrant.

17 His family -- he has one brother that I've met -- I've  
18 talked to since the sentencing that is very nice, very  
19 cooperative. But he has one brother that doesn't want to  
20 help anybody, doesn't even want to be bothered with it.  
21 And his -- the numbers I had for his people changed  
22 constantly or weren't working.

23 Q Do you recall Mr. Porter calling you at any time  
24 during those three months and talking with you -- three  
25 months you said you were looking for him?

Robert B. Hall  
Cross-examination by Ms. Boyce

1 A I think one time he did contact me and say that he --  
2 his mother was ill, her backbone was deteriorating and he  
3 has a new baby and he's not coming in. That was in either  
4 April, May or June. I can't remember for sure. But I do  
5 have notes that he did call. And I assume it was him.  
6 But, you know, I've got -- my mother's ill, I've got to  
7 help her and I've got a new baby and I'm not coming in  
8 until after the baby.

9 Q In light of what the codefendant received as a  
10 sentence does Mr. Porter's plea seem correct to you, what  
11 happened with him?

12 A What happened with him and what happened with the  
13 codefendant are two separate things.

14 I don't know that that codefendant didn't have a lot  
15 of information to give the police on something else. I  
16 have no knowledge of that plea. I have no knowledge of  
17 those negotiations. Nothing. I don't know what happened  
18 there. And there's -- I can't tell you. I didn't  
19 represent her. Her attorney may have got her to give other  
20 information. I'd have to speculate, so I have no idea.

21 Q Was there any other option for Mr. Porter besides the  
22 zero to 20?

23 A Not presented to us. We could go to trial, zero to  
24 25, or plea, agree to cooperate, and it was zero to 20.  
25 But when he made the choices he made not to come back in, I

Robert B. Hall  
Cross-examination by Ms. Boyce

1 think that's why he got the sentence he got.

2 Q And do you feel like you explained to Mr. Porter  
3 concerning the sentence that what he was pleading to, the  
4 maximum he could have gotten?

5 A Yes, I do. I've -- have explained to him the state --  
6 his prior record included a burglary, but it was  
7 nonviolent, that he had no strikes against him. This would  
8 be his first conviction for most serious and that if he  
9 ever did -- was involved in anything like this again it  
10 would be a most serious or serious, he could get life  
11 imprisonment without parole, that the plea -- they were  
12 going to drop the possession of a firearm during the  
13 violent crime, and that takes five years off the table,  
14 additional years that he could get. And that's one time he  
15 did give me a phone number that did work. And he -- let's  
16 see.

17 I think that's when we met on January 27th in 2010.  
18 We had an appointment that he rescheduled and then showed  
19 up about an hour late for that. But we went over  
20 everything and that same day confirmed that, yes, if he was  
21 cooperating they were dropping the possession-of-a-firearm  
22 charge.

23 He agreed to plead. That was January 27th of 2010, is  
24 the day we went over everything and he agreed to the plea.

25 Q Do you recall that he walked out during the time that

Robert B. Hall  
Cross-examination by Ms. Boyce

1 you and he were discussing that that was his only option?

2 A I don't recall that.

3 Q Do you recall if you went over with him that the state  
4 had to prove more than just the mere planning or  
5 preparation for the intent?

6 A Yes. And that's what I think I said before.

7 This was not just planning. It was having guns, being  
8 in the vehicle, not only in the direction of the apartment  
9 complex, but I think he even had an aerial photograph of  
10 the area showing the driveway that they were on where they  
11 were stopped was the -- about the only entrance. If you're  
12 on that driveway you're going to that apartment complex.  
13 You're not just driving down the road.

14 I know I've got the picture, the aerial picture, in  
15 here. I've seen it this morning. But it's clear that if  
16 you're on that driveway you're going to those apartments to  
17 where the C.I. said they were going to rob. And he and his  
18 codefendant both said that they were going there to rob the  
19 dope dealer.

20 Q So did you feel like the state had enough evidence to  
21 convict him had it gone to trial even though there was  
22 nothing more than I guess say the preparation part?

23 A Well, I think there was something more than  
24 preparation. There's something more than planning.

25 They're -- they are pulled over on the driveway that

Robert B. Hall  
Cross-examination by Ms. Boyce

1 only leads to the apartment complex where the intended  
2 victim lived.

3 They had the means to commit an armed robbery with  
4 them. They had the guns in the vehicle.

5 If we had gone to trial could a jury have believed our  
6 argument and found them not guilty? I guess they could. I  
7 don't think there would be a great chance that it would --  
8 do I think a judge would have dropped the -- or dismissed  
9 the charge based on the evidence they had? I don't think  
10 so. But we -- we explored those options. He agreed to  
11 cooperate and enter the plea.

12 Q Okay. You explained to him you felt like a jury had  
13 enough to convict him.

14 A I felt that a jury -- there would be enough that a  
15 jury could convict him, yes, and I had a picture. There's  
16 Three Oaks Road goes -- is -- only goes to the apartment  
17 complexes where the victim lived. And that's where they  
18 pulled him over when they were pulling in there.

19 Q In hindsight is there anything that you think you  
20 should have done differently that may have helped  
21 Mr. Porter?

22 A If I had -- it's bad to say, but if I had not arranged  
23 to let him stay out on bond and get a bond on the violation  
24 of parole he would have probably been in custody and  
25 everything would have been -- he probably would have gotten

Robert B. Hall  
Cross-examination by Ms. Boyce

1 less that way. But his -- he wanted out. And I said Judge  
2 Couch I think even made the comment, you know, he's not  
3 entitled to an attorney on a violation of parole but I'll  
4 let you represent him on this, on the bond hearing. And we  
5 did a bond hearing and the judge set a bond. And I think  
6 his family made it.

7 I guess it's bad to say, but if he'd stayed in jail he  
8 probably would have gotten a totally different sentence.  
9 If he -- if he would have been available when they wanted him, I  
10 think he would have gotten a totally different sentence.

11 MS. BOYCE: May I approach the witness, Your Honor?

12 THE COURT: Yes, ma'am.

13 Q You wrote a letter to Mr. Porter on November 17th of  
14 2011. would you just read that highlighted portion for me?

15 A "The sentence you received was probably due to our not  
16 being able to find you."

17 Q Can you just explain that for me?

18 A well, when they asked for him to come in to be  
19 sentenced we couldnot find him. He was hiding from us.

20 Q Uh-huh.

21 A The only contact I had with him, he said he ain't  
22 coming in, he's going to take care of his mama and he's  
23 going to have that baby born, he's not coming in. That's  
24 exactly what that means.

25 Q was there any point when you talked to him that you

Robert B. Hall  
Redirect examination by Ms. White

1 kind of felt that maybe you should just insist on a trial  
2 and advise him of that or --

3 A The decision for a trial or not is his decision, and  
4 that's very clear. As I recall, he was very excited about  
5 the option of being able to cooperate. Reluctant kind of,  
6 and then he was, yeah, yeah, yeah. He was for it.

7 If he had in his mind some plan, oh, yeah, I'll be  
8 able to circumvent the system by doing this, I don't know.  
9 But he was in total agreement with that and then seemed to  
10 me relieved about it. But what actually was in his mind, I  
11 have no idea.

12 Q Thank you.

13 REDIRECT EXAMINATION

14 BY MS. WHITE

15 Q I just have one brief followup question.

16 About the time served, you said he was picked up when  
17 he was arrested on this charge and sent to the D.O.C. Was  
18 that time in D.O.C. that he spent a probation violation or  
19 parole violation?

20 A I assumed it was a parole violation. He was arrested  
21 on April 1st, like you said. Fifteen days later he was  
22 gone. And I think that was because he went to D.O.C. on a  
23 violation of parole.

24 Q So the 15 -- I'm sorry.

25 A It's a -- I think the -- he was in D.O.C. until he

Robert B. Hall  
Redirect examination by Ms. White

1 came back 14 months later. I think by the time I got the  
2 indication that he was back in jail he had made bond on the  
3 attempted armed robbery and possession of a firearm by a  
4 violent -- during a violent crime. And that's just, you  
5 know, over 15 months.

6 Q But that time that was spent was not directly related  
7 necessarily to his -- to the charge of attempted armed  
8 robbery. That was actually based on the fact that he had  
9 been arrested, violated his prior parole.

10 A Apparently. I didn't -- I didn't have knowledge of  
11 that. The only knowledge I had of parole, that by the time  
12 we worked out the plea when he came to court he was on --  
13 he was in violation of that parole again.

14 Q Okay.

15 MS. WHITE: That's all I have, Your Honor.

16 THE COURT: You may step down.

17 MS. WHITE: The state has no other witnesses, Your  
18 Honor.

19 THE COURT: Anything further?

20 MS. BOYCE: Nothing further, Your Honor.

21 THE COURT: I'll review the exhibits as well as the  
22 transcript and issue an order.

23 END OF REQUESTED TRANSCRIPT OF RECORD

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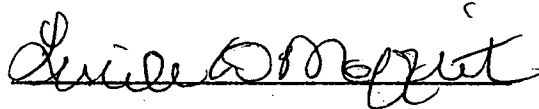
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 3rd day of October 2013.

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

May 6, 2014



Linda D. Moffitt  
Circuit Court Reporter

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) SEVENTH JUDICIAL CIRCUIT  
 COUNTY OF SPARTANBURG )  
 )  
 Thomas Edward Porter, #318797, ) 2012-CP-42-0911  
 )  
 Applicant, )  
 )  
 v. ) ORDER OF DISMISSAL  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

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 M. HOPKINS

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 27, 2012. The Respondent made its Return on or about January 30, 2013. An evidentiary hearing into the matter was convened on October 3, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Hattie D. Boyce, Esquire, of Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Robert Hall, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the plea transcript, and exhibits entered by Applicant.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the November 2008 term of the Spartanburg County Grand Jury for attempted armed robbery and possession of firearm during commission of a violent crime (08-GS-42-7535, count



*[Handwritten signature]*

1 and 2). He was represented by Robert Hall, Esquire. On February 4, 2010, the Applicant pled guilty as indicted to attempted armed robbery. The prosecution dismissed count two for possession of a firearm during commission of a violent crime. Pursuant to a plea agreement, Applicant was released on bond to cooperate with authorities on other matters. Upon information and belief, Applicant failed to abide by the terms of his plea agreement. He was sentenced by the Honorable Roger L. Couch on November 8, 2011, to confinement for a period of fifteen (15) years. The Applicant did not appeal his guilty plea or sentence.

### ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
  - a. Counsel "did not have my best interest at hand when he represented me."
  - b. Counsel "did not investigate my case or speak with any witness on my behalf."
  - c. Counsel "only met with me [three] 3 times and each time told me my only option was to plead to a crime the evidence proves I just couldn't have committed."
  - d. "I was promised one thing, lied to by my attorney and not given the lower sentence or time promised."
  - e. "Had my [lawyer] fully conducted a reasonable investigation into my case, I wouldn't be in prison with the sentence I now have"

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### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant

findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he was arrested when he and three other people were pulled over in a vehicle following police receiving a tip that the four individuals intended to commit an armed robbery and burglary that night. Applicant testified that he and the others had only planned the robbery, but never had the intent to go through with it or attempted the robbery. Applicant testified that Counsel never told him that planning the commit a crime was not a crime. Applicant also testified that Counsel never discussed the possibility of pleading to a conspiracy charge, but instead, told Applicant that he would be found guilty based upon his statement. Applicant testified that he never had possession of a gun, so he does not believe that there was a crime committed and thought the charge should have been dropped. Applicant testified that the co-defendant that had a gun only received a sentence of five years of probation and others in the car were not charged. Applicant testified that his co-defendant pled guilty to unlawful carrying of a pistol. Applicant also testified that Counsel never informed Applicant that the plea was for any additional charge other than attempted armed robbery. Applicant entered into evidence the following items: Exhibit #1, Applicant's statement; Exhibit #2, co-defendant's statement; Exhibit #3, Applicant's sentencing sheet; and Exhibit #4, co-defendant's sentencing sheet.

Applicant testified that he believed the driver of the car was the confidential informant that provided police with the tip because he was never charged. Applicant testified that Counsel failed to investigate the defense of entrapment because the driver was the informant. Applicant testified that he asked Counsel to investigate that and entered as Exhibit #5, a letter from Applicant to Counsel regarding that issue and Exhibit #6, the incident report. Applicant testified that he did not understand the elements of the charges and Counsel never explained them to Applicant. Applicant testified that he met with Counsel three or four times and never reviewed

discovery materials with the exception of the audio and video of both Applicant and his co-defendant's statements. Applicant testified that the State asked him to come and testify, but he refused to do that. Applicant testified that he does not think a violent or most serious charge is appropriate. Applicant also testified that he did not receive credit for the fifteen or sixteen months' time served.

Counsel testified that he took over the representation of Applicant when he joined the office in June 2008. Counsel testified that the Applicant was already housed in the Department of Corrections at that time. Counsel testified that he was able to meet with the Applicant and review the charges, statements, the issue of attempt and what the jury could find and what Applicant's chances of winning were. Counsel testified that he did discuss with Applicant the fact that attempted armed robbery is a motion serious and violent charge. Counsel testified that the evidence included a surveillance tape of police waiting at the apartment complex that was allegedly going to be robbed and of the police stopping the car as it entered the complex. The police found a .38 pistol in the co-defendant's purse and a shot gun on the driver's side towards the back seat. Counsel also testified that the statements given to police indicated intent. Counsel testified that he did discuss conspiracy with the State, but they would not entertain that as an option.

Counsel testified that it was possible that the driver of the car was the confidential informant, but Applicant would have received that information if he chose to proceed to trial. Counsel testified that when asked by the State to cooperate, the Applicant originally said yes. So, the Applicant pled guilty and the gun charged was dismissed with a delayed sentencing. Counsel testified that he could not find the Applicant to bring him in and Applicant ended up being picked up on a bench warrant after Counsel delayed sentencing for as long as he could.

Counsel testified that the Applicant would have received a much better sentence if he had cooperated. Counsel testified that he had no knowledge of the negotiations or plea of the co-defendant. Counsel testified that at the time of the plea agreement, the Applicant reviewed the agreement and appeared to be excited. Counsel testified that the decision to plead and not proceed to trial was the Applicant's decision.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation or speak with any witnesses on Applicant's behalf is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation or investigation.

Furthermore, Applicant offered no witnesses that Counsel failed to interview or any testimony that might have been developed at trial. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction

relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to meet this burden of proof. Accordingly, these allegations are dismissed.

In Hill v. Lockhart, 474 U.S. 52 (1985), the United States Supreme Court held that the two-part standard adopted in Strickland v. Washington, supra, for evaluating claims of ineffective assistance of counsel applies, as well, to guilty plea challenges based on ineffective assistance of counsel. To meet the Court's "prejudice" requirement, a criminal defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill at 59. Not only did the Applicant fail to establish that Counsel offered incorrect advice or made promises that were not kept, the evidence is clear that the Applicant is the one who failed to follow through on promises made. Additionally, the Applicant has failed to establish that he would have proceeded to trial, but for these alleged deficiencies of Counsel. Therefore, this claim is denied and dismissed.

#### *Summary*

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his

representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

#### 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.

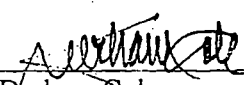
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, 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.

FILED  
 CLERK OF COURT  
 SPARTANBURG, S.C.  
 2014 FEB 27 PM 4:50  
 M. HORN, CLERK

**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 2<sup>o</sup> day of February, 2013.

  
\_\_\_\_\_  
J. Derham Cole  
Presiding Judge

FILED  
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SPRINGFIELD COUNTY  
2014 FEB 20 PM 4:50  
M. HOPE S. ADALTY