

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from York County  
Paul M. Burch, Circuit Court Judge

---

RECEIVED

AUG 03 2012

S.C. Supreme Court

LADARRIUSE A. GAITHER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

APPENDIX

---

ROBERT M. PACHAK  
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA ) IN THE GENERAL SESSIONS COURT OF  
COUNTY OF YORK ) SIXTEEN JUDICIAL CIRCUIT  
2009-GS-46-1781

STATE OF SOUTH CAROLINA., )  
PLAINTIFF, )  
-V- )  
LADARRIUSE GAITHER )  
DEFENDANT. )

Rec Cap 159  
no paid

TRANSCRIPT OF RECORD

482 Days  
MAY 2009  
JANUARY 25, 2010  
YORK, SOUTH CAROLINA

B E F O R E:

THE HONORABLE LEE S. ALFORD, JUDGE.

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

MS. LISA COLLINS  
ASSISTANT SOLICITOR  
SIXTEENTH JUDICIAL CIRCUIT  
YORK, SOUTH CAROLINA  
FOR THE PLAINTIFF

MS. LEAH MOODY  
ATTORNEY AT LAW  
ROCK HILL, SOUTH CAROLINA  
FOR THE DEFENDANT

WANDA NELSON, CVR  
OFFICIAL COURT REPORTER  
SIXTEENTH JUDICIAL CIRCUIT  
AT LARGE

1 (NOTE: DEFENDANT, BLACK MALE ENTERING COURTROOM.)

2 SOLICITOR COLLINS: May it please the court.

3 THE COURT: Solicitor.

4 SOLICITOR COLLINS: Your Honor, this is the State of  
5 South Carolina versus Ladarriuse Gaither who is present  
6 before you today with his retained counsel Leah Moody. He  
7 is before you on three indictments they are as follows.  
8 2009-GS-46-1781. Actually two indictments. 1781 is for  
9 assault and battery with intent to kill and count one;  
10 2009-GS-46-01781 A count two of that indictment is a direct  
11 indictment for possession of a firearm during the  
12 commission of a violent crime. Both of those charges have  
13 been True Billed by the Grand Jury. Also 2009-GS-46-01779  
14 an indictment for criminal conspiracy that has also been  
15 True Billed by the York County Grand Jury. The defendant  
16 has signed indicating his intention to enter pleas of no  
17 contest to these charges today. The State does not oppose  
18 to a no contest plea. At the conclusion of his plea and  
19 sentencing I will be dismissing in consideration of his  
20 plea today and sentencing him on Thursday the following:  
21 2009-GS-46-1780 count 1 a True Billed indictment for  
22 attempted armed robbery. And 2009-GS-46-1781 A which is  
23 count 2 of that same indictment also True Billed a charge  
24 for possession of a firearm in the commission of a violent  
25 crime. We have complied with the victims's rights act.

1 The victim will be present at sentencing the victim does  
2 not oppose us taking the plea portion of the plea  
3 proceeding today without him but he did want to be present  
4 at the sentencing and that will be held on Thursday if Mr.  
5 Gaither successfully gets through the plea pile this  
6 morning. In addition to dismissing the other two charges I  
7 am recommending concurrent sentences and I will recommend a  
8 cap of fifteen years in prison. This is no parole time of  
9 course. Beyond stating the recommendation I have agreed to  
10 stand silent as the prosecutor as to what sentence the  
11 defendant should receive and I am noting for this court and  
12 as a recommendation of course the defendant is free to  
13 argue in mitigation for a lesser sentence. Again the  
14 victim will be free to ask for whatever sentence he feels  
15 is appropriate. Mr. Gaither has no prior convictions on  
16 his NCIC history. He did volunteer to me that he had paid  
17 a fine for possession of marijuana charge in 2007. That  
18 was a first offense and although it did not show a  
19 disposition on his sheet he did tell me that that resulted  
20 in a conviction and that was in of course I believe Rock  
21 Hill City Court our magistrate court. He has no juvenile  
22 adjudications at all as a young man. At the proper time I  
23 have the facts of the case for Your Honor.

24 THE COURT: Sir, you are LaDarriuse Anthony Gaither, is  
25 that right?



1 would be expected to serve the sentence you would actually  
2 receive on this charge. It's also classified as a violent  
3 offense which could affect your ability to participate in  
4 certain programs down at the Department of Corrections on  
5 this charge and any other charges you might get in the  
6 future. It's also classified as a most serious offense the  
7 importance of that classification is you should get two  
8 most serious offences on your record or a combination of  
9 three serious and most serious offenses on your record upon  
10 receiving the second most serious offense or the third  
11 serious and most serious offense you could get a sentence  
12 of life without parole a so called two strikes and three  
13 strikes rule. This offense would be a strike under either  
14 of those two scenarios. Do you understand that?

15 MR. GAITHER: Yes, sir.

16 THE COURT: You are also charged today with possession  
17 of a weapon or firearm during the commission of a violent  
18 crime which carries -- this is also classified as a felony  
19 and it carries a mandatory five year sentence. Do you  
20 understand that charge and the maximum punishment you could  
21 receive on that charge?

22 MR. GAITHER: Yes, sir.

23 THE COURT: It is also a no parole offense. You are  
24 charged also with criminal conspiracy which is classified  
25 as a felony it carries a maximum punishment of five years.

1 Do you understand that charge - - -

2 MR. GAITHER: Yes, sir.

3 THE COURT: - - - and the maximum punishment you could  
4 receive? Understanding the charges and the maximum  
5 sentences and minimum sentences you could receive on these  
6 charges the implications of having a violent offense no  
7 parole offense and a most serious offense on your record  
8 how do you plead to these charges today? My understanding  
9 is that you wish to enter a no contest plea to these  
10 charges; is that correct, sir?

11 MR. GAITHER: Yes, sir.

12 THE COURT: Do you understand that a no contest plea  
13 would constitute convictions on your record nevertheless  
14 even though -- do you understand that?

15 MR. GAITHER: -Yes, sir.

16 THE COURT: Do you understand that by entering these  
17 pleas you give up your right to remain silent?

18 MR. GAITHER: Yes, sir.

19 THE COURT: Do you understand that by entering your  
20 pleas you give up your right to trial by jury?

21 MR. GAITHER: Yes, sir.

22 THE COURT: If you give up your right to a trial by  
23 jury you also give up your right to assert any legal  
24 defenses that you might have in a jury trial?

25 MR. GAITHER: Yes, sir.

1 THE COURT: Now I know your attorney has gone over  
2 your rights with you in that regard but I am going to do so  
3 as well. At trial you have the right to confront and cross  
4 examine all witnesses against you. You would have the  
5 right to present any witnesses and or evidence in your own  
6 defense. You would have the right to testify in your own  
7 defense if you wish to do so and no one can make you  
8 testify in your own trial. If you decide to go to trial  
9 and not testify the judge would tell the jury they could  
10 not hold your failure to testify against you. In fact the  
11 jury couldn't even consider your failure to testify in  
12 their deliberations on your guilt or innocence. You would  
13 be presumed innocent throughout your trial the state would  
14 have to prove you guilty beyond a reasonable doubt to a  
15 jury of twelve people all twelve people would have to  
16 unanimously agree that you were guilty in order for you to  
17 be convicted and even if you were convicted you would still  
18 have the right to appeal that conviction. Do you  
19 understand your right with regard to a trial by jury?  
20 MR. GAITHER: Yes, sir.  
21 THE COURT: Understanding that right do you still wish  
22 to plead no contest or do you want me to set your cases for  
23 trial?  
24 MR. GAITHER: Yes, sir.  
25 THE COURT: You still wish to plead no contest?

1 MR. GAITHER: Yes, sir.

2 THE COURT: Now the state has agreed to dismiss an  
3 attempted armed robbery charge and an additional charge of  
4 possession of a firearm during the commission of a violent  
5 crime in return for your plea and they are recommending a  
6 fifteen year sentence. Is that your understanding of the  
7 agreement you had with the solicitor's office in order to  
8 enter your pleas today?

9 MR. GAITHER: Yes, sir.

10 THE COURT: Has anybody promised you anything other  
11 than that in order to get you to enter your pleas today?

12 MR. GAITHER: No, sir.

13 THE COURT: Any body threatened you or coerced you or  
14 forced you to enter your pleas against your will?

15 MR. GAITHER: NO, sir.

16 THE COURT: Are you satisfied with the manner in which  
17 your attorney has advised you in representing you in these  
18 cases?

19 MR. GAITHER: Yes, sir.

20 THE COURT: Have you and your attorney fully discussed  
21 the charges against you?

22 MR. GAITHER: Yes, sir.

23 THE COURT: Has your attorney told you the witnesses  
24 and evidence the state has available to present at trial to  
25 prove your guilt?

1 MR. GAITHER: Yes, sir.

2 THE COURT: Has your attorney discussed with you any  
3 possible legal defenses that might be available to you if  
4 you were to go to trial?

5 MR. GAITHER: Yes, sir.

6 THE COURT: Have you told your attorney the names of  
7 any and all witnesses you know of that your attorney could  
8 subpoena and bring to trial to assist you in your defense  
9 if you were to go to trial?

10 MR. GAITHER: Yes, sir.

11 THE COURT: Are you today under the influence of any  
12 mind altering substance such as alcohol, drugs or  
13 prescription medications which interfere with your judgment  
14 or ability to understand what you are doing in court today?

15 MR. GAITHER: No, sir.

16 THE COURT: Do you have any mental, emotional or  
17 nervous condition that interferes with your judgment or  
18 ability to understand what you are doing in court today?

19 MR. CHILDERS: No, sir.

20 THE COURT: Are you entering your pleas today of your  
21 own free will?

22 MR. CHILDERS: Yes, sir.

23 THE COURT: All right please give me the facts,  
24 Solicitor.

25 SOLICITOR COLLINS: Your Honor, this offense happened

1 on September 7th 2008 within the city limits of Rock Hill,  
2 South Carolina within York County, South Carolina. It  
3 occurred about 7:00 p.m. in the evening it was still day  
4 light at that time although it was getting toward twilight.  
5 The - had we gone to trial in this matter the state would  
6 present evidence that the defendant and the co defendant  
7 Victor Williams did conspire together to commit an armed  
8 robbery the victim being Valentino Johnson. That there had  
9 been telephone calls made to the victim from the co-  
10 defendant Victor Williams cell phone setting up an armed  
11 robbery while they reported to buy shoes from the victim.  
12 He did buy shoes in bulk and sell them from the trunk of  
13 his car at various places. The calls were made the victim  
14 had agreed to meet them. The victim arrived at Symbol  
15 Street in Rock Hill which was the predetermined meeting  
16 place for this transaction. The testimony of the victim as  
17 well as the co defendant Victor Williams at trial would  
18 have been that Victor Williams approached the victim that  
19 the victim opened his car trunk and began speaking to the  
20 co defendant Victor Williams. That this defendant  
21 LaDarriuse Gaither came up behind the victim the victim  
22 then turned toward Mr. Gaither saw that Mr. Gaither had a  
23 gun and the victim then grabbed the gun that he had in the  
24 trunk of his car this was a registered pistol to the victim  
25 they did engage in a brief tussle at which point the victim

1 was shot in the neck. He is paralyzed from his neck down  
2 although he has a little movement of one shoulder but he is  
3 for all intensive purposes a quadriplegic now for the rest  
4 of his life. The defendant -- the victim and the co  
5 defendant would testify that after the one gun shot that  
6 then the defendant and the co defendant ran. They ran  
7 without taking anything from Valentino Johnson the victim  
8 that is why it was an attempted armed robbery. They did  
9 not actually take anything. The Rock Hill Police  
10 Department investigation would have shown that they did  
11 track the transaction to the co defendant Victor Williams  
12 through his cell phone calls -- went to the co defendant's  
13 cell phone. They then did interview Mr. Williams and  
14 although he initially was not forthcoming ultimately he did  
15 admit to the conspiracy and admitted to the involvement and  
16 did agree to testify at trial. He has already entered a  
17 plea to strong armed robbery and criminal conspiracy and is  
18 awaiting sentencing which was held in abeyance until after  
19 his cooperation at trial of this defendant. The testimony  
20 at trial had we gone forward since this is a no contest  
21 plea I want to be clear on the details would have be that  
22 the victim although he was incapacitated definitely he was  
23 able to affirm and pick out of a line up Victor Williams as  
24 the person that he spoke with. Because of the brevity of  
25 this transaction with the person who actually shot him

1 ultimately he advised that he would not be able to give  
2 specificity as to a hair style. But it did come up that he  
3 said there was some type of twist or threads to the hair  
4 style of the person that shot him he only saw them for a  
5 few seconds and he could not say out of the length of  
6 those. He was never shown a line up of the alleged shooter  
7 including a line up that contained Mr. Gaither. The victim  
8 did recover sufficiently to speak; he can speak and he  
9 would have testified at trial again that he was shot in the  
10 neck that at the time the person that shot him they said  
11 I've got you now that he had never seen either of these  
12 individuals before. We had a statement that the defendant  
13 gave to law enforcement after waiving his maranda rights  
14 wherein he stated -- Mr. Gaither stated that he was with  
15 his cousin Michael Gaither around the time of this  
16 incident. Michael Gaither however gave a statement to law  
17 enforcement that yes he was with this defendant LaDarriuse  
18 Gaither but he was also with -- that Mr. Gaither --  
19 LaDarius Gaither was also with the co defendant Victor  
20 Williams that they came up to Michael Gaither's home and  
21 Michael's cousin LaDarriuse Gaither and that Michael did  
22 then did give them a ride -- the two of them a ride  
23 somewhere that they wished to go and that they both were  
24 acting quite and suspicious. He also -- we would present  
25 at trial and probably in the form of questioning or cross

1 examine the defendant if he had chosen to testify that he  
2 had made two calls from the detention center one to his  
3 grandfather. These calls do state at the beginning for  
4 both parties to hear the parties that were called to hear  
5 that they were being recorded and subject to monitoring.  
6 The call from the defendant to his grandfather would be he  
7 stated at one point in the conversation that he didn't do  
8 anything wrong he was just with the wrong crowd. And in a  
9 call that the defendant made to J.B. Feely who at one time  
10 was a potential alibi witness but that was also at a  
11 different time during the day but that this defendant would  
12 have stated that Victor Williams was lying on him this  
13 defendant but that's not the way it went down anyway which  
14 we would have reported and argued to the jury that that  
15 indicates that the defendant was at least there and he knew  
16 the way it did go down as he stated to his grandfather that  
17 he was with the wrong crowd would at least put him there.  
18 We would have also offered the testimony of Frances Elmore  
19 who does have a prior criminal history which would have  
20 been impeachable although for drugs but Frances Elmore  
21 would testify that he was in a Rock Hill holding cell when  
22 these two men were under arrest for these charges that he  
23 did speak with this defendant while he was waiting for a  
24 bond hearing and Frances Elmore would have testified that  
25 at that time the only charge he had was driving without a

1 license. He was not in any trouble himself other than  
2 although he does have a prior criminal history and although  
3 he's on probation at that time he was not offered any  
4 promises from law enforcement and was not to speak to these  
5 men but that he did engage in a conversation with  
6 LaDarriuse Gaither and later with Victor Williams who was  
7 put in the cell they weren't in there at the same time and  
8 Frances Elmore would have testified to the jury that both  
9 Mr. Williams -- I'm sorry, that LaDarriuse Gaither did  
10 make statements to him. And had Victor Williams ultimately  
11 stated to testify and then deny that as he has previously  
12 stated he did give a sworn statement telling his plea as to  
13 the conspiracy as to his involvement and indicated that Mr.  
14 Gaither was the shooter but that Mr. Williams was aware  
15 that there was a gun he had felt the gun it was heavy  
16 although he had not seen the bullets. But ultimately had  
17 Mr. Williams not reneged on his agreement and not testified  
18 we would have presented testimony not only from Frances  
19 Elmore but from law enforcement as to the statement that  
20 Victor Williams had given to impeach his testimony if he  
21 did change his story at trial although every indication I  
22 have is that he would have gone forward today and -- or  
23 tomorrow when you started with the jury and testified.  
24 That would be the extent of the evidence presented at  
25 trial.

1 THE COURT: I find the decision of the defendant  
2 LaDarriuse Anthony Gaither to plead no contest to these  
3 charges to be made freely voluntarily and intelligently  
4 he's had the representation of a competent attorney with  
5 whom he says he is satisfied. I find the facts presented  
6 to the court by the solicitor's office fully support and  
7 substantiate the pleas in this case and I will accept the  
8 pleas as freely and voluntarily made.

9 Mr. Gaither, if you disagree with the proceeding in  
10 which you are currently involved you have ten days I say  
11 from today's date really you have ten days from the date  
12 you are actually sentenced to file a notice of intent to  
13 appeal because the plea will be over with today the only  
14 thing remaining once I now have accepted the plea the only  
15 thing remaining would be sentencing. But you have ten days  
16 from the date you are actually sentenced to file a notice  
17 of appeal; do you understand that?

18 MR. GAITHER: Yes, sir.

19 THE COURT: Now does the victim wish to be heard?

20 SOLICITOR COLLINS: At the time of the sentencing yes  
21 he will be here.

22 THE COURT: I'm sorry that's right.

23 SOLICITOR COLLINS: We are planned for that at 9:30  
24 Thursday morning.

25 THE COURT: Thursday. All right. You want to save

1 mitigation until then too, Counselor?

2 MS. MOODY: Yes, sir, Your Honor.

3 THE COURT: We will do mitigation and then hear from  
4 the victim Thursday morning.

5 SOLICITOR COLLINS: And of course we would ask that  
6 the defendant continue to be held in custody until  
7 Thursday.

8 THE COURT: Yes, ma'am.

9 SOLICITOR COLLINS: Thank you, Ms. Moody.

10 MS. MOODY: Thank you, Your Honor.

11 SOLICITOR COLLINS: Thank you, Your Honor.

12

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14

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22

23 REPORTER'S NOTE: NO EXHIBITS WERE ENTERED.

24

25

## CERTIFICATE

I, THE UNDERSIGNED WANDA NELSON, CERTIFIED  
VERBATIM OFFICIAL COURT REPORTER FOR THE SIXTEEN  
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO  
HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A  
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF  
ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE  
HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN  
THE CIRCUIT COURT FOR YORK COUNTY, SOUTH CAROLINA, ON  
THE 25TH DAY OF JANUARY, 2010.

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

\_\_\_\_\_  
WANDA NELSON, CVR  
OFFICIAL COURT REPORTER  
NOTARY PUBLIC IN AND FOR THE  
STATE OF SOUTH CAROLINA  
DATE: \_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_

MY COMMISSION EXPIRES: 12/06/2010

2010-CP-46-3127

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 County of York )  
 )  
LaDarius Gaither 339004 )  
Fill name and prison number, (if any) of Applicant )  
 )  
 )  
 State of South Carolina )  
 )  
 )  
 )

IN THE COURT OF COMMON PLEAS

APPLICATION FOR  
POST-CONVICTION RELIEF

2010 JUL 27 PM 4:09  
 RECEIVED  
 CLERK OF COURT  
 YORK COUNTY, SC

INSTRUCTIONS - READ CAREFULLY

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

DAVID HAMILTON  
 CLERK OF COURT  
 YORK COUNTY, SC  
 2010 AUG -4 PM 4:17  
 CERTIFIED TRUE COPY  
 DF

1. Place of detention Lee Correction Institution 490 W Sackey Hwy, Bishopville South Carolina 29010
2. Name and location of Court which imposed sentence York County General Sessions
3. Name(s) of co-defendant(s) (if any) Victor A Williams
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) A+B W/I to Kill 2009GS 4601781
  - (b) Criminal Conspiracy 2009GS 4601779

- (c) Weapons / Possession of a Weapon (Firearm) During Violent Crime  
 2009GS4601781k
- 5 The date upon which sentence was imposed and the terms of the sentence:  
 (a) January 28, 2010  
 (b) \_\_\_\_\_  
 (c) \_\_\_\_\_
- 6 Check whether a finding of guilty was made:  
 (a) after a plea of guilty \_\_\_\_\_  
 (b) after a plea of not guilty \_\_\_\_\_  
 (c) after a plea of nolo contendere  \_\_\_\_\_
- 7 Did you appeal from the judgment of conviction or the imposition of sentence?  
No
8. If you answered "yes" to (7), list:  
 (a) the name of each Court to which you appealed:  
 i. \_\_\_\_\_  
 ii. N/A  
 iii. \_\_\_\_\_  
 (b) the result in each such Court to which you appealed:  
 i. \_\_\_\_\_  
 ii. N/A  
 iii. \_\_\_\_\_  
 (c) the date of each such result:  
 i. \_\_\_\_\_  
 ii. N/A  
 iii. \_\_\_\_\_  
 (d) if known, citations of any written opinion or orders entered pursuant to such results:  
 i. \_\_\_\_\_  
 ii. N/A  
 iii. \_\_\_\_\_
- 9 If you answered "no" to (7), state your reasons for not so appealing:  
 (a) My lawyer told me if he gave me more than what my plea ~~could give me~~ could give me than I could not appeal.  
 (b) \_\_\_\_\_

(c) \_\_\_\_\_  
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

- (a) Ineffective Assistance of Counsel
- (b) Violation of Constitutional Rights
- (c) No contest plea was not followed properly

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

- (a) Counsel failed to investigate case
- (b) Counsel failed to challenge Constitutional Violations
- (c) \_\_\_\_\_

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

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

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

(a) the specific nature thereof:

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

(b) the name and location of the Court in which each was filed.

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

- (c) the disposition thereof
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - 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?

No

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

- (a) which grounds have been presented:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings in which each ground was raised:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

(a) \_\_\_\_\_  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_

N/A

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

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

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

- (a) the name and address of each attorney who represented you:
  - i. Leah B. Moody  
P.O. B 1015 Rock Hill, SC 29731
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. plea and sentencing
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

Vacate conviction

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

No

STATE OF SOUTH CAROLINA )  
County of ~~York~~ York )

VERIFICATION

I, LaDarrise A Gaither, 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.

LaDarrise Gaither

SWORN to and subscribed before me this 26 day of April, 2011.

[Signature] (L.S.)  
Notary Public

My Commission Expires. 5-26-11

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

I, LaDarnise A Gaithe, 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.

LaDarnise Gaithe  
Applicant

SWORN or affirmed to and subscribed before me this

26 day of July, 2016

[Signature]  
Notary Public

My Commission Expires 5-6-17

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
	)	
	)	2010-CP-46-3127
	)	
Ladarrise A. Gaither, 339064,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed July 27, 2010, 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 York County Clerk of Court. Applicant was indicted at the April 2009 term of the York County Grand Jury for assault and battery with intent to kill (2009-GS-46-1781, Count I), possession of a weapon during the commission of a violent crime (2009-GS-46-1781A, Count II), criminal conspiracy (2009-GS-46-1779), attempted armed robbery (2009-GS-46-1780, Count I), and possession of a weapon during the commission of a violent crime (2009-GS-46-1780A, Count II). On January 25, 2010, the Applicant pled no contest to assault and battery with intent to kill (2009-GS-46-1781, Count I), possession of a weapon during the commission of a violent crime (2009-GS-46-1781A, Count II), and conspiracy (2009-GS-46-1779). In exchange for Applicant's pleas, the solicitor dismissed the two remaining charges. On January 28, 2010, the Honorable J. Lee S. Alford sentenced the Applicant to fifteen (15) years for the assault and battery with intent to kill, five (5) years for

possession of a firearm during the commission of a violent crime, and five (5) years for conspiracy, all concurrent. The Applicant did not appeal his pleas or sentences.

Attached herewith and incorporated herein are the records of the York County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, and the 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.
  - a. "Counsel failed to investigate case."
2. "Violation of constitutional rights."
  - a. "Counsel failed to challenge constitutional violations."
3. "No contest plea was not followed properly."

## III.

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

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing.

#### IV.

The Applicant's second and third claims allege his constitutional rights were violated and his "no contest plea was not followed properly." However, the Applicant fails to set forth with specificity the grounds upon which these claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant "specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle

him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). The Applicant has failed to make even a *prima facie* showing. Unless the Applicant amends his claims regarding constitutional violations and his plea to specifically identify his claims, the Respondent would submit these allegations should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act.

V.

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

VI.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

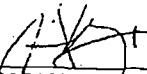
Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

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Assistant Deputy Attorney General

HARRISON D. BRANT  
Assistant Attorney General

By:   
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State of South Carolina) In the Common Pleas  
) Court of York  
)  
County of York ) Case No.: 2010-CP-46-03127

Ladarriuse Gaither., )  
)  
Applicant., )  
)  
-vs- ) Transcript of Record  
)  
State of South Carolina., )  
)  
Respondent. )  

---

October 11, 2010  
York, South Carolina

B E F O R E:

Honorable Paul M. Burch, Judge.

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

Mr. Frank Lee O'Steen  
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For the Respondent

Wanda Nelson, CVR-M  
Circuit Court Reporter  
Sixteenth Judicial Circuit

**ORIGINAL**

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E-X-A-M-I-N-A-T-I-O-N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
Leah Moody	Mr. O'Steen	P.4-14
	Mr. Friedman	P.14-23
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Ladarriuse Gaither	Mr. O'Steen	P.23-28
		P.29-30
	Mr. Friedman	P.28-29

\* \* \* \* \*

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

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
APP.1	Codefendant's Letter		P.11

Reporter's Note: All Exhibits were filed with the York County Clerk of Court's Office.

1 (ON THE RECORD TUESDAY, OCTOBER 11, 2011 AT 10:50  
2 A.M..)

3 (APPLICANT LADARRIUSE GAITHER, BLACK MALE, ENTERING  
4 COURTROOM.)

5 MR. O'STEEN: Your Honor, this is LaDarriuse Gaither  
6 and he brought this PCR action and his main issue is  
7 ineffective assistance by his counsel. He believes there  
8 was information that he would have had at the time of his  
9 plea he would not have chosen to plead. Really mainly two  
10 pieces of information; one was that there was some letters  
11 written by a codefendant which he believes the codefendant  
12 was recanting his story, not implicating him any more. He  
13 was unaware that the codefendant actually done that at the  
14 time he plead. And the second relates to a lineup. He was  
15 - the transcript is going to show that the solicitor  
16 expressed a lineup had not been performed from the time,  
17 that was the first time he had heard of it at the plea.  
18 Before that he thought he had already been picked out of a  
19 lineup and they had chosen him as the person committing the  
20 crime, Your Honor.

21 One second, Your Honor.

22 (PAUSE.)

23 MR. O'STEEN: Your Honor, if I could call Leah Moody  
24 to the stand, please.

25 THE COURT: Ms. Moody, if you'll come around and be

LEAH MOODY: DIRECT BY MR. O'STEEN

-4-

1 sworn, please.

2 Good morning.

3 MS. MOODY: Good morning.

4 (WHEREUPON: LEAH MOODY,

5 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:

6 DIRECT EXAMINATION

7 LEAH MOODY BY MR. O'STEEN:

8 Q. Ms. Moody,

9 Sorry, I don't think I put my name on the record.

10 Lee O'Steen representing Mr. Gaither.

11 Did you represent Mr. Gaither in a criminal action  
12 charge?

13 A. I did.

14 Q. What was he charged with?

15 A. Bear with me. He was initially charged with assault  
16 with intent to kill, attempted armed robbery, criminal  
17 conspiracy, weapons. Well possession of a firearm during  
18 the commission of a violent crime.

19 Q. And an attempted armed robbery and there was a weapons  
20 charge with that one also. I think those ---

21 A. Right.

22 Q. --- two were dismissed?

23 A. Right.

24 Q. Or that one, two parts were dismissed.

25 Mr. Gaither's issue with your representation is that

LEAH MOODY: DIRECT BY MR. O' STEEN

-5-

1 there was some information that he received after he had  
2 pled and was in SCDC.

3 And, Your Honor, may I approach?

4 THE COURT: Sure.

5 BY MR. O' STEEN:

6 Q. Ms. Moody, in your reading of the letter, what is the  
7 gist of the letter from Victor Williams who was the  
8 codefendant to Mr. Gaither?

9 A. He was writing me telling me that he was LaDarriuse's  
10 codefendant and that he was pressured to give a statement  
11 and confused about the statement and he said there was not  
12 much evidence against LaDarriuse and he was willing to  
13 help him on his behalf. He never said that LaDarriuse  
14 didn't do it. He just said that he didn't do it, that he  
15 was not there at the time. And so I took the letter to  
16 mean that -- well the other part he said the solicitor was  
17 playing games or was crazy. And I took it that it was just  
18 yet another letter that he was writing because he wrote  
19 multiple letters to the solicitor regarding what happened.  
20 He changed his statement multiple times.

21 Q. And the solicitor gave -- I assume gave you those  
22 letters. The over all picture of the case, where were you  
23 trying to go with the case? What was it looking like?

24 A. Well the main thing was when I first talked to  
25 LaDarriuse he told me his version of, you know, what

LEAH MOODY: DIRECT BY MR. O' STEEN

-6-

1 happened with him. He was not arrested until maybe a month  
2 later so that eliminated any evidence of like the clothing  
3 and any gun powder residue or any blood splatter based on  
4 where the victim was shot.

5 So then I looked at the victim's statements. He told  
6 me that he was not there, so I looked at the victim's  
7 statement and I learned that there was no identification  
8 done so that was the crux of the case was identification.  
9 So the first thing I did was I subpoenaed all of the  
10 booking photos of the individuals because the description  
11 did not match. It didn't make sense to me. There was two  
12 guys running from the scene with one had dread locks and one  
13 had a short haircut. At the time LaDarriuse had the  
14 beginning stages of dread locks.

15 And what I mean by that he had like twisties, his hair  
16 was short but it was not that short. The codefendant from  
17 what I saw when I saw him at a hearing he had a short  
18 haircut so the only person I could think of they were  
19 talking about in terms of dread locks was my client. So I  
20 subpoenaed the booking photos so that I could see what my  
21 client's hair looked like at the time of booking which was  
22 maybe a month later. And he also mentioned that the  
23 codefendant had a brother who had dread locks.

24 So I got his photos as well and he had long dread  
25 locks. The solicitor presented to the victim the pictures.

LEAH MOODY: DIRECT BY MR. O'STEEN

-7-

1 They kind of washed out the faces of the booking choices so  
2 you only had the hair. So they presented the hair photos  
3 to the victim and the victim said that it was dred locks  
4 but it wasn't as long as the codefendant's brother's hair  
5 was.

6 Q. So it was kind of a lineup -

7 A. Kind of. And that was gonna be how it was going to  
8 have to be about the trial because he wasn't there, that  
9 they had the wrong person. They said that the individuals  
10 in the case were dark skin, the codefendant was -- and what  
11 I mean dark skin between the complexion of myself and  
12 LaDarriuse the codefendant is fair skinned and his brother  
13 was too. So the codefendant who kind of like stirred the  
14 pot in my opinion was he gave so many different statements,  
15 he put three people at the scene. And then it got down to  
16 two people. So it boiled down to was LaDarriuse there.  
17 That was something that we were going to have to deal with  
18 at trial.

19 Q. Was -

20 A. Oh, there's another part to that.

21 Q. Oh, I'm sorry.

22 A. The other part was LaDarriuse said he was not there  
23 so I investigated an alibi. I talked to his grandmother  
24 and his mother in my office and we talked about the day of  
25 the events. Initially when I met with him at the jail he

LEAH MOODY: DIRECT BY MR. O' STEEN

-8-

1 told me that his grandmother was at home all day. That's  
2 what I have in my notes and that's what I probably went  
3 forward with talking with the grandmother because she could  
4 provide the alibi for him that he did not -- that he was  
5 not around 7:30. It was like 7:31 to Nine o'clock was the  
6 window of time that we were dealing with. But his  
7 grandmother came in my office and she told me that she was  
8 at church, she got home at 1:00. When she got there there  
9 were a whole bunch of guys at the house. Some were hanging  
10 on the porch. And she talked about the codefendant.

11 The codefendant was not allowed in her house because  
12 of his behavior, just kind of what he would do when he come  
13 in people's houses so they were all outside. Everybody had  
14 on white t-shirts. I said well what happened next?

15 She said she went back to a church meeting at Boyd  
16 Hill Church across town. She came back, LaDarriuse was  
17 not there. And I believe that the law enforcement was  
18 coming through, walking through the paths but I can't --  
19 don't quote me on that. It's in my notes here somewhere.  
20 But she could not give me an alibi for LaDarriuse between  
21 that time. She said he got dropped off around Eight  
22 o'clock. That led me to his cousin Mike Gaither who was  
23 going to testify for the State who could not testify  
24 favorable for LaDarriuse .

25 As a matter of fact I talked to him like two or three

LEAH MOODY: DIRECT BY MR. O' STEEN

-9-

1 times. He was not happy about having to come back from  
2 school to come and testify. And he was not under my  
3 subpoena he was under the State subpoena and I informed  
4 him, you know, we go to trial you gonna have to come, I  
5 just want you to know that, don't get in trouble over it.  
6 But talking to him he was not getting ready to give a  
7 favorable statement for LaDarriuse .

8 Q. What witnesses did you have for LaDarriuse ?

9 A. Well it was going to be his grandmother but that  
10 wasn't going to be much help. There was going to be  
11 LaDarriuse needing to testify because he was going to have  
12 to testify against what his codefendant was saying which I  
13 felt like, you know, we could impeach the codefendant but  
14 at the same time the codefendant had an offer on the table  
15 from the solicitor where he got a strong armed robbery  
16 offer and I believe it was another charge, it was two, and  
17 they held his sentencing until after. It was going to be  
18 held until after LaDarriuse went to trial.

19 And so in those circumstances, I don't think that his  
20 codefendant was going to testify favorable for him. And in  
21 his letters, I mean he's quite manipulative to me in my  
22 opinion because the letters that he wrote to Lisa Collins  
23 were completely different from what he wrote me. And I  
24 talked to his attorney and his attorney assured me that he  
25 was going to be testifying against LaDarriuse .

LEAH MOODY: DIRECT BY MR. O' STEEN

-10-

1 Q. That was a long answer.

2 A. I'm sorry.

3 Q. That's fine. So this letter that you have in front  
4 of you, the original, is that letter that you received from  
5 the codefendant in this case? And you know it didn't come  
6 through the solicitor's office, it went straight to you?

7 A. This one came to me and I know that I would have  
8 talked about it with LaDarriuse because and summing up  
9 what needed to happen we talked about it. I prepared for  
10 trial and I still even have like my notebook without the  
11 notebook but it is tabulated like all the information I  
12 have. I had gone through I did an inner office memo to sum  
13 up like what were the facts on each given charge to be able  
14 to assess it for him. He was looking at a significant  
15 amount of time. And he did a polygraph at his choice and  
16 at his choice he decided to accept the plea offer.

17 Q. And I assume the polygraph did not come back  
18 favorable?

19 A. It didn't come back favorable, it wasn't going to be  
20 used against him. I just kind of felt like it was  
21 something more that he wanted to tell me but he didn't tell  
22 me. He's a very quite young man. I got to know him over a  
23 year and I did not want to pressure him into pleading and  
24 as of the week before I was preparing, you know, my  
25 notebook had been put together and I was writing my opening

LEAH MOODY: DIRECT BY MR. O' STEEN

-11-

1 and closing argument ready to go forward.

2 Q. Your Honor, if I can enter that letter.

3 A. You can enter a copy. I want to keep my copy.

4 Q. Right.

5 A copy of her letter.

6 THE COURT: Any objection?

7 MR. FRIEDMAN: Can I see it? I don't think I got it.

8 (MR. FRIEDMAN REVIEWING LETTER.)

9 MR. FRIEDMAN: No objection.

10 THE COURT: In without objection and there is no  
11 objection to a copy coming in. Correct?

12 MADAME COURT REPORTER: Let me put my sticker on it if  
13 it's okay and then copy it, if that's okay with the judge  
14 or...

15 THE COURT: That's a copy isn't it?

16 MR. O' STEEN: Yes, ma'am.

17 It's two pages, Your Honor.

18 (WHEREUPON: APPLICANT'S EXHIBIT NUMBER ONE IDENTIFIED  
19 AND MARKED, RECEIVED INTO EVIDENCE.)

20 BY MR. O' STEEN:

21 Q. Do you remember any records anywhere, I know it's been  
22 a while, ever giving a copy of that letter to Mr. Gaither?

23 A. No. But I remember talking to him about it because  
24 when I did a flow chart of all the statements, the  
25 codefendant, I have to find it in here, the codefendant

LEAH MOODY: DIRECT BY MR. O' STEEN

-12-

1 gave so many statements it was very confusing on how to  
2 keep the facts.

3 Q. So you did a flow chart.. You went over that with Mr.  
4 Gaither but you probably did the actual letter?

5 A. No. Because when I met with him times that we talked,  
6 I met with him and we talked to Lisa Collins we were  
7 together. I talked to him first and then she came in and  
8 then I met with him again after the polygraph. And he knew  
9 what I was doing. I met with his family and I had gone  
10 through doing the charts. Just trying to get a time line  
11 of what was said by whom and trying to figure out what this  
12 kid Victor Williams was going to say because he had said so  
13 many different things.

14 Q. Was there ever a lineup done that was presented to the  
15 victim that you're aware?

16 A. I think I answered that and I ask Lisa Collins about  
17 that because there wasn't one. The victim -- Basically  
18 what happened, they had nobody arrested. The victim, not  
19 only did he get shot in the neck, like he can't even feed  
20 himself. He was rushed to the hospital and I believe he  
21 was in Charlotte in the hospital. And then at the time  
22 that he was laying on the ground the individuals ran from  
23 the scene but then three other guys robbed the victim of  
24 what was in his trunk. Took the victim, the victim had a  
25 gun. So there were two sets of defendant's possibly and

LEAH MOODY: DIRECT BY MR. O'STEEN

-13-

1 suspects so when they investigated the incident where it  
2 happened, I believe at the beginning of September.

3 They didn't get a statement from Valentino Johnson who  
4 was the victim until 9/26/08 and that's when he identifies  
5 Victor Williams at the hospital. He only referred -- In my  
6 notes he only refers to one guy but didn't remember the  
7 name. And the reason why he could refer to Victor Williams  
8 is because he knew when he went to that location that he  
9 was going to meet Victor Williams. Victor Williams had  
10 indicated that he didn't call but my client called. We got  
11 the records and I looked to see whose phone numbers that  
12 were - that it came back on, the victims phone as well as  
13 some records, I think the subpoenaed -- the State  
14 subpoenaed on Victor Williams. It was Victor Williams.  
15 And Victor Williams called the guy a couple of times and so  
16 when he got there he could identify Victor Williams because  
17 he had talked to him. He saw him and then when he got shot  
18 he got shot in the back.

19 And then they also did something with Victor,  
20 Valentino Johnson on 10/16/08 he said he saw the second guy  
21 and I wanted to know who was the second guy. And that's  
22 how we got into the hair and all of that trying to describe  
23 it. But at that time I think that's when Mr. Johnson was  
24 able to even -- I mean this guy is in a wheel chair and one  
25 of the statements that he said to the solicitor was if he

LEAH MOODY: DIRECT BY MR. O' STEEN  
CROSS BY MR. FRIEDMAN

-14-

1 wanted to kill himself he can't even commit suicide. So he  
2 was in bad, a very bad condition.

3 MR. O' STEEN: Your Honor, I have no further questions.

4 THE COURT: Mr. Friedman.

5 MR. FRIEDMAN: Thank you, Your Honor.

6 CROSS EXAMINATION

7 LEAH MOODY BY MR. FRIEDMAN:

8 Q. Good morning, Ms. Moody.

9 How long have you been practicing law?

10 A. Now you're gonna make me think. Since 1996.

11 Q. How much of your practice is in criminal law?

12 A. I'd say about fifty percent.

13 Q. Were you appointed or retained in this case?

14 A. I was retained.

15 Q. Do you recall about how many times you met with the  
16 applicant?

17 A. No. But I worked on this case because I believed him  
18 when he said he was not there. I worked on this case, I  
19 think I put in, my office put in a total of seventy  
20 something hours in this case and I was ready to go to  
21 trial. That was before we went to trial.

22 Q. Was this case on the trial docket?

23 A. Yes. We were scheduled to go to trial the day, I  
24 think in the transcript what you all have is the actual  
25 entry of the plea. He had to enter that plea on I believe

LEAH MOODY: CROSS BY MR. FRIEDMAN

-15-

1 that Monday or we were going to be striking a jury.

2 Q. Were you prepared to go to trial that week?

3 A. Uh-huh.

4 Q. During your meetings with him, do you recall  
5 discussing the elements of the charges the State was  
6 required to prove?

7 A. Oh yes because I did an inner office memo that  
8 basically -- well that's my closing. It basically outlined  
9 all the case elements and what the State would have to  
10 prove, prove to the jury. And I went over that with him  
11 and I explained it to his family as well as about five or  
12 six pages of just writing down the rule of law, what the  
13 elements were, the general rule and then try and analyze  
14 all the facts that came out from the discovery and from  
15 working on the case.

16 Q. Did you discuss with the applicant his version of the  
17 facts?

18 A. With my client?

19 Q. Yes, ma'am.

20 A. Yes we talked about it.

21 Q. Did you discuss potential defenses with him?

22 A. Yes.

23 Q. Can you briefly describe what kind of investigation  
24 you did?

25 A. Yes. As I said earlier I subpoenaed all the booking

1 photos to be able to show that it was not him. I talked to  
2 his grandmother, I contacted his cousin, Mike Gaither who  
3 gave a statement that suggested that he and the codefendant  
4 when he -- Okay. The codefendant and the defendant were  
5 together at some point in time that night and they went to  
6 the apartments called the Glenn's and they spent the night  
7 at the Glenn's. So I wanted to find out how all that  
8 occurred and what his grandmother knew about that so that I  
9 could try and put together an alibi for him.

10 I talked to the solicitor following up on the  
11 codefendant where the brother was. Let me see what else.

12 I looked at, I got some of the phone records. We were  
13 prepared to subpoena the phone records but they had the  
14 phone records already. Let me see.

15 I tried to contact some individuals that he gave me  
16 their names that could possibly help him with the alibi  
17 like the girl that he went to -- well I guess it was his  
18 girlfriend, Brittany Thompson, she had a sister and there  
19 was a whole bunch of people at that house. Tried to follow  
20 up on that to figure out where the girl was, if she was  
21 living there. And I believe he told me that she had moved  
22 or someone told me that she had moved. Contacted this guy  
23 named Leon who lived across the street from his  
24 grandmother's house, left messages, never got a return  
25 phone call. He gave me the name of J.B and Buddha. Never

LEAH MOODY: CROSS BY MR. FRIEDMAN

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1 really got who Buddha was. There was a person named Big  
2 Trey, didn't have an actual name for him to get to him.  
3 Leon Hall was the guys name who was renting across the  
4 street. His grandmother came to my office and said that  
5 the guy no longer lived there.

6 I had his Crickett cell phone that they brought to my  
7 office to be able to go through to prove that he was not  
8 the person who contacted the victim. Well I have J.B. and  
9 Boo but then I have a correction of Buddha. They were at  
10 his grandmother's house sometime early on in the afternoon.  
11 But there was nobody who could place him somewhere else  
12 other than possibly being in a location at 7:30 between --  
13 the hours were 7:31 to 9:00 p.m. His cousin places him  
14 with the codefendant afterwards. His grandmother places  
15 him with a whole bunch of other people ahead of time but  
16 she doesn't see who he leaves the house with.

17 I mean and talking with my client.

18 Q. Were there any type, any witnesses that you found that  
19 would have been helpful for him at trial?

20 A. None that could like say that he was with them from  
21 7:31 to 9:00. He even says that he walked over to the  
22 crime scene. The individuals from the park who were  
23 playing basketball they couldn't really see the people  
24 because all they saw was the guys running so they weren't  
25 up close on them so like to say who it exactly was. This

1 fictitious person and maybe it's not fictitious but this  
2 guy name Lee; couldn't get where Lee was and if the  
3 codefendant was going to help him it would have been to  
4 tell us a number for Lee to tell us any information and I  
5 talked to his attorney Derek Chiarenza and his position,  
6 Derek Chiarenza's position was that my client was there and  
7 that he committed the crime with the codefendant.

8 Q. How many letters did you receive from the codefendant?

9 A. I believe it was maybe one or two but I think it was  
10 just one because Lisa Collins gave me all the letters that  
11 he wrote to her. If you want me to check I can check here.

12 But I did tell my client that the guy was giving  
13 multiple statements and he knew of some of the multiple  
14 statements because he had them in the discovery that I sent  
15 to him which I hate stamped and sent to him.

16 Well he wouldn't have had the letters, he would have  
17 had the statements. But the codefendant wrote a letter to  
18 the solicitor professing his innocence and he kept saying  
19 he was innocent. And stating how he was praying for the  
20 victim.

21 Q. Did you discuss the letter from the codefendant with  
22 the applicant?

23 A. I believe he had it because it was a copy. I only  
24 have a copy of it but I did tell him what his codefendant  
25 was saying to let him know that his codefendant was not

LEAH MOODY: CROSS BY MR. FRIEDMAN

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1 being helpful to him. And of course he read the statements  
2 so he indicated that he was not there and so that's what  
3 led me on trying to find out who exactly was the other  
4 person there because he said he wasn't there.

5 Q. Were you able to speak to the codefendant's attorney  
6 about what the codefendant's testimony would have been at  
7 trial?

8 A. Uh-huh.

9 Q. Is it your testimony that that would have not been  
10 favorable toward to the applicant?

11 A. Oh yes. The basis of him getting the plea offer that  
12 he got and the email from Lisa Collins was she sent me a  
13 copy of the email that she sent to Derek Chiarenza. And  
14 she said I will allow your client to plead to strong armed  
15 robbery and criminal conspiracy; I will agree to stand  
16 silent on his sentence. Sentencing will be held in  
17 abeyance until after the trial of the codefendant  
18 LaDarriuse Gaither. I will dismiss the other charges with  
19 the right to restore them if he fails to testify truthfully  
20 and consistently as stated here in. So they discussed his  
21 testimony and then read the first sentence.

22 "As we discussed once your client's statement is  
23 finalized if your client testifies truthfully at the trial  
24 of LaDarriuse Gaither and if his testimony is consistent  
25 with the statement he will sign next week in the presence

1 of yours," and then she would allow him to plead. So based  
2 on that and based a conversation with Lisa Collins he was  
3 going to testify that LaDarriuse e was there.

4 Q. Did the State make any plea offers in this case?

5 A. To LaDarriuse?

6 Q. To the applicant?

7 A. Yes. Lisa Collins to her credit she is a state  
8 prosecutor and she is a reasonable state prosecutor so she  
9 offered to let him plead to certain charges and reduce  
10 them. And that's what he pled to. She dismissed some  
11 charges, she didn't want to take the victim through a long  
12 trial so she let LaDarriuse plead. The victim was fine  
13 with LaDarriuse pleading to criminal conspiracy, and I  
14 have the transcript and I can look back at it to make sure  
15 I'm telling you correctly.

16 Q. This plea offer this is the one that he actually  
17 accepted?

18 A. Yes. That's the one he actually accepted.

19 Q. Did you inform him of the consequences of the plea?

20 A. Yes we did a plea affidavit where he had to fill out  
21 the affidavit himself. He understood based on one of the  
22 questions that the possible penalty for the charges. With  
23 a ABWIK it carried twenty years, and it was considered a  
24 violent and most serious offense. The possession of a  
25 weapon during the commission of a crime was considered a

LEAH MOODY: CROSS BY MR. FRIEDMAN

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1 violent crime. With conspiracy both of the gun and  
2 conspiracy I think this is what he meant by this,  
3 conspiracy both which carries five years a piece and that  
4 they are both non-violent. He has violent on here and non-  
5 violent. The ABWIK is non parolable offense and then the  
6 judge went back over it with him. In his recommendation  
7 from the solicitor was recommend a cap of fifteen years and  
8 dismiss the other charges.

9 Q. Did you explain the State's recommendation to the  
10 applicant?

11 A. Yeah we talked about it. I mean him deciding to plea  
12 was maybe he decide, you know, right before we went in to  
13 do the plea on that Monday but we talked about it. And  
14 then he did a polygraph. The solicitor talked to him. I  
15 talked to him. You know it was his choice. It was his  
16 choice whether we went to trial but what I wanted to  
17 impress upon him was that if we go to trial and they come  
18 back with a guilty verdict that he has all of the charges  
19 not just the charges that you know Ms. Collins was you know  
20 allowing him to plead to on a cap.

21 And there was a possibility that he could get every  
22 bit of the time bringing the victim in you know if you saw  
23 the victim the jury definitely would you know have  
24 sympathy. I think the judge would have sympathy. I think  
25 all of what the victim would have been through I think that

1 would have impacted what his sentence was. Not that he  
2 wasn't entitled to go to trial and not that you know he  
3 would be punished for wanting to get his trial but that's  
4 the consequences of possibly going to trial getting a  
5 guilty verdict and that he needed to weigh it but it was  
6 his decision.

7 Q. Did you explain to him what a No Contest Plea meant?

8 A. Yes. Because he was adamant that he was not there.

9 And I mean -- and I believed he wasn't there but I felt  
10 like the State's evidence was going to be overwhelming and  
11 I could not produce an alibi for him that would keep him  
12 out of that window of time. But then you know after I did  
13 this plea with him, there was something that came to mind  
14 that and maybe if I was -- well I don't know if this would  
15 be ineffective assistance of counsel, but his codefendant  
16 had dread locks so that to me explained who the dread lock  
17 person, the person with the dread locks?

18 That explained to me who was either there or either  
19 his codefendant cut his hair right before he got arrested.  
20 But somebody had dread locks and was there. And I think he  
21 was the person with the short hair. And he might not a  
22 been there but there was another alternative to who had the  
23 dread locks that I did not -- I couldn't figure out how they  
24 could just place him there and his hair was short. He was  
25 not, you know, supposed to been there.

LEAH MOODY: CROSS BY MR. FRIEDMAN  
LADARRIUSE GAITHER: DIRECT BY MR. O' STEEN

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1 Q. Whose decision was it to enter the plea?

2 A. His.

3 Q. I have nothing further, Your Honor.

4 MR. O' STEEN: Nothing further, Your Honor.

5 THE COURT: You can step down.

6 MS. MOODY: Thank you.

7 (WITNESS LEAVING WITNESS STAND.)

8 MR. O' STEEN: Your Honor, I would like to call Mr.  
9 Gaither.

10 THE COURT: Mr. Gaither, come around and be sworn  
11 please.

12 (WHEREUPON: LADARRIUSE  
13 GAITHER, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS  
14 FOLLOWS:)

15 DIRECT EXAMINATION

16 LADARRIUSE GAITHER BY MR. O' STEEN:

17 Q. Please state your name for the court please?

18 A. LaDarriuse Gaither.

19 Q. Could you spell your first name?

20 A. L-a-D-a-r-r-I-u-s-e.

21 Q. Mr. Gaither, I'm going to take what is marked as  
22 Applicant's One.

23 May I approach, Your Honor.

24 THE COURT: Yes, sir.

25 BY MR. O' STEEN:

1 Q. Would you identify that document for me?

2 A. Oh, it's a letter that my codefendant wrote my lawyer.

3 Q. When was the first time you saw that document?

4 A. When I got to the department of Correction.

5 Q. This would have been after your plea and it would have  
6 taken you down to Department of Corrections so the plea and  
7 everything was over at the time you received that?

8 A. Yeah I got convicted in 2010. I received it in 2011.

9 Q. Okay. And that letter to you says what? What's the  
10 intent of your codefendant in that letter?

11 A. Basically he was trying to tell them that, you know  
12 what I'm saying, that he, basically he said he was  
13 pressured and confused. I mean he was scared at the time.  
14 You know what I'm saying, that's natural if you get in  
15 trouble trying to blame it on somebody else you know what I  
16 mean. He was coming, coming forth telling my lawyer not  
17 the solicitor. He come forward telling my lawyer how he  
18 was feeling when he wrote the statements.

19 Q. And your impression of your case was that his  
20 testimony was -- Your impression of the case was what  
21 evidence was going to be used against you?

22 A. My codefendant's statements.

23 Q. Were you aware at the time you pled there were any eye  
24 witnesses that would identify you?

25 A. No. Like you know what I'm saying the victim he

LADARRIUSE GAITHER: DIRECT BY MR. O'STEEN

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1 wasn't -- I wasn't -- I thought he had picked me out of  
2 aline up, you know what I'm saying. But it came to a point  
3 where he was never presented my lineup. And like I felt  
4 like, you know what I'm saying, that would have proved me  
5 innocent.

6 Q. Were you aware of any physical evidence such as  
7 fingerprints or blood on clothing or anything that would  
8 have identified you?

9 A. They had -- They had some fingerprints at the scene  
10 that was linking my codefendant and they said they had his  
11 brother but I really didn't understand it. But though they  
12 had them two, their two names on it.

13 Q. You understand your case was at the time you pled was  
14 that the main evidence against you was going to be your  
15 codefendant?

16 A. Yeah. See my codefendant was pointing, he was  
17 pointing the finger at me.

18 Q. Okay.

19 A. I mean I never received this saying that he was  
20 pressured and confused.

21 Q. Okay. If at the time you pled were you aware of your  
22 codefendant's change of heart or change of his opinion?

23 A. No. Like he had wrote two statements that I received  
24 that he saying I done that. But it was different things in  
25 it that he was saying and different in each statement but

1 both of them saying that I done it.

2 Q. So you're aware of two statements where his testimony  
3 was going to be that you had - was the shooter in the case?

4 A. Yes, sir.

5 Q. And if you had received that document, would you have  
6 - would it have changed your opinion of your case?

7 A. Yeah. That's why I pled no contest. I was just  
8 telling them that I didn't do it but this was supporting  
9 what I was saying that he's lying. I mean he's basically  
10 saying he's pressured and confused so when he was saying  
11 basically it was just coming, it's coming from anyone.

12 Q. So at the time you pled you did not have a copy of  
13 that and you had not seen a copy?

14 A. I never received a copy or seen or talked about it.

15 Q. And were you aware that he had any change of heart in  
16 his testimony?

17 A. No. All I know is he was pointing the finger at me.

18 Q. If you had received that piece of paper, if you had  
19 known about his change of at least that letter what it says  
20 in that letter, would you have pled guilty or would you  
21 have taken a plea?

22 A. No, sir. See what I'm saying, I was pressured not by  
23 saying well this is -- She's saying it's the best thing for  
24 me but at the time it looked like the best thing for me  
25 because he was pointing the finger and that's basically all

LADARRIOUSE GAITHER: DIRECT BY MR. O' STEEN

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1 I was hearing. But this right here was supporting me. I  
2 never received this so when I heard it, when I got in the  
3 Department of Corrections it was basically going off of  
4 what I was saying that, you know what I'm saying? He  
5 telling a lie on me.

6 Q. Okay.

7 A. And by the photo lineup never being presented, these  
8 two things could have proved me innocent. But I never knew  
9 that my photo line up wasn't present until I went to court.

10 Q. So you say you were unaware of the photo lineup not  
11 having been done or no one picked you out and you were  
12 unaware of your codefendant had any change of heart?

13 A. Yes, sir.

14 Q. Okay. Is there anything else you would like to tell  
15 the Court?

16 A. Like in the part where they saying that he's saying  
17 that the man had dreds but they was small dreds, you got  
18 witnesses supporting that on too that he had dreds so if  
19 they was small dreds then how can somebody playing  
20 basketball far away see them? And then at the fact came up  
21 about my codefendant brother by his dreds. And I mean is  
22 -- it ain't point to me no more, you know what I'm saying?  
23 But it was never presented to me like that. All I know is  
24 he point fingers at you.

25 Q. So if you had known that information you would not

LADARRIUSE GAITHER: DIRECT BY MR. O'STEEN  
CROSS BY MR. FRIEDMAN

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1 have taken the plea?

2 A. Yeah because it's a point where I'm still saying that  
3 I was innocent.

4 Q. Okay.

5 No further questions, Your Honor.

6 CROSS EXAMINATION

7 LADARRIUSE GAITHER BY MR. FRIEDMAN?

8 Q. MR. Gaither, you pled guilty; is that right?

9 A. No context.

10 Q. I'm sorry, no contest. Do you remember telling the  
11 Court that you understood the nature of the charges and the  
12 possible punishment?

13 A. Yeah I understand.

14 Q. Do you remember telling the Court that you understood  
15 that a No Contest Plea if still resulted with convictions  
16 on your record?

17 A. See I felt like that's the best thing for me at the  
18 time.

19 Q. You also told the Court that you understood your  
20 constitutional rights including your right to a jury trial;  
21 is that correct? You told the Court that nobody threatened  
22 you or promised you anything to get you to plead guilty?  
23 Do you recall that?

24 A. Yeah nobody threatened me or promised me anything.

25 Q. You also told the Court at that time that you were

LADARRIUSE GAITHER: REDIRECT BY MR. O' STEEN  
LEAH MOODY: RECROSS BY MR. FRIEDMAN

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1 satisfied with your attorney. Do you remember that?

2 A. Yeah. At the time I was satisfied.

3 Q. You told the Court that you fully discussed the  
4 charges and the State's evidence and the possible defenses  
5 with your attorney. Do you remember that?

6 A. Yeah. At the time I only discussed, I received  
7 evidence but I didn't receive all of my evidence.

8 Q. Did you give your attorney the names of any witnesses  
9 that she failed to contact?

10 A. Yeah like this was people that, you know what I'm  
11 saying, that I associated with. It wasn't no a daily basis  
12 so I didn't know real names like "Home Boy" and stuff like  
13 that.

14 Q. Did you have phone numbers or addresses for those  
15 people?

16 A. No. All I knew you know what I'm saying, Leon stayed  
17 across the street from me. And I ain't know J.B. Buddha's  
18 address.

19 Q. I have nothing further, Your Honor.

20 MR. O' STEEN: Redirect.

21 REDIRECT EXAMINATION

22 LADARRIUSE GAITHER BY MR. O' STEEN:

23 Q. The State ask you if you were - if you went through  
24 what you -- Judge Alford was your plea judge and Judge  
25 Alford runs down a list in every plea of all of your rights

LADARRIUSE GAITHER: REDIRECT BY MR. O'STEEN  
LEAH MOODY: RECROSS BY MR. FRIEDMAN

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1 and at the time you said you did understand your rights.  
2 You're not saying at the time you didn't understand your  
3 rights. You're saying at the time you did not have all the  
4 evidence for you to make an informed decision on taking the  
5 plea?

6 A. Yes, sir.

7 Q. Nothing further, Your Honor.

8 MR. FRIEDMAN: No further questions, Your Honor.

9 MR. O'STEEN: If I might take the exhibit back.

10 (WITNESS LEAVING WITNESS STAND.)

11 MR. O'STEEN: Your Honor, nothing further from the  
12 petitioner.

13 MR. FRIEDMAN: Just briefly, Your Honor, I recall Ms.  
14 Moody.

15 THE COURT: You're still under oath.

16 RECROSS EXAMINATION

17 LEAH MOODY BY MR. FRIEDMAN:

18 Q. Ms. Moody, you recognize this letter?

19 A. Yes. This is the same letter that the Applicant  
20 presented.

21 Q. Is there a date that you received that mailing on it?

22 A. Yes. In my office we typically date stamp any  
23 envelope just for CY and on this date this letter is  
24 received July 8, 2009 where Mr. Williams says that there's  
25 not much evidence against Mr. Gaither.

LEAH MOODY: RE-CROSS BY MR. FRIEDMAN

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1 Q. And that was before the guilty, that was before the  
2 plea. Right?

3 A. That's correct.

4 Q. Was that before or after you spoke with the solicitor  
5 about the codefendant, what he was pleading guilty to?

6 A. That was -- this is before. This letter is before.

7 Q. So you got that letter before you knew what the  
8 codefendant's testimony would be against the applicant?

9 A. That's correct. I got this in July we did the plea  
10 and the trial was scheduled for January 28th 2010.

11 Q. Is it your testimony that you were able to discuss  
12 that with the applicant?

13 A. I had to have because I told him we talked about that,  
14 the ways this guy was going back and forth.

15 Q. I have nothing further, Your Honor.

16 A. Well can I say the date of when I got when the  
17 testimony was?

18 Q. Yes, ma'am.

19 A. The testimony from the solicitor about what Victor  
20 Williams was going to testify about was in October of 2009.  
21 This letter came July 8th 2009 so it's impossible that we  
22 didn't discuss it.

23 Q. All right.

24 MR. O'STEEN: Nothing further, Your Honor.

25 MR. FRIEDMAN: No other witnesses, Your Honor.

1 MR. O'STEEN: No, Your Honor.

2 THE COURT: Okay. Let me take a look at the trial.

3 MR. O'STEEN: Thank you, Your Honor.

4 THE COURT: I will try to get a decision out to you.

5 Thank you all for your representation in this matter.

6 (END OF TRANSCRIPT OF RECORD IN THE MATTER OF

7 LADARRIUSE GAITHER, CASE NO. 2010-CP-46-03127.)

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Dear, Leah Moody

I'm Victor Wil  
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getting shot or  
the fact it is

Time, if I don't  
at me's



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 LaDarriuse A. Gaither, #339064, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 2010-CP-46-3127

ORDER OF DISMISSAL

2012 FEB -9 PM 1:32  
 YORK COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 27, 2010. The Respondent made its Return on February 11, 2011. An evidentiary hearing into the matter was convened on October 11, 2011 at the York County Courthouse. The Applicant was present at the hearing and represented by F. Lee O'Steen, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Leah Moody, Esquire, also testified at the hearing. This Court had before it the records of the York County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the plea transcript, the PCR application, the State's Return thereto, and a July 8, 2009 letter from co-defendant Victor Williams to counsel.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted at the April 2009 term of the York County Grand Jury for assault and battery with intent to kill (ABWIK) (2009-GS-46-1781, Count I), possession of a weapon during the commission of

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a violent crime (2009-GS-46-1781A, Count II), criminal conspiracy (2009-GS-46-1779), attempted armed robbery (2009-GS-46-1780, Count I), and possession of a weapon during the commission of a violent crime (2009-GS-46-1780A, Count II). Leah Moody, Esquire, represented the Applicant. On January 25, 2010, the Applicant pled no contest to ABWIK (2009-GS-46-1781, Count I), possession of a weapon during the commission of a violent crime (2009-GS-46-1781A, Count II), and conspiracy (2009-GS-46-1779). In exchange for Applicant's pleas, the State dismissed the two remaining charges. On January 28, 2010, the Honorable Lee S. Alford sentenced the Applicant to fifteen (15) years for ABWIK, five (5) years for possession of a firearm during the commission of a violent crime, and five (5) years for conspiracy, which were to all run concurrently. Applicant did not appeal the plea or sentence.

#### ALLEGATIONS

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

1. Ineffective assistance of counsel in that
  - a. "Counsel failed to investigate case."
  - b. "Counsel failed to challenge constitutional violations."
2. "No contest plea was not followed properly."

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

Plea counsel testified that she received a letter from Applicant's co-defendant Victor Williams. In the letter, the co-defendant said he was pressured to give a statement and was

willing to help Applicant. Counsel asserted that the co-defendant never said Applicant did not commit these offenses and he changed his story multiple times. She testified that she discussed the co-defendant's statements and his letter with Applicant prior to the plea. Counsel testified that the co-defendant was manipulative and wrote completely different letters to the solicitor. She also testified that she spoke with the co-defendant's attorney, who indicated that the co-defendant's testimony at Applicant's trial would not be favorable to Applicant. Counsel testified that she conducted a thorough investigation, but no alibi witnesses panned out. She testified that no witness could account for Applicant between 7:30 and 9:00. She asserted that she spent more than seventy hours on the case and was prepared for trial. Counsel testified that it was ultimately Applicant's decision to accept the plea offer.

Counsel testified that she subpoenaed booking photos, contacted Applicant's cousin and grandmother, contacted the solicitor, tried to find an alibi witness, was prepared to subpoena phone records, and tried to locate witnesses Brittany Thompson, a neighbor named Leon, J.B., and Buddha. She asserted that Brittany Thompson and Leon did not return her calls, and she did not have contact information on J.B. and Buddha. Counsel testified that Applicant's cousin and grandmother placed Applicant with the co-defendant on the day in question. She testified that there was no lineup because no one was arrested at first and the victim was paralyzed and immediately rushed to the hospital. Counsel testified that she told Applicant that the jury would have had sympathy for the victim at trial because he was paralyzed during the shooting. She asserted that Applicant was adamant that he was not there, and she explained the significance of the no contest plea to Applicant. She testified that she explained the consequences of the plea to Applicant and had him sign a plea affidavit.

Applicant testified that he saw the co-defendant's letter to counsel for the first time after

the plea. He asserted that he thought the victim had picked him out of a lineup. He testified that the main evidence against him was the co-defendant's statement, and he was not aware of the co-defendant's change of opinion until after the plea. Applicant testified that he did not know the real names and addresses of some of the witnesses that he gave to counsel.

#### Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

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

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625. 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).

This Court finds that Applicant's testimony is not credible with respect to the discussions about the co-defendant's letter and the absence of a photo lineup while also finding that trial counsel's testimony is credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on several occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, and possible defenses or lack thereof.

This Court finds that it was Applicant's decision to accept the plea offer. Applicant indicated during the plea hearing that he understood the nature of the charges and the possible punishments. He also indicated that he was satisfied with his attorney and that no one has threatened him or promised him anything to accept the plea offer. Applicant told the plea court that he was entering the plea of his own free will. This Court finds that Applicant entered the no contest plea freely and voluntarily with a full understanding of the consequences of the plea.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in her representation. This Court finds that

counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that counsel properly discussed the co-defendant's multiple statements and letters prior to the plea. This Court is not persuaded by Applicant's testimony that he did not know about the co-defendant's letter until after the plea.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically 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 her representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by counsel's performance. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

#### All Other Allegations

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

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his plea or sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with

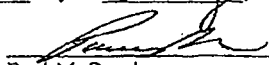
prejudice.

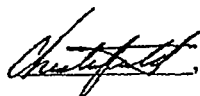
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules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

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 1st day of February, 2012.

  
\_\_\_\_\_  
Paul M. Burch  
Presiding Judge  
16<sup>th</sup> Judicial Circuit

  
\_\_\_\_\_, South Carolina.

WITNESSES  
RHPD / B Haire

DOCKET NO. 2009-GS-46-01781  
2009-GS-46-01781 (A)  
The State of South Carolina  
County of York

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

Defendant

COURT OF GENERAL SESSIONS

April 23<sup>rd</sup> Term 2009

I Ladarriuse Anthony Gaither hereby appear in my own proper person and plead guilty to the within indictment or to "No CONTEST" for both counts  
count I - Assault + Battery  
with intent to kill  
AND count II Possession of Firearm during Violent Crime  
✓ Ladarriuse Gaither  
Defendant

ARREST WARRANT NUMBER  
Count I: K327321  
Count II: Direct Indictment (In Re: K327327)

THE STATE

vs.

Witness: *David Hamilton*  
C.C.C. PLS. AND G.S.

LADARRIUSE ANTHONY GAITHER

ACTION OF GRAND JURY  
TRUE BILL  
*David Hamilton*  
Deputy Person of Grand Jury  
4/23/09  
VERDICT

Person of Petit Jury  
Signature:

Indictment for  
COUNT I: ASSAULT AND BATTERY WITH INTENT TO KILL  
SC Code: § 16-03-0520; CDR Code: 0014  
COUNT II: POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME  
SC Code 16-23-0490; CDR Code: 0549

CERTIFIED TRUE COPY  
2010 AUG 18 AM 9:42  
DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 23, 2009, the Grand Jurors of York County present upon their oath:


**COUNT I: ASSAULT AND BATTERY WITH INTENT TO KILL**

That on or about September 7, 2008, the Defendant Ladarriuse Anthony Gaither did, with malice aforethought, commit an unlawful assault and battery of a violent nature upon the victim Valentino Johnson, causing the victim violent injury, to wit: while acting in concert together and in the course of attempting to commit an armed robbery of the victim, the Defendant Ladarriuse Anthony Gaither and the codefendant Victor A. Williams used a handgun to shoot the victim Valentino Johnson in the neck with the intent to inflict serious bodily injury to said victim, which did cause serious bodily injuries to the victim which required medical treatment and which resulted in said victim being paralyzed. Said incident occurred in the 200 block of Simrill Street in Rock Hill, South Carolina, which is located within York County, South Carolina. All in violation of Section 16-3-620, Code of Laws of South Carolina, (1976, as amended) and S.C. Common Law.

**COUNT II: POSSESSION OF A FIREARM DURING THE COMMISSION  
 OF A VIOLENT CRIME**

That on or about September 7, 2008, the Defendant Ladarriuse Anthony Gaither did unlawfully have in his actual or constructive possession a firearm while committing the crime of Assault and Battery with Intent to Kill, a violent crime as defined in Section 16-1-60, Code of Laws of South Carolina (1976, as amended). Said incident occurred within York County, South Carolina. All in violation of Section 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

WITNESSES  
RHPD /B. Haire

ARREST WARRANT NUMBER  
327328

ACTION OF GRAND JURY

TRUE BILL

*[Signature]*  
Person of Grand Jury  
Date: 4/23/09

VERDICT

Person of Petit Jury

DOCKET NO. 2009-GS-46- *01779*  
The State of South Carolina  
County of York

COURT OF GENERAL SESSIONS  
April 23<sup>rd</sup> Term 2009

THE STATE  
vs.  
LADARRIUSE ANTHONY GAITHER

Indictment for  
CRIMINAL CONSPIRACY

SC Code: 16-17-0410  
CDR Code:0049

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

Defendant

*Ladarrise Anthony Gaither*  
hereby appear in my own proper person and plead guilty to the within indictment or to  
*"No contest"*  
*criminal conspiracy*

*Ladarrise Gaither*  
Defendant

Witness  
*[Signature]*  
C.C.C./P.L.S. AND G.S.

CERTIFIED TRUE COPY  
2010 AUG 23 AM 9:42  
DAVID HAMILTON  
CLERK OF COURT  
YORK COUNTY, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

INDICTMENT

At a Court of General Sessions, convened on April 23, 2009, the Grand Jurors of York County present upon their oath:

CRIMINAL CONSPIRACY

That on or about September 7, 2008, the Defendant Ladarriuse Anthony Gaither did willfully, knowingly, and feloniously unite, combine, conspire, confederate, agree and have a tacit understanding with another person, to wit: Victor A. Williams, for the purpose of committing the crime of Armed Robbery, and said Defendant Ladarriuse Anthony Gaither and said codefendant Victor A. Williams did act together and in concert thereafter on September 7, 2008 in an attempt to commit the planned act of Armed Robbery, said incident occurring at the 200 block of Simrill Street, Rock Hill, South Carolina. Said offense and said incident did occur within York County, South Carolina. All in violation of the Common Law of South Carolina and Section 16-17-410, 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