

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

2010-CP-10-6960

RECEIVED

AUG - 5 2011

SYLVESTER SCOTT,

S.C. Supreme Court
Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX

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

State of South Carolina,)
Plaintiff,)
vs.) No. 09-GS-10-6471
Sylvester Scott,)
Defendant.)

TRANSCRIPT OF HEARING

The within Hearing was held on March 16, 2010, before The Honorable R. Markley Dennis, Jr., in Courtroom 4D of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel, as follows:

APPEARANCES:

Tripp Lawton, Assistant Solicitor
9TH CIRCUIT SOLICITORS OFFICE
100 Broad Street, 4th Floor
Charleston, South Carolina 29401
Appearing for State of South Carolina

Andrew Grimes, Assistant Public Defender
CHARLESTON CO PUBLIC DEFENDER
101 Meeting Street, 5th Floor
Charleston, SC 29401
Appearing for Defendant

DEBORAH GARRISON
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Post Office Box 901
Johns Island, South Carolina 29457
dGarrison@secourts.org

State of South Carolina v. Sylvester Scott
Case No. 09-GS-10-6471
Hearing of March 16, 2010
Before The Honorable R. Markley Dennis, Jr.

2

1 THE COURT: You are Sylvester Scott?

2 DEFENDANT: Yes, sir.

3 TRIPP LAWTON: Your Honor, this is
4 Sylvester Scott. He's here to enter a plea of
5 Guilty to entering a bank with the intent to
6 steal. He's represented by his attorney, Andrew
7 Grimes.

8 THE COURT: Mr. Scott, Mr. Grimes
9 represents you in this matter?

10 DEFENDANT: Yes, sir.

11 THE COURT: He's explained to you the
12 nature of the charge contained in Indictment 09-
13 6471?

14 DEFENDANT: Yes, sir.

15 THE COURT: That indictment charges
16 you with entering a financial institution with
17 intent to steal, do you understand that?

18 DEFENDANT: Yes, sir.

19 THE COURT: Do you understand for
20 that that I could sentence you up to thirty
21 years for this?

22 DEFENDANT: Yes, sir.

23 THE COURT: Is that correct, Mr.
24 Grimes?

25 ANDREW GRIMES: Yes, sir.

State of South Carolina v. Sylvester Scott
Case No. 09-GS-10-6471
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Before The Honorable R. Markley Dennis, Jr. .

3

1 THE COURT: Do you understand that I
2 could sentence you to thirty years?

3 DEFENDANT: Yes, sir.

4 THE COURT: How do you plead, guilty
5 or not guilty?

6 DEFENDANT: Guilty.

7 THE COURT: Are you satisfied with
8 your lawyer?

9 DEFENDANT: Yes, sir.

10 THE COURT: Any complaints about the
11 way that he has handled your case?

12 DEFENDANT: No, sir.

13 THE COURT: Solicitor, any
14 recommendation?

15 TRIPP LAWTON: No, Your Honor.

16 THE COURT: Mr. Grimes, that is your
17 understanding, as well?

18 ANDREW GRIMES: Yes, sir.

19 THE COURT: Have you discussed the
20 matter fully with your client?

21 ANDREW GRIMES: Yes, sir.

22 THE COURT: Has he been advised of
23 his rights and the consequences of his plea?

24 ANDREW GRIMES: Yes, sir.

25 THE COURT: Based on your

1 investigation, do you agree with his decision to
2 enter this plea?

3 ANDREW GRIMES: Yes, sir.

4 THE COURT: Mr. Scott, is all that
5 true, sir?

6 DEFENDANT: Yes, sir.

7 THE COURT: Then you realize and
8 understand, sir, that if I accept your plea that
9 you will not have a jury trial, you will not
10 confront the witnesses against you and you are
11 giving up the right to remain silent?

12 DEFENDANT: Yes, sir.

13 THE COURT: Anyone promised you
14 anything or threatened you in any way to get you
15 to plead guilty, sir?

16 DEFENDANT: No, sir.

17 THE COURT: Tell me the facts if you
18 would, solicitor.

19 TRIPP LAWTON: Your Honor, this
20 happened on March 18th, 2009, 11:15 in the
21 morning at 946 Orleans Road at The Tideland
22 Bank, which is directly across from The Citadel
23 Mall.

24 The defendant, in disguise, entered the
25 bank, presented a note to a Ms. Erin VanBuren,

1 who is present in the courtroom. The note
2 indicated, "Give me all your 100's, 50's, \$10's,
3 \$20's, no one will get hurt."

4 He got about \$1,700, Your Honor. There
5 was a video that was occurring. They were also
6 able to look at videos to see where the
7 defendant left and with that they were able to
8 get a canine to track down to where they located
9 the disguise -- a wig, dreadlocks, also -- they
10 were able to get DNA off of that.

11 He's also charged with two of these
12 crimes in the area, Your Honor.

13 As far as priors go:

14 1998, Burg 2nd Violent and a grand
15 larceny;

16 2001, resisting arrest, POE, and
17 also an assault on police officer while
18 resisting arrest;

19 2003, 2004, 2005, POE and also a
20 2007 Burg 2nd, as well as a
21 2005 Burg 2nd.

22 I don't believe that the victim wants
23 to talk today, Your Honor. Unlike a lot of
24 victims, she is still working there, Your Honor.
25 It's something that she deals with every day.

1 Something that never crossed her mind before it
2 happened. I don't believe that she wants to
3 address, uh, (pause).

4 THE COURT: Are those facts correct,
5 sir?

6 DEFENDANT: Yes, sir.

7 THE COURT: Have you fully understood
8 all of my questions?

9 DEFENDANT: Yes, sir, Your Honor. I
10 would like to apologize ---

11 THE COURT: Hold on a second. I am
12 going to give you a chance, we're just not there
13 yet because I haven't accepted the plea. Have
14 you truthfully responded to all of my questions?

15 DEFENDANT: Yes, sir.

16 THE COURT: Are you under the
17 influence of any alcohol or any medication here
18 today?

19 DEFENDANT: No, sir.

20 THE COURT: Have you taken any type
21 of medication in the last twenty-four hours?

22 DEFENDANT: No, sir.

23 THE COURT: Have you ever been
24 treated in the past for any emotional problems
25 or any mental illness?

1 DEFENDANT: No, sir.

2 THE COURT: Very well, I will accept
3 the plea. Mr. Grimes, I will be happy to hear
4 from you, sir.

5 ANDREW GRIMES: Thank you, Your
6 Honor. First of all, I will let Mr. Scott
7 explain why he robbed the bank that day.

8 THE COURT: Certainly. Sir, I'll be
9 delighted to hear from you.

10 DEFENDANT: Thank you, Your Honor.
11 First of all, I would like to apologize to the
12 court and I'd like to apologize to the victim.
13 I realize that -- I want to let the court know,
14 let you'all know that the person that did this
15 was not the person I really tend to be. I have
16 a -- I was dealing with a heroin addiction. I
17 can't take it away, it's -- I've destroyed my
18 family, I've let them down. My fiancée and my
19 daughter were facing an eviction notice during
20 that time -- (emotional). I just wanted to come
21 through for them one time, -- (emotional, just
22 one time. Again, I would like to apologize to
23 my family for screwing up. I'd like to also --
24 also apologize to the lady at the bank.

25 THE COURT: Thank you, sir. Mr.

1 Grimes, anything else?

2 ANDREW GRIMES: Yes, sir. I liked
3 what you said in a previous (unrelated plea)
4 about being blindsided, I thought that was very
5 good. This was sort of the opposite of that
6 situation. Mr. Scott comes from a very good
7 family, his father was a merchant marine,
8 merchant seaman for thirty years, his mother
9 works at The Citadel, his brother lives and
10 worked in Atlanta. Sylvester started using
11 drugs, started heroin. I talked to some people
12 in my office yesterday that know the family,
13 know the neighborhood and said that they'd heard
14 that Mr. Scott had some problems. He went to
15 Burke, graduated there. Unfortunately it was
16 his senior year that he started using heroin.
17 After graduating he wen to New Jersey, got
18 involved with heroine. He then got back on the
19 right path and did okay for a year and a half,
20 went to youth counseling, and then got again
21 involved in heroin.

22 You wonder how does this happen to
23 someone who had the resources and the family
24 that he did. He was able to work for Judge
25 Martin. They said that remember him being a

1 good kid. Some of his friends used to be
2 jealous because he did so much, was able to
3 hang out and do things they couldn't do.

4 I know when I growing up that I had
5 friends that hung out, did marijuana and -- and
6 I didn't do that but they also said, 'Andrew, we
7 don't want you to hang out with us, don't do any
8 of this.' I was lucky. But Mr. Scott didn't
9 have the self-conviction to walk away.

10 He spoke about losing his family -- you
11 see Ms. Wilson, his fiancée. She was actually
12 in college and she dropped out to kind of help
13 him, cared about him. Now she' working at
14 probably a lower-paying job than she would have
15 otherwise.

16 It's really affected his mom, I talked
17 to her. His other family is out of town and
18 weren't able to be sure, though I'm sure if they
19 would have come given the history that he's had.

20 But one thing about his record, he's
21 got a few resisting arrests, getting in fights,
22 beating up people dealing with violent people.
23 I am sure that this was very traumatic
24 experience for the teller. I watched the video,
25 there was another customer came up afterwards

1 and you could tell that this was unusual. I am
2 sure that it was very traumatic.

3 Mr. Scott, when I first met him, I got
4 to know him and he, except for the drugs, he's
5 got a good mind. He could easily be up here.
6 Unfortunately he had a bad decision -- like he
7 said, he screwed up again. We would ask that
8 the court be as merciful as possible.

9 THE COURT: Burg 2nd -- when was the
10 last one?

11 TRIPP LAWTON: 2005 Burg 2nd.

12 THE COURT: What was the last one?

13 TRIPP LAWTON: 2007 Burg 2nd.

14 THE COURT: What happened with that?

15 TRIPP LAWTON: He received five
16 years suspended on three years followed by two
17 years probation.

18 THE COURT: So he was given five
19 years, served three?

20 TRIPP LAWTON: Yes, sir.

21 DEFENDANT: Yes, sir.

22 THE COURT: In 2007?

23 ANDREW GRIMES: I think he did two
24 years actually.

25 THE COURT: When were you released

1 from the three-year sentence -- the three-year
2 sentence imposed in 2007, when did you get
3 released?

4 DEFENDANT: December of '08.

5 THE COURT: What was the date of the
6 sentence?

7 TRIPP LAWTON: 3/18 -- oh, the
8 sentence?

9 THE COURT: 2008?

10 TRIPP LAWTON: May 20th, 2008. He
11 got out in December of '08.

12 ANDREW GRIMES: Your Honor, I think
13 he'd spent ten months in jail before ---

14 THE COURT: I understand -- it's the
15 new math. So you get out in December of '08?

16 DEFENDANT: Yes, sir.

17 THE COURT: And you commit this crime
18 in March of '09?

19 DEFENDANT: Yes, sir.

20 THE COURT: I don't question for one
21 second that you're sincere when you say that you
22 want to change. Excuse my cynicism, but talk is
23 cheap. You have to put your words into action.
24 The first thing that you've got to do is to
25 acknowledge that you're an addict and that you

1 need help.

2 DEFENDANT: Yes, sir.

3 THE COURT: Seeking help is the first
4 step that you're going to have to have -- you're
5 probably going to have to seek it every day that
6 you're free.. That is not a crime, nothing bad,
7 just the consequence of your choices.

8 But I'm convinced as I am -- you can --
9 if you want it, you can deal with it, you can
10 maintain sobriety if you want to do that.
11 People do it every day, with a lot worse
12 addictions than you have. Some don't. It's up
13 to you.

14 It's not question that -- I don't know
15 whether this will help you or not. I hope that
16 it will give you time to think about some
17 things. The sentence of the court is that you
18 be committed to the Department of Corrections
19 for a term of twelve years. I give you credit
20 for the time that you have served. How long has
21 that been?

22 ANDREW GRIMES: I have about 300
23 days.

24 THE COURT: Three hundred?

25 ANDREW GRIMES: Yes, sir.

1 THE COURT: Give you credit for three
2 hundred days. You understand that this is a
3 nonparoleable offense, Mr. Scott?

4 DEFENDANT: Yes, sir.

5 THE COURT: So you will served
6 eighty-five percent of that sentence. There is
7 a debate that I'm sure all of -- certainly my
8 colleagues would be, in a discussion we had
9 recently about a decision that the Supreme Court
10 handed down about whether or not probation can
11 be given in a case where there is a nonparole-
12 able offense. I hope some day that they will
13 modify it. I don't fault the community
14 supervision program. You understand that you are
15 going to have to complete that?

16 DEFENDANT: Yes, sir.

17 THE COURT: They can return you up to
18 the fifteen percent remaining?

19 DEFENDANT: (Affirmative nod).

20 THE COURT: Frankly, sometimes that
21 is not enough time to help an addict. That's
22 why fives years is important. Frankly, we ought
23 to be able to tack it on afterwards and then we
24 would have some supervision that would be good
25 for you. But I can't in this case. You

1 understand that you're going to have to complete
2 that?

3 DEFENDANT: (Affirmative nod).

4 THE COURT: I hope that you will
5 listen to them (indicating Probation agent)
6 because I am sure they will offer you some
7 resources and some counseling opportunities.
8 Take advantage of it.

9 I don't know what counseling remains in
10 prison but I would urge you to take advantage of
11 any that they offer while you are there, so that
12 you can get on the road to recovery. Good luck
13 to you, sir.

14 (HEARING CONCLUDED)

15

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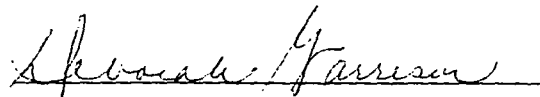
24

25

CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on March 16, 2010;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison

Circuit Court Reporter

9th Judicial Circuit

Charleston, South Carolina

September 22, 2010

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

Sylvester Scott

vs.

State of South Carolina

Defendant(s)

2010 -CP- 10 - 6960

(Please Print)

Submitted By:

Sylvester Scott
Lieber Corr. Inst.

SC Bar #:

Telephone #:

Address:

P.O. Box 205
Ridgeville, SC. 29472

Fax #:

Other:

E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts

- ☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice

- ☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP- -
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts - Personal Injury

- ☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

Real Property

- ☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions

- ☒ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements

- ☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799)

Administrative Law/Relief

- ☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

Appeals

- ☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex/Other

- ☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510)

Submitting Party Signature: _____

Date: _____

FORM 5

STATE OF SOUTH CAROLINA)

County of Charleston)2010-CP-10-6960
IN THE COURT OF COMMON PLEASSylvester Scott)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2010 AUG 26 PM 1:08
JULIE J. KIRK
CLERK OF COURTINSTRUCTIONS - READ CAREFULLY

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

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, P.O. Box 205,
Ridgeville, SC. 29472
2. Name and location of Court which imposed sentence Charleston County,
Court of General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2009-GS-10-6471 (entering a bank with intent to steal)

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 16, 2010 (12-years)
- (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?
- _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____

- (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) involuntary plea, erroneous advice from counsel;
- (c) denial of Sixth and Fourteenth Amendment, U.S. Const.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see attached memorandum of law in support
- (b) same as above
- (c) same as above
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. n/a
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. _____
- iii. _____

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

first filing pcr.

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

- (a) which grounds have been presented:

- i. n/a
- ii. _____
- iii. _____

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

- i. n/a
- 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) first filing for post conviction relief (PCR).
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? yes
- (b) your trial, if any? n/a
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? n/a
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? n/a
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. Andrew grimes, Esquire
Charleston, Bar
- 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 sentence and conviction and remand for new trial.

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

no

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Dorchester)

VERIFICATION

I, Sylvester Scott, 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.

Sylvester Scott

SWORN to and subscribed before me this 24th
day of August, 2010.

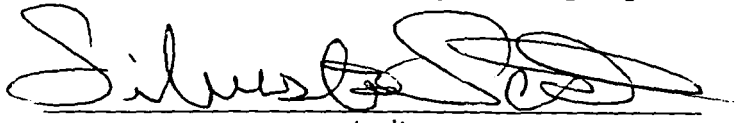
Ludrecan Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

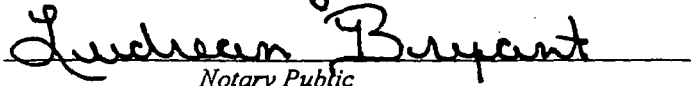
**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Sylvester Scott, 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.


Applicant

SWORN or affirmed to and subscribed before me this
24th day of August, 2010.


Notary Public

My Commission Expires: May 26, 2020

10-6960

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF THE COMMON PLEAS

Indict.No. 2009-GS-10-6471

Sylvester Scott -- Petitioner,

-Vs-

State of South Carolina -- Respondent,

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR POST CONVICTION RELIEF
PURSUANT TO S.C. CODE ANN.
§§17-27-20 THROUGH 160

Respectfully Submitted,
/s/ _____
Sylvester Scott

2010-CP-10-6960

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)

FILED
2010 AUG 26 PM 1:08
JULIE J. HARRIS
CLERK OF COURT

Sylvester Scott
Petitioner,

) Indict.No. 2009-GS-10-642

-V-

) MEMORANDUM OF LAW IN SUPPORT OF

State of South Carolina

) APPLICATION FOR POST CONVCITION

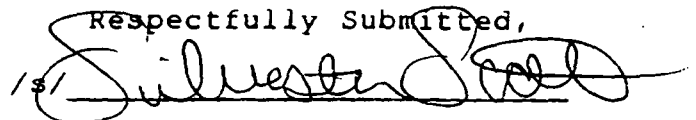
Respondent,

) RELIEF PURSUANT TO S.C. CODE ANN

COMES NOW, Sylvester Scott, pro-se, herein after, Petitioner , seeking relief in this Honorable Court pursuant to S.C. Code Ann. §§17-27-20 through 160, claiming that his rights have been violated in a number of ways, including but not limited to his Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to due process of law that is protected under the Constitution of the United States.

Through the issues presented and citations of authorities relied on, Petitioner will show unto this Honorable Court his entitlement to the requested relief sought herein.

Respectfully Submitted,

/s/ 

Sylvester Scott

STANDARD OF REVIEW

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-part standard for evaluating claims of ineffective assistance of counsel. The first part of the test requires that a defendant show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness.

The second part of the test requires that a defendant show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. The second part of the Strickland test has also been referred to as the "prejudice" requirement.

Although the Strickland test dealt with ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part test was extended so as to apply to ineffective assistance of counsel claims arising out of the plea process in Hill v. Lockhart, 474 U.S. 52 (1985).

In Hill, the Court held that in the context of determining the voluntariness of a guilty plea that is entered upon the advice of counsel, the first half of the Strickland test would require an inquiry into whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. Simply put, the first inquiry is whether counsel's advice was deficient.

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR ADVISING PETITIONER TO
PLEAD GUILTY WITHOUT PERFORMING ANY PRETRIAL INVESTIGATION BOTH
FACTUAL AND LEGAL, THUS RENDERING PETITIONER'S GUILTY PLEA
INVOLUNTARY?

FACTS

Petitioner asserts that he was denied the effective assistance of trial counsel when counsel erroneously advised Petitioner to plead guilty without performing any pretrial investigation both factual and legal.

This case stems from three separate incidents of alleged bank robberies. The State's theory was that on 3-18-09, a Tideland Bank had been robbed. Upon investigation, Erin Van Buren, (bank teller), told the police that an unknown black male entered the bank wearing sunglasses, a wig, fake beard, and the suspect was wearing a dark shirt and black pants. the teller asked the subject to remove the sunglasses and the subject approached the window stating he needed to cash some checks. The teller told the police that the unknown blackman then passed a note to the teller that stated: "give me all your 100's, 50's, 20's, no dye packs and no one gets hurt". The teller told the police the unknown blackman then fled the scene.

During the course of the police investigation the Officer's were investigating two other bank robberies in that the police believed the robberies were connected and committed by the same perpetrator. While investigating the other bank robberies

Investigators composed a photographic line-up and presented it to the tellers who were working at the Tideland Bank at the time of the robbery. Petitioner's photo was placed in the photo line-up and shown to the tellers. Vanburen (teller) told the investigators she was "unable" to make an identification. Shannon Russell (the other teller), also told investigators that she to was "unable" to make an identification. (emphasis supplied).

While still on the scene K9 officers had followed what they believed to be the suspect. While following the suspect the Officers located a discarded wig and beard/mustache. The Officers believed these items were consistent to what the suspect was reported wearing. The items were found in the rear of a neighboring shopping center. Also located with the items was a plastic bag containing a store receipt from Hokus Pokus Costume Store. The receipt revealed a purchase for a wig, beard/mustache and a roll of tape. The date of the sales receipt was 3-17-09. Investigators went to Hokus Pokus to inquire about the receipt and who may have purchased the items. It was learned at that time that a skinny white male and a heavy set white female had purchased the items in question and clearly identifying a male and female purchased the items. (a white male and female).

It should be noted that while interviewing Van Buren Team 4 Officers stopped a subject [fitting the description of the perpetrator who had robbed the bank].(emphasis supplied). Van Buren was unable to provide a positive identification but stated that the person stopped by the officers "could possibly" be the

subject. At that time Van Buren provided investigators with a written statement along with all the other employees that were interviewed. The individual who was stopped was placed into investigative detention and was identified as [Terrell Doctor], Doctor agreed to speak with the investigators and was subsequently interviewed and released.

Somehow, for reasons unknown Investigating Officers were able to obtain a search warrant by claiming that Petitioner was developed as a suspect, and Petitioner was to have been identified from a photographic line-up. Petitioner was subsequently arrested and charged with multiple bank robberies. Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to conduct any pretrial investigation before erroneously advising Petitioner to plead guilty. Petitioner asserts that had counsel of effectively investigated the case before advising Petitioner to plead guilty, as Petitioner clearly had viable and competent defenses available to pursue a trial by jury. To sufficiently develop this issue Petitioner will give testimony in support of his allegations and will further develop this issue during the PCR Hearing.

Petitioner asserts that he would not have plead guilty but would have insisted on going to trial. For the aforementioned reasons Petitioner respectfully prays that this Court will grant the requested relief of a new trial.

DISCUSSION

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right... ..to have the assistance of counsel for his defense." U.S. Const. amend. VI. The right to the effective assistance of counsel means the right to "effective assistance of counsel." See Cuyler v. Sullivan, 446 U.S. 335, 344, 352 (1980); also see United States v. Morrison, 449 U.S. 361, 366 (1981); Tollett v. Henderson, 411 U.S. 258, 266-68.

At the heart of effective representation is the independent duty to investigate and prepare. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th.Cir.), cert. denied ____ U.S. ____, 103 S.Ct. 1798. Therefore, permissible trial strategy can never include the "failure" to conduct reasonably substantial investigation of the case.

The test formulated in Strickland v. Washington, 466 U.S. 668 (1984), for determining whether counsel has rendered constitutionally ineffective assistance reflects this concern. In Strickland, the Court identified two components to any ineffective assistance of counsel claim. (1) deficient performance; and (2) prejudice. Under that decision, a criminal defendant alleging prejudice must show that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. at 687, see also Kimmelman v. Morrison, 477 U.S. 365, 374 (the essence of an ineffective assistance of counsel claim is that counsel's unprofessional

errors so upset the adversarial balance between the defense and prosecution that the proceeding was rendered unfair and the conviction suspect).

Preparation and investigation "must be more than perfunctory." Counsel has an affirmative duty to conduct appropriate investigation, both factual and legal. Coles v. Peyton, 389 F.2d 224, 226 (4th.Cir.), cert. denied 393 U.S. 849 (1968).. The failure to ascertain and investigate possible defenses has often resulted in finding that the defendant was denied adequate representation. See Goodwin v. Swenson, 287 F.Supp. 166, 176-86 (W.D.Mo.1968)..

The primary input of the attorney to his client's case is that of professional expertise. Even in a simple criminal case, meticulous investigation and thoughtful legal analysis will often reveal a panolpy of issues -- to which the defendant, a layman, will be oblivious. Garland v. Cox, 472 F.2d 875, 879 (4th.Cir.).

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. The American Bar Association Standards for Criminal Justice, Prosecution and Defense Function describes the obligation in terms no one could misunderstand in circumstances of a case like this one: "it is the duty of the lawyer to conduct prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to

secure information in the possession of the prosecution and law enforcement authorities. See ABA for Criminal Justice 4-4.1 (2nd. ed. 1982 Supp.). The failure to investigate, research and prepare is equivalent to not representation at all. Brubaker v. Dickson, 310 F.2d 30, accord Willaims v. Beto, 354 F.2d 698, and Brooks v. Texas, 381 F.2d 619.

Petitioner asserts that his plea was involuntarily given under the circumstances. Petitioner's pleas was based upon counsel's erroneous advice. The facts set forth supra clearly show that, (1) none of the bank employees identified Petitioner, (2) a white male and female were to have purchased the items in question, (3) Terell Doctor was stopped near the location and the Bank teller Van Buren told the investigators "it could possibly be him." Petitioner asserts that he was denied the effective assistance of trial counsel when counsel failed to perform any pretrial investigation before encouraging Petitioner to plead guilty. Petitioner asserts that except for counsel's errors Petitioner would not have plead guilty but would have insisted on going to trial.

Petitioner respectfully prays this Court will grant the request of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR ERRONEOUSLY ADVISING PETITIONER TO ENTER A PLEA OF GUILTY WITHOUT MOVING TO SUPPRESS THE EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT?

FACTS

Petitioner asserts that he was denied the effective assistance of counsel when counsel erroneously advised Petitioner to plead guilty without moving to suppress the evidence that was seized in violation of the Fourth Amendment.

Petitioner asserts that the affiant who prepared the search warrant used misleading facts and conclusionary statements to obtain the search warrant. As a result of counsel's failure to move to suppress the evidence Petitioner was left with no choice but to enter a plea of guilty based upon counsel's erroneous advise.

Petitioner asserts that had counsel moved to suppress the evidence he would not have plead guilty but would have insisted on going to trial.

DISCUSSION

Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to move to suppress the evidence (DNA Buccal Swab) seized by the State based on false and conclusionary statements made by the affiant in order to obtain the search warrant.

In Franks v. Delaware, 438 U.S. at 171-72, 98 S.Ct. at 2684, 57 L.ED.2d at 682, the United States Supreme Court held that the

Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed. In State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), the South Carolina Supreme Court also addressed whether a defendant could attack the veracity of facts supporting a search warrant when the warrant was valid on its face. Noting that the United States Supreme Court had not yet squarely addressed this issue, the South Carolina Supreme Court answered the question in the affirmative, providing the following limited test: "did the officer, or other government official, in such a capacity, intentionally, recklessly, or in bad faith recite facts he knew or should have known to be erroneous, without correcting the error by additional affidavit or information to obtain the issuance of the warrant?" Sachs 264 S.C. at 555, 216 S.E.2d at 509.

To summarize, the Franks Court provided the following two-part test:

(1) To mandate an evidentiary hearing, the challenger's attack must be more than conclusionary and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

(2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. Franks supra Id.

Franks addressed an act of commission in which false information had been included in the warrant affidavit. However, the Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit. See e.g., United States v. Colkely, 899 F.2d 297 (4th.Cir.1990); United States v. Vazquez, 605 F.2d 1269 (2nd.Cir.1979). To be entitled to a franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge. See Edward Gregory Mascolo, Controverting An Informant's Factual Basis for a Search Warrant: Franks v. Delaware Revisited and Rejected Under Connecticut Law, 15 Q.L.R. 65 (1995).

The instant case involves both an act of commission and an act of omission by the affiant. The affiant provided the judge with misleading facts by stating "While investigating one of these robberies, CPD Detectives developed Sylvester Scott as a suspect. He was later identified from a photographic line-up and the perpetrator". Subsequently, the affiant also provided the judge with a "conclusionary statement" while stating "After reviewing the surveillance video from the Tideland Bank robbery, Detectives noted the perpetrator did bare a strong resemblance to Sylvester Scott."

Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to challenge the veracity of the search warrant based on the misleading

statements, in such that "no one" identified Petitioner as being the perpetrator. Petitioner will submit documented evidence during the PCR hearing in order to sufficiently develop this claim and contention.

Although, it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right, the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search and seizure. See e.g. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967). In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. See e.g. Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

The essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance of the proceeding. See Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness. 466 U.S. at 688, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694.

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of

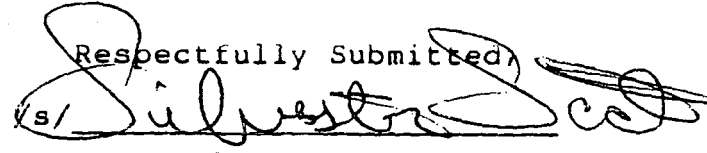
ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the outcome of the proceeding would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Petitioner will submit tangible documentation during the PCR hearing, with testimony in support of this claim.

For the aforementioned reasons, Petitioner respectfully prays this Court will grant the requested relief of a new trial.

CONCLUSION

WHEREFORE, Petitioner respectfully prays this Honorable Court will grant the requested relief of a new trial.

Respectfully Submitted,

/s/ Sylvester Scott
Sylvester Scott

10-6960

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

CERTIFICATE OF SERVICE

FILED
2010 AUG 26 PM 1:08
JULIE ARMSTRONG
CLERK OF COURT
BY _____

I, Sylvester Scott, do hereby swear and declare that I have mailed the Original and (1) one copy of the enclosed Application for Post Conviction Relief and Memorandum of Law in Support to the Charleston County Clerk of Court, Ms. Julie Armstrong, 100 Broad St., Charleston, SC. 29401-2258

This was done by placing the aforesaid documents in a properly addressed, sufficient postage affixed, and placed in the U.S. Mail here at Lieber Correctional Institution in Ridgeville, SC. 29472.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 24th DAY OF August, 2010

Lucrecia Bryant

Notary Public

My Comm. Expires May 26, 2020

Respectfully Submitted,
s/ Sylvester Scott
Sylvester Scott

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
 STATE VS.
SYLVESTER SCOTT

AKA: _____
 Race: B Sex: M Age: 39
 DOB: 03-18-1970 SS#: [REDACTED]
 Address: [REDACTED]
 City, State, Zip: CHARLESTON, SC 294070000
 DL#: _____ SID#: SC00634279

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Entering a Bank with Intent to Steal 0-30 years

INDICTMENT/CASE#: 2009GS1006471

A/W#: K404031

Date of Offense: 3/18/2009

S.C. Code §: 16-11-0380(A)

CDR Code #: 0257

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-11-0380(A) of the S.C. Code of Laws, bearing CDR Code # 0257

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

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

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

ATTEST: [Signature] 73720 [Signature] [Signature] 8743
 Lawton, Trip SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. 300 days

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:	\$	
§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
§ 47.12 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
§ 90.7 (SCCJA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter: D. Garrison

SCCA/217 (11/2009)

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge

Judge Code: 2060

Sentence Date: 3/16/10

WTL20090603470

WITNESSES

DAVID OSBORNE
Charleston City Police Department

AGENCY CASE NUMBER

0904490

ARREST WARRANT NUMBER

K404031

DATE OF ARREST

June 3, 2009

ACTION OF GRAND JURY

TRUE BILL

AUG 0 2009

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2009GS1006471

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

August Term 2009

THE STATE

vs.

SYLVESTER SCOTT

DOB: 1970-03-18

B/M

Indictment for

Entering a Financial Institution
with Intent to Steal

FILED

2009 AUG -6 AM 9: 56

JULIE J. ARMSTRONG
CLERK OF COURT

BY

09-3381 (01)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

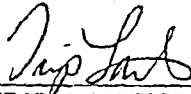
INDICTMENT

At a Court of General Sessions, convened on August 3, 2009 the Grand Jurors of Charleston County present upon their oath:

Entering a Financial Institution with Intent to Steal

That in Charleston County, South Carolina, on or about March 18, 2009, the Defendant, SYLVESTER SCOTT, unlawfully did enter Tidelands Bank located at 946 Orleans Road, Charleston, SC which is a building or part of a building occupied as a bank, depository, or building and loan association with the intent to steal money or securities for money, either by force, intimidation, or threats; all in violation of Section 16-11-380, 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.



TRIP LAWTON
ASSISTANT SOLICITOR

ARREST WARRANT

K- 404031

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

 THE STATE
 against
SYLVESTER SCOTT
 Address: **CHARLESTON, SC 29403**
Phone: **SSN**Sex: **M** Race: **B** Height: **5'10"** Weight: **190**DL State: **OL#**DOB: **3/18/1970** Agency ORI#:Prosecuting Agency: **CPD**Prosecuting Officer: **OSBORNE**Offense: **ENTERING FIN INST W/INT TO STEAL**

Offense Code:

Code/Ordinance Sec: **16-11-380**
 This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of

 The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

 A copy of this arrest warrant was delivered to
 defendant **SYLVESTER SCOTT**
 on **6-3-09** **1230 HRS.**

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

 Form Approved by
 S.C. Attorney General
 April 21, 2003
 SCCA 616
DET DAVID OSBORNE
 Personally appeared before me the affiant **DET DAVID OSBORNE** who
 being duly sworn deposes and says that defendant **SYLVESTER SCOTT**
 did within this county and state on **MARCH 18, 2009** violate the criminal laws of the
 State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of **CHARLESTON**)
 in the following particulars:
ENTERING FINANCIAL INST W/INTENT TO STEAL
16-11-380

 I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address

180 LOCKWOOD BLVD**CHARLESTON, SC 29403**Affiant's Telephone **843-377-7434**

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

 It appearing from the above affidavit that there are reasonable grounds to believe that
 on **MARCH 18, 2009** defendant **SYLVESTER SCOTT**
 did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of **CHARLESTON**) as set forth below:

 DESCRIPTION OF OFFENSE:
ENTERING FINANCIAL INSTITUTION W/INTENT TO STEAL
16-11-380

 Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
 defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
 the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on **3 June 2009**Judge's Address **3870 LEEDS AVE, SUITE 112****N. CHARLESTON, SC 29403**Judge's Telephone **843-743-2390**

Signature of Issuing Judge (L.S.)

Judge Code: **5904 (MAG)**
 Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

BAIL set by

WITNESSES

Judge Lombard
on 04 2009
Type and Amount 50,000
Name of Surety: PRELIMINARY HEARING held by

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

Judge _____
on _____

Defense Attorney: _____
Decision: 0

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, nol. pros., etc.)
Disposition: _____
Sentence: _____

JURORS

Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____
Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

(DATE) _____

CHECKLIST

SUM. CRT. CASE # 5105
CASE # 0257
REPORT GROUP 7900
TSP. CODE _____

Charleston Police Department

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appear before me, a magistrate of this county one, DETECTIVE DAVID OSBORNE, who first being duly sworn deposed and says that, SYLVESTER SCOTT B/M 3-18-70, did within this county and state on the 18TH MARCH 2009 violate the criminal laws of the State of South Carolina in the following particular:

DESCRIPTION OF OFFENSE

ENTERING A FINANCIAL INSTITUTION WITH THE INTENT TO STEAL
16-11-380

The affiant states there is probable cause to believe that the defendant named did commit the crime set forth and that such probable cause is based on the following facts:

ON MARCH 18, 2009 AT ABOUT 1050 HRS., SYLVESTER SCOTT DID KNOWINGLY AND INTENTIONALLY VIOLATE ENTERING A FINANCIAL INSTITUTION WITH THE INTENT TO STEAL LAW AT 946 ORLEANS AVE. THE TIDELANDS BANK, WHICH IS LOCATED IN THE CITY OF CHARLESTON.

ON THE ABOVE DATE AND TIME, A B/M ENTERED THE TIDELANDS BANK AND HANDED A NOTE TO THE TELLER DEMANDING SHE SURRENDER CURRENCY AND SHE DID. THE B/M TOOK THE CURRENCY AND FLED THE BANK. THE B/M HAD DREADS AND A BEARD THAT THE TELLER BELIEVED WERE FAKE HAIR PIECES.

CPD OFFICERS ARRIVED ON SCENE AND CANVASSED THE AREA. A CPD K-9 UNIT ARRIVED AND TRACKED FROM THE BANK TO THE REAR OF AN ADJACENT BUSINESS TO A PATH THAT LED TO THE REAR OF 1963 HAZELWOOD DR. THERE THE OFFICER LOCATED A FAKE DREAD HAIR PIECE AND FAKE BEARD.

THE HAIR PIECES WERE SENT TO SLED FOR DNA ANALYSIS AND A DNA PROFILE WAS DEVELOPED. THE DNA PROFILE DEVELOPED FROM THE HAIR PIECE CAME BACK MATCHING THE DNA PROFILE TO SYLVESTER SCOTT.

CPD DETECTIVES OBSERVED THE INDIVIDUAL SHOWN AS THE PERPETRATOR ON THE BANK SURVEILLANCE VIDEO DID BEAR A STRONG RESEMBLANCE TO SYLVESTER SCOTT.

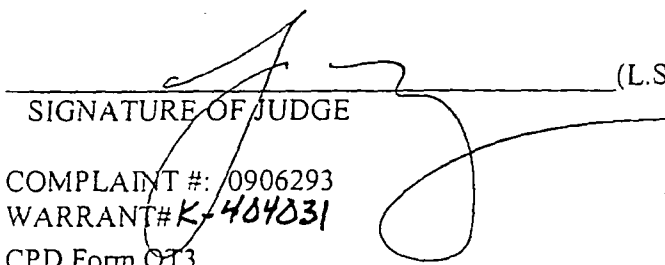
THE ABOVE IS TRUE AND BELIEVABLE BASED ON THE INVESTIGATION OF THE CHARLESTON POLICE DEPARTMENT.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 3 DAY OF Jan 2009 ,



AFFIANT
180 Lockwood Blvd.
Charleston, SC 29403
843-577-7434

 (L.S.)
SIGNATURE OF JUDGE

COMPLAINT #: 0906293
WARRANT# K-404031
CPD Form 013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	2010-CP-10-6960
Sylvester Scott, #296019,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed August 26, 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 Charleston County Clerk of Court. The Applicant was indicted at the August 2009 term of the Charleston County Grand Jury for entering a financial institution with intent to steal (2009-GS-10-6471). Andrew Grimes, Esquire, represented the Applicant. On March 16, 2010, the Applicant pled guilty as indicted. The Honorable R. Markley Dennis, Jr. sentenced him to confinement for twelve (12) years. The Applicant did not appeal the guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction, the records of the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel in that counsel
 - a. Advised Applicant to plead guilty without performing any pretrial investigation both factual and legal, thus rendering Applicant's guilty plea involuntary.
 - b. Advised Applicant to plead guilty without moving to suppress the evidence obtained in violation of the 4th Amendment.
2. Involuntary guilty plea.

III.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the 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 (1984); Butler, 286 S.C. 441, 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).

Respondent submits that 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, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the

truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntary nature of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper, 305 S.E.2d 247.

V.

Respondent denies each allegation that is not expressly admitted, qualified, or explained.

VI.

WHEREFORE, the State requests an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

11/1/12, 2010.

STATE OF SOUTH CAROLINA

)

) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

2010-CP-10-6960

Sylvester Scott, 296019,

)

Applicant,

)

)

vs

)

) AFFIDAVIT OF SERVICE BY MAIL

)

State of South Carolina,

)

)

Respondent.

)

)

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return of the Respondent in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

David J. Parrish, Esquire
Nexsen Pruet, LLC
P.O. Box 486
Charleston, SC 29402

DATED this 16th day of November, 2010.



Molly A. Flowers, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Sylvester Scott #296019,

Applicant,

vs.

State of South Carolina,

Respondents.

IN THE COURT OF COMMON PLEAS

Case No. 2010-CP-10-6960

**MEMORANDUM IN SUPPORT OF
APPLICATION FOR POST-
CONVICTION RELIEF**

Applicant Sylvester Scott ("Scott") respectfully submits this Memorandum in Support of his application for Post-Conviction Relief based on an involuntary guilty plea arising from ineffective assistance advice of counsel.

FACTS

Scott's arrest and guilty plea stemmed from three unarmed bank robberies that occurred in the Charleston Area in 2009. The dates of the robberies and banks were as follows:

<u>Date of Robbery</u>	<u>Bank</u>
03-18-2009	Tidelands Bank – 946-J Orleans Road
04-02-2009	Heritage Trust – 2030 Sam Rittenberg Blvd
04-15-2009	Ameris Bank – 834 Savannah Highway

The Tidelands Bank robbery occurred at 10:50 a.m. (Scott Bates 0041) and was conducted by a black male wearing a dreadlocks wig and fake beard. (Bates Scott 0074). The Heritage Trust robbery was conducted by a black male wearing a dreadlocks wig and a surgical mask (Bates Scott 0074). The Ameris Bank robbery was conducted by a black male wearing a dreadlocks wig and a fake beard. (Bates Scott 0199). In each case the perpetrator passed the

bank teller a note demanding money, but did not display or suggest the possession of any weapon.

Following the robbery at Tideland Bank, a police tracking dog hit on a plastic bag located among a lot of garbage and trash scattered in the woods behind the bank. The plastic bag contained a dreadlock wig, a fake beard, and a cash register receipt from the store (Hokus Pokus) where those items were purchased (Bates Scott 0388). The detectives sent the wig and beard to SLED for a DNA analysis.

The employees at the Hokus Pokus store where the wig/beard was purchased were by interviewed. The male employee (James Applegate) recalled that a "white couple" purchased the dreadlocks wig (Bates Scott 0002-0003). The female employee at Hokus Pokus (Carole Crabtree) did not recall who purchased the disguise. (Bates Scott 0004).

It took SLED over a month to process the DNA on the wig/beard found behind Tideland Bank, and the robberies were committed at Heritage Trust and Ameris Bank while SLED was still processing the DNA.

On the day of the robbery at Ameris Bank, the investigating officers located a witness who had observed a black male wearing gloves walking in the direction of the bank and coming from the direction of a white Toyota Camry automobile that was parked at or near the bank. The witness also observed a black female sitting in the Camry. The bank manager of Ameris Bank informed the detectives that on the day before the robbery, and again on the day of the robbery, a black female had entered the bank and acted "suspiciously." Photos of the black female taken from the bank surveillance camera were published in the news media. The next day Tonya Toomer contacted the police and identified herself as the person reflected in the Ameris Bank surveillance photograph, and she agree to meet with detectives at the police station for an

interview. (Bates Scott 0203). During her meeting with the detectives Toomer acknowledged that she was in Ameris Bank on the day before and day of the robbery and had driven a white Toyota Camry and parked it in or near the bank parking lot on the day of the robbery. (Bates Scott 0203-0204). Toomer was arrested and jailed for the robbery.¹

An undisclosed confidential informant then informed the police that Sylvester Scott was the father of one of Toomer's children and that Scott resembled the disguised perpetrator depicted in the bank surveillance photographs from the robbery (Bates Scott 0265). Soon thereafter a second undisclosed confidential informant told the detectives that Scott and Toomer were both "drug users" and Scott had visited Tonya while she was in jail for the bank robbery. (Bates Scott 0266).

At this point the detectives developed Scott as a potential suspect in the Ameris Bank robbery based on his connection with Tonya Toomer. The detectives showed the employees at Ameris Bank a six-person photographic line-up array that contained a photograph from Scott's driver's license records. Two Ameris Bank employees signed witness photographic line-up admonition forms indicating that, of the six persons shown in the photo array, Scott's picture most resembled the perpetrator (who was wearing a fake beard and wig). However, both witnesses add notes to their statements indicating that they could not positively identify Scott as the perpetrator. Specifically, one employee wrote "I chose #2 [Scott's picture] because he is most like the person I remember robbing the bank," and the other employee wrote: "Not positive." The third employee was unable to identify any of the pictures the photograph lineup. (Bates Scott 0309-0309).

The police then obtained Scott's cell phone records, which together with Tonya Toomer's cell phone records, showed that Scott and Toomer were both in the general vicinity of Ameris

¹ The charges against her were later dropped.

Bank (i.e., in the vicinity of the cell tower in that area) and had called each other around the time of the robbery. (Bates Scott 0238).

Around this time SLED finished processing the DNA on the wig/beard found after the Tideland Bank robbery and issued a report indicating that the DNA matched Scott's DNA profile in the SLED computer database. No witnesses at Tideland Bank ever identified Scott as the perpetrator.

Sooner thereafter Scott was arrested and charged with all three bank robberies. The evidence connecting him to the Tideland robbery consisted of his DNA match to the wig/beard found behind the bank. The evidence connecting him to the Ameris Bank robbery consisted of the witness photo array statements and his relationship to, and cell phone communications with, Tonya Toomer on the day of the robbery. No such evidence was developed connecting him to the Heritage Trust robbery.

An attorney (hereinafter "counsel" or "Scott's counsel") with the Charleston County Public Defenders Office was appointed to represent Scott. On the eve of trial, and based on the recommendation of counsel, Scott pled guilty to the charge of entering Tideland Bank with intent to steal (the State having dropped the charges for the other two bank robberies), and Scott was sentenced to 12 years in jail without the possibility of parole.

Scott filed an Application for Post-Conviction Relief, in which he submits that his guilty plea was involuntary, was made without him have been provided full and accurate information regarding the evidence against him, and was based on erroneous advice regarding the plea sentencing range. He seeks that his sentence be vacated and a jury trial on the merits of the charges alleged against him.

STANDARD OF REVIEW

“A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.” Kolle v. State, 690 S.E.2d 73, 78 (S.C. 2010) (citing Strickland v. Washington, 466 U.S. 668 (1984)). To establish a claim of ineffective assistance of counsel, a PCR applicant must demonstrate that (1) counsel’s representation fell below an objective standard of reasonableness, and (2) that, but-for counsel’s errors, there is a reasonable probability that the outcome would have been different. Martinez v State, 403 S.E.2d 113, 114 (S.C. 1991) (citing Strickland v. Washington, 466 U.S. 668 (1984)). The first prong of the Strickland test, “attorney performance,” is measured by simple reasonableness under prevailing professional norms. Cherry v State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland 466 U.S. at 688). The second prong requires a showing that the deficient performance prejudiced the defendant to the extent that there is a “reasonable probability that but-for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. The second part of the Strickland test has been referred to as the “prejudice” requirement. Alexander v. State, 402 S.E.2d 484, 484 (S.C.1991).

A defendant who has entered a guilty plea on the advice of counsel may attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but-for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Kolle v. State, 690 S.E.2d 73, 78 (S.C. 2010). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’” Kolle, 690 S.E.2d at 79 (quoting Hill v. Lockhart, 474 U.S. 52 (1985)). In other words, the test for determining the validity of a guilty

plea is whether, but-for counsel's errors, a reasonable probability exists that the defendant would not have pled guilty. Alexander v. State, 402 S.E.2d 484, 485 (S.C. 1989) (citing Hill v. Lockhart, 474 U.S. 52 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Kolle, 690 S.E.2d at 78 (quoting Johnson v. State, 480 S.E.2d 733, 735 (S.C. 1997)). An ineffective assistance claim may rely, at least in part, on failure of counsel to properly advise. Davie v. State, 675 S.E.2d 416, 423 (S.C. 2009) (finding failure of plea counsel to communicate the State's initial offer prejudiced defendant); Kolle v. State, 690 S.E.2d 73, 80 (S.C. 2010) (finding plea counsel was deficient in advising).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Kolle, 690 S.E.2d at 78 (quoting Suber v. State, 640 S.E.2d 884, 886 (S.C. 2007).) "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Id. 690 S.E.2d 78-79 (quoting Roddy v. State, 528 S.E.2d 418, 420 (2000)).

DISCUSSION

In support of his claim of an involuntary plea based on ineffective assistance of counsel, Scott contends that his counsel failed to investigate an alibi witness and other evidence that would exonerate of the charges, failed to prepare for trial, and coerced him to plead guilty upon the threat of him facing a 90-year sentence for the three robberies and having "no defense" to the "overwhelming evidence" against him.

As a threshold matter, Scott was informed by his counsel that employees of Ameris Bank had "positively" identified him as the perpetrator on a photo array statement. Scott was not given or shown copies of those statements prior to his plea hearing. Those photo identification

statements were the only direct evidence connecting him to the Ameris Bank robbery. Only later did he learn that the statements supposedly "positively" identifying his photograph actually contained notes indicating that the witnesses were equivocal and "not positive" in identifying him.

As to his DNA being found on the wig/beard disguise located in the woods behind the Tideland, Scott explained to his counsel that he lived in the apartments near those woods and several days before the robbery he was smoking pot in those woods with an acquaintance from the neighborhood. While they were smoking pot in the woods, the acquaintance asked Scott to help him open a package that contained a disguise, which the acquaintance indicated he was going to wear to shoplift some clothes from a nearby Ross Department Store. Scott's DNA must have come into contact with the disguise when he opened the package.

Scott's counsel informed him that he could not offer that defense at trial, and Scott got into an argument with you counsel over his counsel's refusal to believe his explanation. Scott then informed his counsel that the day of the Tideland's robbery (March 18th) was Scott's birthday, and at the time (10:50 a.m.) when Tideland's was being robbed in West Ashley, Scott was in downtown Charleston purchasing a cell phone from the Cricket Mobile cell phone store located on Meeting Street across from the Piggly Wiggly store. Scott also told his counsel that he had to give a driver's license and sign a contract for the phone, and the contract should show that he was in the Cricket Store at the time of the Tideland's robbery. Scott also informed his attorney that he ran into a friend, Michael Castine, outside the cell phone store, and Castine could verify that Scott was in downtown Charleston when Tideland's was being robbed in West Ashley.

Scott's counsel never contacted or attempted to subpoena Castine to trial, and counsel did attempt to obtain a copy of Scott's cell phone contract and records.

Around this time Scott sent a letter to the head of the public defender's office requesting another attorney. His letter (Bates Scott 00780 states in pertinent part:

Mr. Pennington, I'm writing you about my lack of confidence and trust in [my attorney]. I've been in Chas. Co. Detention Center since 5-17-09, for 3 counts of entering a bank with intent to steal. My initial visit with [my attorney] was not a positive one due to the fact he hadn't check into statements and my violation of my Constitutional Rights. From the beginning [my attorney] has been reluctant to assist me with proving the errors in my case.

My position has always been not to plea guilty, however [my attorney] has other reservations concerning my case. I'm requesting that [my attorney] be remove [sic] from representing me; also I have a co-defendant represented by the public defender office and I feel it's a conflict of interest due to the fact that my attorney is not working in my best interest.

In closing I'm not satisfied nor am I confident with [my attorney's] approach to my case; in other words I don't trust [my attorney's] judgment at all; so I would appreciate it if I was given another lawyer that's not in the same office my co-defendant lawyer. Thank you!

Scott's request for different counsel was denied.

As Scott's case approached trial, Scott repeatedly refused his counsel's admonishment that he should plead guilty. As the case was approaching trial, Scott had no intention of pleading guilty and thought he was picking a jury. At that point, Scott's counsel told him that the evidence against him was "overwhelming" and that he had "no defense." Scott's counsel also told Scott that he had thought the "feds were going to takeover the case" and he was not prepared for trial, and counsel urged Scott to enter a plea because he did not wanted to see Scott get sentenced to 90 years in jail. Counsel told Scott that if Scott pled guilty he would receive a sentence of 5-7 years at a medium security prison.² [Scott reluctantly agreed to plea guilty at the repeated instance of his counsel and after being told (1) he was facing 90 years in jail, (2) had no

² The charge against Scott, entering a bank with intent to steal, is considered a non-violent offense.

defenses to overwhelming evidence, (3) his attorney was not prepared for trial, and (4) he would receive a relatively light 5-7 sentence at medium security prison in exchange for plea.]

At the plea sentencing hearing, Scott's counsel did not ask the plea judge for a reduced sentence, and the judge sentenced Scott to 12 years without the possibility of parole. Scott is currently serving his sentence at Lieber Correction Institute, which is a Level 3 (highest security level) maximum-security facility that houses violent offenders and inmates with behavioral problems.

Following his sentencing, Scott learned that his counsel had never attempted to contact his alibi witness (Michael Castine) and had erroneously informed him that he had been "positively" identified by bank employees.

Under these circumstances, ineffective assistance was rendered. Scott's attorney did not investigate an important alibi witness (Michael Castine) and documents (cell phone contract/records) that would have placed Scott at a different location at the time of the Tideland Bank robbery, and which would have cast a doubt on the probative value of his DNA being on the disguise that was discovered in the trash in the woods after the Tidelands Bank robbery. Moreover, Scott's attorney erroneously told him that he had been "positively" identified. Scott's attorney scared Scott into pleading guilty on the eve of trial by telling him that he was facing a 90-year sentence, telling him that he was not prepared for trial, and telling him that had "no defense" to "overwhelming evidence" against him. Scott also pled guilty based on his counsel's erroneous advice that he would receive 5-7 years if he agreed to plead guilty.

Scott's guilty plea was not the product of his voluntary and intelligent choice among the alternative courses of action and defenses. Instead, Scott was improperly pressured into pleading

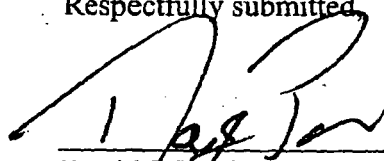
guilty on the eve of trial based his counsel's failure to prepare, erroneous advice regarding the evidence against him, and erroneous advice regarding the sentencing range for a plea.

Scott received ineffective assistance of counsel that resulted in his unknowing and involuntary guilty plea. But-for or his counsel's failure to prepare his case and erroneous advice regarding important evidence and the sentencing range for a plea, Scott would not have pled guilty and would have insisted on going to trial.

CONCLUSION

For the above reasons, Scott's PCR Application should be granted, his sentence vacated, and his case set for a jury trial.

Respectfully submitted,



David J. Parrish
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01/21, 2011

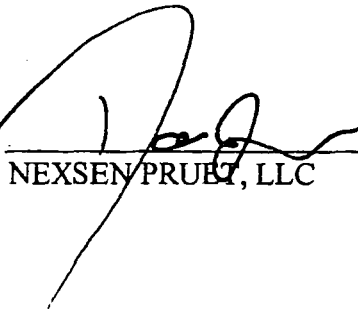
Attorney for Plaintiff Sylvester Scott #296019

CERTIFICATE OF SERVICE

This is to certify that a copy of **MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF** has been served upon the following Counsel of record via email delivery this 2/ day of January, 2011.

Matt Friedman
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
MFriedman@scag.gov

Attorney for State of South Carolina



NEXSEN PRUET, LLC

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Sylvester Scott	6	24	--	--
4	Michael Castain	28	--	--	--
5	Andrew Grimes	33	40	51	
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1	E X H I B I T S			
2	NO.	DESCRIPTION	ID.	EV.
3	Plaintiff's 1	Photographic line-up		
4		admonition	11	11
5	Plaintiff's 2	Handwritten note		
6		from Applicant		
7		to Mr. Pennington	18	18
8	Plaintiff's 3	Notes	48	--
9	Plaintiff's 4	No Exhibit	--	--
10	Plaintiff's 5	Photographs	15	15
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1 THE COURT: Okay. This is Sylvester Scott?

2 MR. PARRISH: Yes, sir.

3 THE COURT: All right. You're Sylvester
4 Scott?

5 MR. PARRISH: Yes, sir.

6 THE COURT: We're going forward with
7 Mr. Scott?

8 MR. PARRISH: Yes, sir, Your Honor, we are.

9 THE COURT: All right. Mr. Scott, you are
10 here today, you filed an application for post-conviction
11 relief. You pled guilty to, it looks like, one count of
12 armed robbery.

13 MR. PARRISH: Your Honor, it was unarmed
14 robbery.

15 THE COURT: So strong-arm robbery?

16 MR. PARRISH: I think the charge was entering
17 a financial institution with intent to steal --

18 THE COURT: That's right, entering a
19 financial institution with attempt to steal. That's not
20 one you see every day, but you could get up to 30 years
21 for that. All right? You had three of those charges.
22 Now, you ended up pleading guilty. One of them, Judge
23 Dennis gave you 12 years. Now, you ask the Court here
24 today to set aside that guilty plea; is that right?

25 THE APPLICANT: Yes, sir.

1 THE COURT: You understand if you are
2 successful today and I grant your application for
3 post-conviction relief, the state is going to go back and
4 try you, and they are probably going to try you on all
5 three of those charges, not just on the one you pled
6 guilty to, and, if you are convicted, you have a very
7 strong likelihood of being sentenced up to 30 years on
8 each of those.

9 Theoretically, the judge could sentence you
10 to those consecutively as opposed to concurrently.
11 Consecutive means you do 30, you finish that, start the
12 next 30 and you finish that, so you could face up to 90
13 years in prison. Right now, the most you're facing 12
14 and the balance of whatever it is you have already
15 served. So, do you understand that?

16 THE APPLICANT: Yes, sir.

17 THE COURT: And you want to go ahead and ask
18 me to set aside your plea?

19 THE APPLICANT: Yes, sir.

20 THE COURT: Okay. Mr. Parrish, are you
21 ready?

22 MR. PARRISH: Yes, sir, Your Honor.

23 THE COURT: Call your first witness.

24 MR. PARRISH: As a threshold matter I did
25 send your law clerk a memo. I have an extra copy if

1- anybody needs it.

2 THE COURT: Well, I got it.

3 MR. PARRISH: If I could, just the first page
4 of that memo, there are three robberies. The facts are
5 different for each one of them and the dates on them, so
6 it might be helpful to follow what I'm doing.

7 THE COURT: All right.

8 MR. PARRISH: Mr. Scott I call to the stand.

9 SYLVESTER SCOTT,

10 having been first duly sworn,
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 THE WITNESS: Sylvester Desmond Scott.

14 BY MR. PARRISH:

15 Q. I'm David Parrish, a Court-appointed attorney for
16 Mr. Scott. Can you hear me okay, sir?

17 A. Yes.

18 Q. If at any time you can't hear me or you don't
19 understand me, please let me know, and I'll repeat or
20 rephrase the question, okay?

21 A. No problem.

22 Q. Mr. Scott, how old are you?

23 A. I'm 44.

24 Q. And what is your educational background? How far
25 did you go in school?

1 A. I graduated.

2 Q. High school?

3 A. Yes, high school.

4 Q. Are you married?

5 A. No, sir.

6 Q. Do you have any children?

7 A. Yes, I do.

8 Q. And where were you born?

9 A. In Charleston, South Carolina.

10 Q. How long have you lived in Charleston?

11 A. All my life.

12 Q. Where did you go to high school?

13 A. Burke High.

14 Q. Mr. Scott, the bank robberies, or the robberies
15 you were accused, of occurred in March and April of 2009.
16 Were you employed during that period of time?

17 A. Yes, I was.

18 Q. And where were you working?

19 A. In Voc Rehab on Dorchester Road.

20 Q. And what did you do out there?

21 A. I work in an assembly plant.

22 Q. Doing what?

23 A. Doing various different things, we had contracts
24 with different companies doing for AT&T and Barbarians,
25 we had wood panel, different things. We were doing

1 different things.

2 Q. Lets get to the merits of this case. After you
3 were arrested and charged with these crimes, you were
4 appointed an attorney?

5 A. Right.

6 Q. Who was the attorney?

7 A. Andrew Grimes.

8 Q. Do you recognize Mr. Grimes in the courtroom here
9 today?

10 A. Yes, I do.

11 Q. Do you recall about how many times you met with
12 Mr. Grimes during the course of your case?

13 A. I would say about four or five times.

14 Q. Were they at the jail or the detention center or
15 were they at the courthouse waiting to --

16 A. Yeah, like a couple, some in person at the
17 detention center.

18 Q. I'm going to start backwards. There are three
19 robberies which you were accused, and I'm going to the
20 last one, the Ameris Bank robbery on 4/15 of 09. What
21 did Mr. Grimes tell you about any witness identification
22 of you in connection with that crime?

23 A. Said that he had two tellers that positively
24 identified me as the perpetrator.

25 Q. What did you understand him telling you positively

1 identified to mean?

2 A. That there was no doubt I was picked out as the
3 perpetrator, as the one who committed the crime.

4 Q. So based on Mr. Grimes' information, you were told
5 that two tellers had positively identified your picture
6 as the perpetrator of the crime?

7 A. Correct.

8 Q. If I may approach, I've got what has been marked
9 as Plaintiff's Exhibit No. 1.

10 THE COURT: Go ahead.

11 BY MR. PARRISH:

12 Q. Plaintiff's Exhibit 1 is a series of three
13 photographic lineup admonition forms. When was the first
14 time you saw these forms? Was it before or after you
15 pled guilty in this case?

16 A. Shortly before I pled guilty.

17 Q. Tell me what happened. How much paperwork did you
18 have get from Mr. Grimes before you pled guilty in this
19 case?

20 A. I got a good stack.

21 Q. Like a couple of inches?

22 A. About like that, yeah, couple inches, like that.

23 Q. When did you get that stack of information?

24 A. I would say about a week or two before the trial.

25 Q. Okay. At any point in time did Mr. Grimes or

1 anybody point out to you that the first document on
2 Plaintiff's Exhibit 1, the witness -- and I'm having to
3 look over your shoulder, I'm sorry, sir, I'm not doing
4 this on purpose -- the witness says, I have made a
5 positive identification, but did anybody point out to you
6 that at the bottom they put, I chose number two, which is
7 your picture, because he is most like the person I
8 remember robbing the bank? Did anybody call that to your
9 attention?

10 A. No, nobody did.

11 Q. Two pages over on Plaintiff's Exhibit No. 1 is a
12 second lineup, and I can't read the witness's signature,
13 but did anybody point out that that witness was unable to
14 identify you at all on the photo lineup?

15 A. No.

16 Q. And the last witness lineup, in connection with
17 you being told you have been positively identified, did
18 anybody show or tell you that that witness, even though
19 they said positively identified you, wrote not positive
20 at the bottom?

21 A. No, sir.

22 MR. PARRISH: I would offer this as Plaintiff's
23 Exhibit 1.

24 THE COURT: All right.

25 (Photographic Line-up Admonition Form marked

1 for identification and admitted into evidence as
2 Plaintiff's Exhibit No. 1.)

3 BY MR. PARRISH:

4 Q. Mr. Scott, were you aware of the three witnesses
5 that you were under the belief or been informed
6 positively identified, you one, in fact, had not, one
7 indicated they had not, and the last one was equivocal in
8 the identification of you? Were you aware of that at the
9 time you pled guilty?

10 A. Sir?

11 Q. Were you aware of those three witness statements?
12 One of them hadn't identified you at all, one had written
13 not positive, and the other one said, I picked his
14 picture because it's the closest of the group? Were you
15 aware of that when you pled guilty?

16 A. I wasn't really aware of it because we was
17 focussed on another charge, another bank charge other
18 than that one.

19 Q. I'm going to get to that in a second. Did anybody
20 ever tell you that, in fact, you had not been positively
21 identified?

22 A. No, no.

23 Q. When you pled guilty, were you under the
24 impression from your attorney that you had been
25 positively identified by eyewitnesses at the Ameris Bank

1 robbery?

2 A. Right, right.

3 Q. I'm now going to turn to the Tidelands Bank
4 robbery and that was on 3/18/2009? Does March 18th have
5 any significance to you?

6 A. Yes. That's my birthday.

7 Q. And you are aware whoever robbed that bank had on
8 a wig and a mask, a beard type disguise, their face was
9 concealed?

10 A. Yeah, from what they said, yes.

11 Q. And you're aware that wig and mask was found
12 behind the woods behind the bank and ultimately your
13 DNA matched that?

14 A. Right.

15 Q. Tell the Court what you told Mr. Scott as to how
16 or why your DNA might have been on those items found
17 behind the bank.

18 A. The morning of the incident, I was headed to the
19 bus stop, and I told my attorney that that morning that I
20 an across a guy that frequents the neighborhood and that
21 morning me and -- we was headed toward the bus stop
22 together, and that morning, I told him it was my birthday
23 and we start started talking and walking together, so he
24 said he had a joint. We were going to some pot in the
25 woods that morning, so me -- this particular guy that

1 frequents the neighborhood, he does a lot of shopping in
2 the neighborhood and he goes around selling things in the
3 neighborhood, miscellaneous things, so that particular
4 morning, when we was back in the woods smoking pot
5 together, he asked me to open this package for him.

6 He said he was going to use this to go into a
7 shopping center right behind where we was and go and
8 shoplift, like, you know, open this, give it to him, and
9 that was it. It may have got on it like that, because I
10 wasn't really sure if my DNA was on it or not, if I was
11 told, so that morning, after I left him in the woods, I
12 went downtown. I caught the bus and I went downtown.

13 Q. Let's stop right there. The morning of the
14 Tideland Bank robbery was your birthday, and you were at
15 the bus stop and a friend said, Let's go smoke a joint in
16 the woods?

17 A. No. I was headed to the bus stop and ran into
18 this guy.

19 Q. Was the bus stop in the area of that Ameris Bank?

20 A. Right across the street.

21 Q. I've got what I've marked as Plaintiff's Exhibit
22 5, and the numbers are out of order, Madame court
23 reporter, so the photographs, if I may approach the
24 witness -- and, Mr. Scott I'm going to flip through these
25 but I'm going to ask you, do those photographs accurately

1 depict the wooded area where you were smoking the pot
2 before you got on the bus stop the morning of the Ameris
3 Bank robbery? Say yes or no out loud.

4 A. Yes, sir.

5 Q. All right. Is that a place where people in that
6 neighborhood where you live kind of hang out in these
7 woods?

8 A. They frequent the area, yeah. Everybody goes in
9 that particular area.

10 Q. I see a lot of trash and stuff in the woods here.

11 A. Yeah.

12 Q. And this is, to your knowledge, this is where the
13 mask and beard was found after the bank robbery?

14 A. That's what I was told, yeah.

15 Q. But you're not the only person who has ever been
16 in these woods before, are you?

17 A. No, no, everybody goes in there.

18 Q. So do the photographs that I showed you as Exhibit
19 5 accurately depict the condition of woods behind the
20 bank where were you smoking the pot before you got on the
21 bus the morning of the Ameris Bank robbery?

22 A. Yes, it does.

23 MR. PARRISH: I may offer these as Exhibit 5
24 please, Your Honor.

25 (Photographs marked for identification and

1 admitted into evidence as Plaintiff's Exhibit No. 5.)

2 BY MR. PARRISH:

3 Q. You're in the woods behind the bank the morning of
4 March 18, your birthday, friend says let's smoke a joint.
5 When you got finished doing that, where did you go?

6 A. I went to the bus stop about I caught the bus
7 downtown.

8 Q. And when you got downtown, what did you do?

9 A. I got downtown, I walked down Meeting Street.
10 There is a barber shop that is located on Meeting Street,
11 right next to a Cricket phone store and a hair and nail
12 shop and I went there, going to get my hair cut for my
13 birthday, you know.

14 Q. All right. The Tideland's Bank robbery on 3/18
15 occurred at about 10:50 a.m. based on the records in the
16 file. Where were you on 10:50 on March 18?

17 A. I was downtown on Meeting Street.

18 Q. You had a hair cut?

19 A. Had my hair cut, yes, sir.

20 Q. Did you buy a cell phone?

21 A. Yes, sir.

22 Q. What was the name of the cell phone store?

23 A. Cricket.

24 Q. Where on meeting street were you located around
25 10:15 when Tideland's Bank was being robbed?

1 A. At that time I was in front of the barber shop on
2 Meeting Street at that time.

3 Q. That is across from the Piggly Wiggly that is
4 downtown?

5 A. Exactly.

6 Q. Did you run into anybody when were you down there?

7 A. Yes, sir.

8 Q. Who did you run into?

9 A. A ran into a friend of mine, Michael Castain.

10 Q. Is Mr. Castain in the courtroom?

11 A. Yes, sir.

12 Q. When you told Mr. Grimes that the reason your
13 DNA might have been on the mask or wig is because you
14 were smoking pot with a guy behind the bank, how did he
15 react or what did he tell you he was going to do in
16 connection with that?

17 A. He listened to it, but I guess he didn't feel as
18 though that information was sufficient.

19 Q. Did you -- how did you understand whether he was
20 going to accept and offer that as an potential defense on
21 your behalf?

22 A. I didn't feel as though he was going to use it as
23 a defense.

24 Q. Did you get in an argument with him about him not
25 willing to accept that?

1 A. Yeah. We got into a confrontation about that.

2 Q. Do you think he believed you when you told him?

3 A. No, he didn't.

4 Q. Did you then tell him about Mr. Castain and the
5 Cricket phone store?

6 A. Yeah. I told him about Mr. Castain a little
7 before the trial.

8 Q. Did you also tell him about your cell phone
9 records at that store?

10 A. Yes, sir. I told him -- I asked him if he could
11 go subpoena my cell phone, the purchase of my cell phone
12 to verify it at the time it was bought and everything
13 because I used my driver's license to purchase that. I
14 signed a contract with Cricket.

15 Q. Just make sure we're clear on the record, you told
16 him that Mr. Castain and the cell phone records would
17 show you were downtown at the time the Tideland was
18 being robbed across town?

19 A. Exactly.

20 Q. To your knowledge, did Mr. Grimes or anybody else
21 associated with your defense interview Mr. Castain or
22 obtain copies of cell phone records?

23 A. No, he didn't.

24 Q. At that point in time, did you become dissatisfied
25 with Mr. Grimes's defense?

1 A. Yes, I did. I became very upset about what was
2 going on.

3 Q. Did ask you to have a new attorney appointed for
4 you?

5 A. Yes, sir. I wrote to Ashley Pennington. I wrote
6 a letter to Ashley Pennington, asking to have me
7 appointed another attorney.

8 MR. PARRISH: Your Honor, if may again
9 approach, I have what is marked as Plaintiff's Exhibit
10 No. 2.

11 (Handwritten note from applicant to Mr.
12 Pennington marked for identification and admitted into
13 evidence as Plaintiff's Exhibit Exhibit No. 2.)

14 BY MR. PARRISH:

15 Q. Mr. Scott, is this the letter you wrote to
16 Mr. Pennington, which I believe is the head of the public
17 defender's office, asking for a new attorney?

18 A. Yes, it is.

19 Q. This is your hand writing?

20 A. Yes, it is.

21 Q. And if you don't mind, real quickly in this second
22 paragraph, first sentence, my position has always been
23 not to plead guilty; however, Mr. Grimes has other
24 reservations concerning my case. I'm requesting Mr.
25 Grimes be removed and you asked for a different attorney.

1 A. Yes, I did.

2 Q. Was your request granted?

3 A. No, it wasn't.

4 Q. What did Mr. Grimes tell you about whether you
5 should plead guilty or go to trial?

6 A. He advised me to plead guilty to the charge.

7 Q. And how did you react to that?

8 A. I didn't like it. I didn't want to plead guilty,
9 but he told me that I didn't have any chance of winning,
10 I didn't have any evidence -- I mean, it was too
11 overwhelming against me, he said.

12 Q. When you came down to the courthouse, were you
13 coming down here to plead guilty or pick a jury?

14 A. I was on the trial docket. I came to pick a jury.

15 Q. So the morning that you were down here, you met
16 with Mr. Grimes to pick a jury, what discussion did he
17 have with you?

18 A. He said I didn't have any chance of winning the
19 case. He said I didn't have any evidence in my favor,
20 and he said that it was too overwhelming for me. He said
21 I didn't have any chance of winning. I didn't have any
22 defense for the case, that was his words.

23 Q. Did he mention to you again that you had been
24 positively identified by eyewitnesses?

25 A. Yes. All that came about.

1 Q. Did he mention what Mr. Castain or the Cricket
2 cell phone records were available to show you weren't
3 really who you said you were?

4 A. No. He never brought that up.

5 Q. What did Mr. Grimes tell you about how prepared he
6 was to go to trial?

7 A. He said he wasn't really prepared for -- when he
8 said for this, I'm assuming he said for me to go to
9 trial.

10 Q. Did he say why he might not have been prepared to
11 go to trial?

12 A. He fells as though my case was going to go
13 federal.

14 Q. What do you mean by that?

15 A. That at one point in time, the assumption that the
16 federal government was going to take over my case.

17 Q. So you got down here this morning to pick a jury
18 trial, and then tell the Court in your own words how you
19 ended up pleading guilty the morning you thought you were
20 coming down here to pick a jury trial.

21 A. I pled guilty because I was under the assumption
22 that I didn't have any defense, no other alternative,
23 because my attorney keeps telling me that I'm going to
24 lose, I'm going to get 90 years in prison, we understand
25 your record is going to kill you, you know, and I just --

1 he just gave me no way out. I felt that was the only way
2 to go, that was the only route I had, even though I
3 didn't want to take it that was the only route I had.

4 Q. How many years did he tell you were facing in
5 jail?

6 A. 90.

7 Q. Was it your idea to plead guilty or his?

8 A. It was his idea.

9 Q. Did he tell you what possible sentencing you might
10 get if you pled guilty?

11 A. No. He said he was going to ask the judge for
12 five to seven year sentence, due to the fact that a guy
13 was ahead of me in the middle of a trial and stopped and
14 pled out to a murder case and got ten years. And he told
15 me, he said, well, since the judge gave this guy ten
16 years for murder, I'm going to ask him to give you five
17 to seven for this, since your case is nonviolent.

18 Q. How much if any pressure was placed on you by
19 Mr. Grimes to plead guilty the morning you thought you
20 were going to plead guilty?

21 A. There was plenty of pressure, because every avenue
22 that I wanted to talk, he keep shooting it down, like I
23 didn't have any -- I don't have no other alternative.

24 Q. Tell the Court whether you were concerned that you
25 were going to start a trial and your attorney is telling

1 you, you don't have any defenses?

2 A. I was very much concerned. I was, like I say, I
3 feel as if I was trapped and I had no way out. I didn't
4 have any alternative but to plead guilty.

5 Q. You ultimately agreed to plead guilty. Did your
6 attorney ask the judge for five to seven years?

7 A. No, he didn't.

8 Q. Did your attorney indicate if you agreed to plead
9 guilty, did he tell you what kind of facility, minimum,
10 maximum, security facility?

11 A. He said I would be a nonviolent offender, which
12 nonviolent offender usually goes to a medium or minimum
13 security.

14 Q. And did your attorney ask for a medium security
15 facility at your plea hearing?

16 A. No, he didn't.

17 Q. Mr. Scott, you pled guilty. Tell the Court why
18 you did that.

19 A. I pled guilty because I was forced to plead
20 guilty. I was forced to plead guilty because my attorney
21 didn't give me any alternative for a defense in my case.

22 Q. At the time you pled guilty, did you have the
23 knowledge that you have here today?

24 A. No, I didn't.

25 Q. Specifically, those witness statements, learning

1 they had not positively identified you?

2 A. No, I didn't.

3 Q. Had you known that, would have you pled guilty?

4 A. No, I would not have.

5 Q. If you had known your attorney was not going to
6 ask for a five to seven-year sentence, in a medium
7 security prison would you have pled guilty?

8 A. No, I would not have.

9 Q. What are you asking the Court to do here today?

10 A. I'm asking the Court to vacate my sentence and
11 grant me a new trial.

12 Q. Due realize if that happens, you're going to go
13 back in front of a jury on maybe one or all of those
14 charges?

15 A. Yes, I do.

16 Q. And you're willing to put your case up to a jury?

17 A. Yes, I am.

18 Q. Sir, is there anything you would like to tell the
19 Court that I have not asked you here today? This is your
20 one point to state your case, so I want to make sure I
21 haven't rushed you. Is there anything that you want to
22 add that you feel is important that we haven't gone over
23 here?

24 A. No. That about cover covers it all, everything we
25 went over, that about covers it, covers everything.

1 Q. Okay.

2 MR. PARRISH: Would you please answer any
3 questions Mr. Friedman has. He represents State of South
4 Carolina.

5 THE WITNESS: Yeah, no problem.

6 CROSS-EXAMINATION

7 BY MR. FRIEDMAN:

8 Q. Good morning, Mr. Scott. Do you recall your plea
9 hearing in this case?

10 A. Uh-huh.

11 Q. Do you remember telling the judge that you
12 understood the nature of the charge and the possible
13 punishments?

14 A. Yes, I do.

15 Q. And the possible punishment, I believe, was up to
16 30 years?

17 A. Right, right.

18 Q. You told the plea Court you were satisfied with
19 your attorney; do you recall that?

20 A. Right.

21 Q. You also told the Court you understood your right
22 to a jury trial?

23 A. Yes.

24 Q. And you wanted to waive that right?

25 A. Right.

1 Q. You told Court that no one had threatened you or
2 promised you anything to get you to plead guilty?

3 A. Correct.

4 Q. Do you recall the solicitor recited the facts in
5 this case?

6 A. Right.

7 Q. And the Court asked you if you agreed with those
8 facts and you said you did? Do you remember that?

9 A. Yeah.

10 Q. You also addressed the Court in this case?

11 A. Yes, I did.

12 Q. And you apologized to your family and to the
13 victims?

14 A. Right, I did.

15 Q. You said that you were dealing with a heroin
16 addiction; is that right?

17 A. Right, right.

18 Q. You said I destroyed my family, I let them down.
19 Do you remember that?

20 A. Right, right.

21 Q. Mr. Parrish asked you about the photo lineup. I
22 believe you testified your attorney told you two of the
23 tellers positively ID'd you; is that right?

24 A. Right.

25 Q. Is it true that that was for the Ameris Bank

1 robbery?

2 A. Right.

3 Q. It was not the robbery you pled guilty to, right?

4 A. No, it wasn't.

5 MR. FRIEDMAN: Nothing further, Your Honor.

6 MR. PARRISH: Short redirect.

7 BY MR. PARRISH:

8 Q. Why did you apologize to the Court at your plea
9 hearing?

10 A. I apologized because my attorney told me when we
11 go forth before the plea proceedings that he would ask me
12 to address the Court and apologize to the victim, because
13 he said that would help out with the plea, with him
14 asking for the five to seven year deal, and I told him at
15 the time, I said, well, I don't know what to say because
16 I never planned on pleading out or admitting guilt. He
17 said I needed to say something is because the judge who
18 we were in front of like to hear people take
19 accountability for their actions.

20 Q. Did you and Mr. Grimes discuss ahead of time what
21 you were supposed to say at the plea hearing?

22 A. Pardon me?

23 Q. Did you and Mr. Grimes discuss ahead of time what
24 you were supposed to say at the plea hearing when you
25 talked to the judge?

1 A. That part we did.

2 Q. Did you discuss at the rest of the plea hearing
3 what you needed to do?

4 A. Yes.

5 Q. Were you following your attorney's instructions
6 when you pled?

7 A. Yes, I was.

8 Q. Anything else you want to add that I haven't asked
9 you so far or anything you want to add in response to
10 what Mr. Friedman just asked you?

11 A. Yes. What Mr. Friedman had say I pled guilty that
12 I understand what was going on, yes, I pled guilty at
13 that time. I pled guilty involuntarily because I wasn't
14 aware of certain evidence or lack of investigation in my
15 case at the time, so when I pled, I pled guilty
16 involuntarily.

17 Q. He also asked you a question along the lines you
18 only pled guilty to the Tidelands Bank not Ameris Bank,
19 but the morning you came down here to pick'a jury, the
20 Ameris Bank charge was pending against you as well,
21 right?

22 A. All three was on the table.

23 Q. Anything else you want to add?

24 A. No, sir.

25 MR. PARRISH: Thank you, Your Honor. No

1 further questions.

2 THE COURT: Recross?

3 MR. FRIEDMAN: Nothing further, Your Honor.

4 THE COURT: You can step down.

5 MR. PARRISH: Call Mr. Castain.

6 MICHAEL CASTAIN,

7 having been first duly sworn,

8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. PARRISH:

11 Q. How old are you?

12 A. I'm 40.

13 Q. Where are you from? Where did you grow up?

14 A. I grew up here in Charleston.

15 Q. Are you employed right now?

16 A. Yes, sir, I am.

17 Q. What do you do?

18 A. I'm a lead line cook at Applebee's on Sam

19 Rittenburg.

20 Q. How long have you been doing that?

21 A. Cooking?

22 Q. Yes, sir.

23 A. Cooking, about 20 years.

24 Q. What is your educational background? How far did
25 you go in school?

1 A. I got a two year degree in culinary arts.

2 Q. Do you know Sylvester Scott?

3 A. Yes, I do.

4 Q. Tell the Court how you know him.

5 A. Me and Sylvester Scott basically grew up together
6 playing ball, on Highland Park. We lived on the same
7 project growing up for a while, and we were in school
8 together.

9 Q. Were y'all good friends growing up?

10 A. We knew each other. We were in school, you know.
11 We knew each other. We weren't, like, hanging out best
12 friend type stuff. He knew me and I knew him, you know.
13 We have respect for each other. We played a lot of ball
14 together.

15 Q. How about now? How good of a friend are you right
16 now?

17 A. Basically the same. We knew each other, I got
18 respect for him; he got respect for me.

19 Q. The reason you're here, the charge for Mr. Scott
20 for the Tideland Bank robbery on March 18, 2009, what if
21 any significance does that date have to you? And please
22 tell the Court.

23 A. Basically, that was the last time I remember
24 seeing Mr. Scott. I was on my way to work, and usually
25 on in the middle of the week, I get my hair cut, and I

1 was downtown at Blades Barber Shop on Meeting Street.

2 Q. Is that across from Piggly Wiggly?

3 A. Yes, and my barber is a guy we called Hemp --
4 H-e-m-p, it's his nickname -- and Mr. Scott was in the
5 chair. I hadn't seen him for a while, you know. We were
6 talking. He told me it was birthday and wanted to hang
7 out. He said, Man, I know you got something for me.

8 I said yeah, let me get my tape on so I could get
9 to work, because at the time I was working at Dolphin's
10 Cove restaurant and I used to catch the restaurant
11 between, like, 10:30 and 11:15 because I had a choice of
12 two buses to catch.

13 So when I got my hair taped up, we went outside,
14 we talked, and I gave ten bucks for his birthday and he
15 walked me to the bus stop. It was, like, 20 feet from
16 the front door of the barber shop, so we walked and
17 talked, smoking cigarettes, talking, and when my bus
18 pulled up and I got on the bus, it was exactly 11:13 or
19 11:14, because I was making jokes with the bus driver,
20 telling him, you know, you're running kind of late today.

21 Q. Where were you going on the bus?

22 A. To work.

23 Q. And you did that every day back then?

24 A. Yes, sir.

25 Q. How did you know it was Mr. Scott's birthday?

1 A. Because he told me.

2 Q. Did you get him anything for his birthday?

3 A. I gave him ten bucks.

4 Q. And so around the hours of 10:50 on March 18 when
5 Tideland's was being robbed over in West Ashley, did you
6 see Sylvester Scott downtown on Meeting Street across
7 from the old Piggly Wiggly?

8 A. Yes. We were standing right next to each other,
9 smoking a cigarette.

10 Q. Is there any doubt in your mind you saw him at
11 that point in time?

12 A. No, no doubt in my mind.

13 Q. Is there any doubt that you saw him at that time
14 frame, around the 10:50 time frame, plus or minus?

15 A. No doubt in my mind.

16 Q. Did anybody from Mr. Scott's attorney's office
17 ever call you and ask you if you could put him in a
18 different location, be a witness on his behalf?

19 A. No, sir. The only attorney I spoke to was I spoke
20 to you a couple weeks ago when you contacted me about
21 this situation.

22 Q. But I'm the only attorney your investigator or
23 anybody has ever asked you about Mr. Scott's explanation
24 that he couldn't be where they said he was?

25 A. Yes.

1 Q. Are you here freely and voluntarily today?

2 A. Yes, sir.

3 Q. Are you being promised or paid anything for being
4 here?

5 A. No, sir.

6 Q. Has anybody threatened or coerced you to be here?

7 A. No, sir.

8 Q. Why are you here? Why did you do this?

9 A. Well, if I was in this situation, I would want
10 somebody to do it for me, you know, being that I've been
11 on this side of the law before, been in trouble before,
12 and I understand, you know, certain things. I would want
13 somebody to be there for me if I was in trouble.

14 Q. Are you going to work after this?

15 A. Actually, I'm off today. I am going to the
16 doctor. I got a contusion in my right knee.

17 MR. PARRISH: Thank you.

18 THE WITNESS: Thank you.

19 MR. PARRISH: Beg the Court's indulgence just
20 one minute, Your Honor.

21 THE COURT: All right.

22 MR. PARRISH: Sir, thank you for your time,
23 if you'd answer any questions the state's attorney has,
24 please.

25 MR. FRIEDMAN: I have no questions, Your

1 Honor.

2 THE COURT: You can step down.

3 MR. PARRISH: By agreement with Mr. Friedman,
4 I'm going to let him call Mr. Grimes in his case and
5 reserve the right to cross-examine, if it's all right
6 with the Court. At this point, subject to the right to
7 cross-examine Mr. Grimes, we have no further witnesses.

8 THE COURT: All right. Mr. Friedman?

9 MR. FRIEDMAN: Your Honor, the state would
10 call Andrew Grimes.

11 ANDREW DAVID GRIMES,
12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 THE WITNESS: Andrew David Grimes,
16 G-r-i-m-e-s.

17 BY MR. FRIEDMAN:

18 Q. How long have you been practicing law?

19 A. Graduated law school in 1995, and after that
20 clerked, where I did a mix of criminal, civil, and had a
21 private practice where, I would say, 75 percent is
22 criminal, and full time since about 2004.

23 Q. You were appointed in this case; is that right?

24 A. Yes, sir.

25 Q. Do you recall about how many times you met with

1 the applicant?

2 A. Not specifically, off the top of my head, but I
3 would say, you know, at least four or five, maybe a
4 little bit more.

5 Q. Do you recall if you discussed the elements of the
6 charges and what the state was required to prove?

7 A. Yes, sir. I remember I sent him a copy of the
8 statute, I know that.

9 Q. And I believe there were three counts of entering
10 a bank with intent to steal; is that right?

11 A. Yes, sir. I think there also initially two counts
12 of armed robbery, but those were dismissed, wrong charge.

13 Q. Did you discuss potential defenses with the
14 applicant?

15 A. Yes, sir.

16 Q. And you heard the testimony of the potential alibi
17 witness, Mr. Castain?

18 A. Yes, sir.

19 Q. Did the applicant give you that gentleman's name
20 before the plea?

21 A. Yes, sir.

22 Q. Did he give you any contact information for him?

23 A. No, sir.

24 Q. Did he give you any way to get in touch with him?

25 A. As I recall, he told me his brother would be able

1 to contact him and would give me his contact information.

2 Q. Did you ever talk to the applicant's brother?

3 A. No, sir. I called a couple times and left a
4 message or wasn't able to leave a message.

5 Q. The applicant also testified about the DNA that
6 was on the wig or the disguise that was found?

7 A. Yes, sir.

8 Q. Did he tell you his reason behind that, that I
9 believe he said he ran into a friend and they smoked pot
10 in the woods?

11 A. I believe that was one of the accounts he gave me.

12 Q. Did you do any investigation to look into that?

13 A. Yes, sir. We actually went out to the scene, me,
14 Alicia Penn, who was going to be my second chair, and my
15 investigator, took a lot of photographs, and it certainly
16 was a place where a lot of people hung out, a lot of beer
17 cans, other miscellaneous items, and then we walked down,
18 and I think talked to Lorraine Wilson, who was a
19 potential witness in the case, and she lived about a few
20 blocks down from there.

21 Q. Did he give you the name of the gentleman that he
22 was smoking the pot with?

23 A. I don't recall if he did.

24 Q. What about the cell phone records? Did he mention
25 that to you, that he was buying a cell phone at the time

1 of this Tidelands Bank robbery?

2 A. Yes, sir.

3 Q. Did you look into that at all?

4 A. A little bit. I think I asked my investigator to
5 go to the store. He e-mailed me and said the person had,
6 like, a box of records, and it would be hard for him to
7 go through those records. Probably wasn't done in the
8 most timely manner.

9 I guess Mr. Scott thought the case was going to go
10 federal, so for a while we were going to find out what
11 was going to happen there, found out the case wasn't
12 going to go federal, so we started to work on the case
13 more.

14 Q. Whose decision was it to plead guilty?

15 A. Ultimately it's Mr. Scott's, and I think he was
16 reluctant to plead guilty.

17 Q. This was a straight up plea; is that right?

18 A. I would say officially it would be a straight up
19 plea, but we approached Judge Dennis, Mr. Lawton and I,
20 and I think I told Judge Dennis the state was not opposed
21 to a ten-year sentence, and after Judge Dennis heard
22 everything, he decided to give him 12 years, and I don't
23 know if it's on the record or not, but he made a comment
24 to make sure he actually got ten years.

25 Q. Did you ever tell the applicant that you were

1 going to ask for five to seven years?

2 A. I don't -- I wouldn't disagree if I told him that,
3 but I would be kind of surprised. We talked to Judge
4 Hughston in chambers, and Judge Hughston said he would
5 give him between 12 and 15, and I would have told Judge
6 Dennis I wasn't opposed to ten years, I probably would
7 have told Mr. Scott the best I can do is ten years, and I
8 could have told him I thought he deserved less than ten
9 years, but I don't recall the specifics of those
10 conversations.

11 Q. Did you coerce the applicant to plead guilty?

12 A. No, sir.

13 Q. Were you prepared for trial?

14 A. I wasn't prepared to go forward on the alibi
15 defense, certainly, but we did subpoena several
16 witnesses, I think several bank customers, Jocelyn
17 Atkinson, Al Hess, I believe, who had given different
18 descriptions. We had subpoenaed two or three employees
19 from the Hocus Pocus store where the wig and mustache
20 were purchased. My investigator had done -- kind of
21 crafted our own eyewitness admonition form, and those
22 witnesses testified it was a white person who had come in
23 and bought the items, so we were prepared to go forward
24 on that.

25 I don't know if we were going to call Ms. Lorraine

1 Wilson. She kind of -- there was some stuff that helped
2 us, some stuff that hurt us, but I don't think we could
3 ever come up with a good, feasible argument on the DNA.
4 Ultimately, I think that was -- what I told Mr. Scott, I
5 said, I know we can beat the other two charges, but I
6 don't know how we get around the DNA.

7 THE COURT: I didn't hear you clearly. Did
8 you say you were or you were not ready to go forward on
9 the alibi defense?

10 THE WITNESS: Was not ready to go forward on
11 the alibi defense.

12 BY MR. FRIEDMAN:

13 Q. When you say you weren't ready to go forth on the
14 alibi defense, is that because you hadn't done enough
15 investigation or that investigation was not
16 substantiated?

17 A. I would say I probably had done no real
18 investigation, talked to -- I guess I was relying on
19 Mr. Scott's family to give me contact information.

20 Q. And they ultimately did not provide you with that
21 contact information?

22 A. No, sir.

23 Q. Did you tell the applicant what to say at his plea
24 hearing, as far as apologizing to the Court?

25 A. I would have told him apologies help, show

1 remorse. It's usually one thing judges, Courts, look at
2 to see if a person is truly remorseful.

3 Q. Did you tell him to say that he had a heroin
4 addiction?

5 A. I imagine so. I would bring that out myself, to
6 explain; otherwise, you have a pretty solid person. I
7 like Mr. Scott. He's very smart and intelligent, but
8 once he got hooked on heroin, his life just went the
9 opposite way of some of his peers. A lot of his peers
10 are successful, and trying to explain to the judge how
11 someone who comes from a good family, good upbringing to
12 end up having the record that he did, and, you know,
13 showing it's more because of drugs and not because he's
14 mean spirited or someone out there robbing and beating up
15 people.

16 Q. Now, if he had gone to trial, would that have been
17 on all three of the robberies?

18 A. No. I believe it was just on the March 18th.
19 Now, whether the other ones would have come in or not
20 would have been an issue at trial. I think Mr. Lawton
21 indicated he was going to try to bring him in, kind of
22 404(b) evidence on identification.

23 MR. FRIEDMAN: I have nothing further, Your
24 Honor.

25 CROSS-EXAMINATION

1 BY MR. PARRISH:

2 Q. Hi, Mr. Grimes. There were three robberies: The
3 Tidelands, Heritage, and Ameris Bank in that order. To
4 my knowledge, there was absolutely no evidence of any
5 kind whatever connecting him to the Heritage Bank. Do
6 you recall that?

7 A. I'm not sure which one Heritage was.

8 Q. It was the middle one, Tidelands, Heritage, and
9 Ameris. Tidelands, DNA; Heritage, nothing; Ameris Bank,
10 the positive witness identification?

11 A. If you can refresh my memory, was Heritage One the
12 one that Detective Korsacko was handling?

13 Q. I'm not prepared to answer that question right
14 now.

15 A. If that was the one, the only evidence they would
16 have would be using 404(b) evidence to show that the
17 person who did the first robbery may have done the
18 Heritage robbery because of the similarities and the
19 patterns. Apart from that, I don't know of any evidence.

20 Q. I didn't see it in the file that I got from him.
21 It wasn't in the state's file. The last bank, the Ameris
22 Bank robbery, the only really probative evidence they had
23 was these so-called positive ID lineup statements. Do
24 you agree with that?

25 A. I wouldn't disagree with it. I haven't looked

1 into it in too much detail.

2 Q. If you want to see it, it's marked as an exhibit
3 up here. It's photo, admonitions; three of them, two of
4 them flat out say not positive, and one has kind of I
5 picked that one because it's the best of the group. You
6 would agree that the Ameris Bank evidence against
7 Mr. Scott was fairly weak, as far as the state's evidence
8 against him?

9 A. Yes, sir.

10 Q. And would you agree it would be important for him
11 to know that he had not, in fact, been positively
12 identified?

13 A. Yes, sir.

14 Q. In fact, you're aware that every time the state or
15 detectives went into court to get search warrants and
16 arrest warrants, they said he had been positively
17 identified for the Ameris Bank robbery?

18 A. Yes, sir.

19 Q. And that is not quite maybe the full story,
20 correct?

21 A. Yes, sir.

22 Q. And sitting here today, can you tell the Court
23 with certainty that you told Mr. Scott before he pled
24 guilty that he had not, in fact, been positively
25 identified as he was under the impression at the time?

1 A. Yes, sir.

2 Q. You did tell him that?

3 A. I told him we could win those two charges. I told
4 him that a week or two before court. That was one of
5 those that we were going to challenge, the officer saying
6 it says a positive identification when it is not.

7 Q. Did you sit down with Mr. Scott before he pled
8 guilty and show him those witness admonition forms and
9 say they do not, in fact, say positive on there?

10 A. I don't remember going through it because -- as he
11 said, we weren't focussed too much on that because it was
12 such a weak case. Our focus was the DNA.

13 Q. Mr. Scott, after he was sentenced, wrote your
14 office and asked for a copy of his file. Do you recall
15 that?

16 A. I don't recall.

17 Q. Do you recall somebody in your office sent him his
18 entire file so he could prepare his PCR case?

19 A. No, I don't recall that either. I may have -- if
20 I did, I may have just gave it to my paralegal and asked
21 her to send it off.

22 Q. So you agree with me there really wasn't much for
23 Heritage; little about Ameris Bank, except the
24 so-called -- so, really, the only thing that was damning
25 to Mr. Scott was the DNA on the mask and wig found behind

1 the Tideland Bank?

2 A. Yes, sir.

3 Q. In fact, if Mr. Scott had an alibi eyewitness and
4 cell phone records that would put him on the other side
5 of town at the time of that robbery, would that be
6 important evidence to have?

7 A. Yes, sir.

8 Q. I marked -- for identification purposes only at
9 this time, but I marked as Plaintiff's Exhibit 3, and
10 these are copies of notes from your file, and at the
11 bottom is my Bates number just for my edification, Scott,
12 0068. At the very bottom -- let me back up.

13 In the middle of this, it lists witnesses, and
14 this is your handwriting, right?

15 A. Yes, sir.

16 Q. And at the very bottom, it says Michael Castain?

17 A. Yes, sir.

18 Q. That is the gentleman who testified here today?

19 A. I assume so.

20 Q. And you don't recall ever talking to or
21 interviewing Mr. Castain?

22 A. No, sir.

23 Q. And over next to it, it says -- could you just
24 read that since it's your handwriting? It says, Michael
25 Castain, and what did you write next to it?

1 A. The symbol for defendant, triangle, phone for
2 present, looked for receipt, bought phone from Cricket on
3 Meeting.

4 Q. So at the time before he pled guilty, Mr. Scott
5 was telling you that Michael Castain and these cell phone
6 records might show he wasn't where the state claimed he
7 was at the time?

8 A. Yes, sir.

9 Q. And you agree this is important evidence?

10 A. Yes, sir.

11 Q. And I believe you said you thought the federal
12 government was going to take over these robberies,
13 considering they were bank robberies, so there might have
14 been a little bit of a delay in investigating his claim?

15 A. Yes, sir.

16 Q. Did you ever write Mr. Scott and say, Mr. Scott, I
17 don't have Castain's telephone number. If you don't give
18 it to me, you're going to lose at trial. It's important
19 that somebody call and give me that number?

20 A. No. I never wrote and told him that.

21 Q. You gave me this morning, I didn't have this on
22 the original file, so I don't have an exhibit number on
23 this, but I'm going to show you the information you gave
24 me this morning.

25 A. If you want to use my copy.

1 Q. All right. I am going to offer this as an
2 exhibit, so if I may approach, Your Honor. Excuse me.
3 That is only one copy. That's the wrong page. That's
4 the only copy I have. I'm looking at your e-mail from
5 Lee Ginn, Andrew Grimes e-mail from Lee Ginn on Friday,
6 March 12, 2010, and just tell the Court what this e-mail
7 is telling you.

8 A. Is this the --

9 Q. I'm sorry, Your Honor I've gotten it confused. I
10 thought I had multiple copies here.

11 A. Make sure that's the same one.

12 Q. Correction, e-mail from Andrew Grimes to Lee Ginn
13 on March 15, 2010. I apologize. I just got them.

14 A. Andrew, FYI, I spoke with Josh Boyd at Chapman
15 Communications 724-5216, d/b/a Cricket communications
16 located at 472 Meeting Street. Josh said if defendant
17 purchased the telephone in the last two months, he had a
18 box full of receipts on site he could go through. If
19 longer than that, he was very doubtful he could locate
20 anything, especially if dated over a year.

21 Q. Did you make any effort to follow up and try to
22 get those documents from the cell phone store?

23 A. No, sir.

24 Q. And you would agree if there was, in fact, a cell
25 phone contract or a record showing the phone activated

1 about 10:50 a.m. on March 18th, Mr. Scott's birthday when
2 Tideland's was being robbed, that would put him downtown
3 and would be fairly important evidence?

4 A. I would assume it would put him downtown, as long
5 as someone identified Mr. Scott as being the one buying
6 it and that would be important evidence.

7 Q. The e-mail you just read is dated 2010, a year
8 after the charges -- or after the robbery occurred?

9 A. Yes, sir.

10 Q. So there was a year delay before your first
11 attempt to even look at the issue getting the Cricket
12 cell phone records?

13 A. You could certainly characterize it that way.

14 Q. At the time Mr. Scott and you had the discussion
15 about wanting him to plead guilty, did he indicate to you
16 what sentencing range you recommended that he might be
17 able to live with in light of the potential 90 years he
18 was facing?

19 A. Are you talking about the day of the plea or
20 the --

21 Q. Yes, sir.

22 A. I don't recall that offhand. We had several
23 discussions about pleas before that, and I think -- I
24 imagine he probably was -- it's my memory, and I could be
25 corrected, but I imagine he was fine with the ten,

1 probably wasn't thrilled about it, but he could live with
2 that. I don't know -- I don't think we ever talked about
3 90 years because I think, if anything, it would be an
4 LWOP-able offense, so if they tried him on two, they
5 wouldn't try him on the third one.

6 Q. The day of this plea, was he, in fact, coming down
7 here to pick a jury or thereabouts?

8 A. I know he got close, as you saw in my notes, but I
9 don't remember what the Court's schedule was and how long
10 it would take. The 17th would have been a Wednesday, I
11 imagine --

12 Q. He was on the trial docket and approaching trial?

13 A. Certainly on the trial docket, coming for trial
14 and we pled in the trial court, but I don't know if he
15 was really, like, up next at trial. We had subpoenaed
16 witnesses for that week, but I don't know --

17 Q. I saw the subpoena, so I was assuming there was a
18 trial date potential, so Mr. Scott was down here on the
19 eve of trial, or close to it, when he pled guilty?

20 A. That's possible -- sometimes you're on the trial
21 docket and schedules may work out where it may get
22 carried over, and I don't know if his was one that was
23 going to be able to fit in for the rest of the week, but
24 we were certainly up next.

25 Usually, Judge Dennis will have a little pretrial

1 conference, kind of talk about the case and what issues
2 might be there, and we didn't have that in the case.

3 Q. Before I forget, Your Honor, I would like to offer
4 as the next exhibit the e-mail, March 15th e-mail that he
5 wrote and read into the record. I don't have an exhibit
6 sticker on it.

7 THE COURT: All right. Any objection?

8 MR. FRIEDMAN: No objection.

9 (E-mail marked for identification as
10 Plaintiff's Exhibit No. 3.)

11 BY MR. PARRISH:

12 Q. So you had witnesses subpoenaed, the trial date
13 potentially close, did you tell Mr. Scott he was facing
14 90 years in jail?

15 A. Probably not. I think we were just there --

16 Q. Probably not, or did you not?

17 A. I don't recall. I would say I was in --

18 Q. And you didn't have the alibi witness or the cell
19 phone records that Mr. Scott was adamant would show he
20 didn't do what he was accused of doing?

21 A. No, sir.

22 Q. Was Mr. Scott, throughout your representation of
23 him, adamant that he was not going to plead guilty?

24 A. We talked before, and we talked about a seven-year
25 plea. I could look at my notes and give a better time

1 frame. I know talked to Detective Osborne and said,
2 well, if he can give us some information on the other
3 robberies, we can help him out, maybe get a better deal.

4 Q. Let me rephrase. Was Mr. Scott reluctant to plead
5 guilty?

6 A. Yes, sir.

7 Q. At the plea hearing, if I read the transcript
8 correctly, you didn't ask the judge or recommend any
9 sentencing range to the judge at the plea hearing.

10 A. It's been a couple weeks since I've looked at the
11 plea transcript. If that's is what it says, that's what
12 it says.

13 Q. Do you recall telling Mr. Scott that if he agreed
14 to plead guilty and avoid a 90 year jail sentence that he
15 would serve it medium versus maximum security facility?

16 A. No, sir.

17 Q. Would you agree the charge he was facing was
18 considered a nonviolent offense by the State of South
19 Carolina?

20 A. It was considered nonviolent, but it's classified
21 as 85 percent sentence.

22 Q. Maybe I shouldn't do this, but I'm going to ask
23 you, if Mr. Scott said on the eve of trial he got
24 witnesses on standby, he's facing 90 years in jail, do
25 you believe Mr. Scott would have been able to make a

1 voluntary and knowing decision to plead when you don't
2 have an important alibi witness and the cell phone
3 documents, ready to go in the courtroom, which, if they
4 were true, Mr. Castain, what he said is true, to show
5 that he wasn't where they said he was at the time of the
6 robbery, would you agree that it would be difficult for
7 him to make an informed decision under those
8 circumstances?

9 A. I'm trying to think of the best way to answer
10 that. If they were true, he still had the DNA issues,
11 and if I had known how Mr. Castain came across, and he
12 seemed to come across fairly credible with his details
13 today, so I don't think -- he may very well make a good
14 witness, assuming that was true, we could find the phone
15 records. I still think people can make an informed
16 decision. You weigh the pros and cons. I have this
17 defense, but it's going to be hard to make out versus,
18 DNA is there, so someone who with the experience
19 Mr. Scott has with the judicial system, I think might
20 be -- can make an informed decision.

21 Q. Would you agree he was not given the opportunity
22 to make an informed decision when Mr. Castain was still
23 absent from the scene and the cell phone records, nobody
24 had made any meaningful efforts to locate them, that
25 without those two key pieces of evidence that would have

1 explained away the DNA evidence, without that, he could
2 not make a voluntary and knowing and intelligent
3 decision?

4 A. I mean, you're asking me to speculate.

5 Q. I'm asking you, based on your experience and years
6 as an attorney in handling these cases on a day by day
7 basis.

8 A. Yeah, I think he can.

9 MR. PARRISH: If I could beg Court's
10 indulgence for just one moment. I appreciate your taking
11 time to be here. I have no further questions.

12 REDIRECT-EXAMINATION

13 BY MR. FRIEDMAN:

14 Q. Mr. Grimes, do you have a copy of Plaintiff's
15 Exhibit No. 3, where it says Michael Castain at the
16 bottom?

17 A. Yes, sir.

18 Q. Does it say that he bought the applicant a cell
19 phone as a birthday present?

20 A. I see birthday. It just says present on my notes.

21 Q. Let's see. Does it not say bought a phone for a
22 present?

23 A. Yeah.

24 Q. Were you here when Mr. Castain testified he gave
25 the applicant \$10 as a present?

1 A. Yes, sir.

2 Q. And the e-mail that you sent to Lee Ginn, is Lee
3 Ginn the investigator?

4 A. Yes, sir.

5 Q. He said that the cell phone store kept records for
6 the last two months. May I approach? Do you have that?

7 A. Yes, sir.

8 Q. Do you recall when you were appointed on this
9 case?

10 A. I think I was appointed probably May 17, 2009.

11 Q. And do you recall when the Tideland's robbery was?

12 A. Is that the --

13 Q. The first one.

14 A. I guess that was March the 18th.

15 Q. So you were appointed about two months after the
16 robbery?

17 A. Sounds that way.

18 Q. Did you hear it would have been difficult for you
19 to obtain those cell phone records if you were appointed
20 two months after the robbery and they only keep the cell
21 phone records for two months?

22 A. I think they keep them more than two months. In
23 fact, if I started right on May 17th, I probably should
24 have been able to get them, no problem.

25 Q. Would you agree that your e-mail says if it's

1 longer than two months, it's very doubtful they could
2 locate the receipts?

3 A. Yes, sir.

4 MR. FRIEDMAN: I have nothing further, Your
5 Honor.

6 THE COURT: Redirect?

7 MR. PARRISH: No questions, Your Honor.

8 THE COURT: You can step down. Anything
9 further from the state?

10 MR. PARRISH: Your Honor, I would like to
11 offer that I did, in fact, send a subpoena to the Cricket
12 cell phone store on Meeting Street across from the Piggly
13 Wiggly within the last month. Unfortunately, last year
14 that store changed ownership and the records and the
15 owners have been difficult, if not impossible, to get.

16 They redirected us to Cricket in North
17 Charleston, and after my secretary basically called and
18 threatened them and I informed them that they would be in
19 contempt of Court if they didn't respond, I personally
20 spoke with Cole, the Cricket manager there on this past
21 Friday afternoon, and he just told me that they don't
22 show that the phone was even activated until October 17,
23 2009, which doesn't make sense because the Ameris Bank
24 robbery that was in April, they were trying to link him
25 to cell phone records.

1 The bottom line is those records have been
2 misplaced or are not available currently because of
3 change in ownership. Something doesn't make sense as far
4 as the date of phone activation. They weren't sure if
5 subsequent activations might have dumped the old records,
6 but that is why I cannot offer the records here today. I
7 would do so, but they are just simply not available.

8 So for a brief summation for the benefit of
9 Mr. Scott, of the three robberies, only one of them, the
10 DNA was problematic, and Mr. Scott gave counsel an alibi
11 witness that would have shown he could not have been
12 where he was supposed to have been at the time. I
13 believe his counsel even reluctantly or maybe honestly
14 admitted that that was some important information that
15 Scott was missing when he pled guilty in this case.

16 And under these circumstances, there was a
17 pressure, I'm not saying coerced, but pressure and
18 involuntary plea based on lack of knowledge and
19 information and available defenses that were ready and
20 available. So under these circumstances, I would
21 respectfully submit that a PCR is appropriate in this
22 particular circumstance.

23 THE COURT: Mr. Friedman?

24 MR. FRIEDMAN: Thank you, Your Honor. The
25 state would submit that the applicant has failed to meet

1 his burden. He was only going forward on one of the
2 robberies at this time. Counsel did agree that the alibi
3 issue was important, but he testified he was relying on
4 the applicant's family to supply that contact
5 information.

6 He testified that the applicant told him his
7 brother would try to get in contact with Mr. Castain.
8 Mr. Grimes tried to contact his brother, was never able
9 to get ahold of him and never heard back from him.
10 Mr. Grimes testified that the DNA issue, they had no way
11 of getting around that issue, no feasible defense.

12 He looked into it, went to the scene with his
13 investigator, but he had no witnesses that were helpful
14 as far as the DNA issue. With the cell phone records,
15 there is an e-mail stating that they keep the receipts
16 for two months.

17 After that, it's very doubtful they could
18 look for them. Mr. Grimes wasn't appointed until two
19 months after this incident, so it can't be expected for
20 him to track those down, if they only keep them for two
21 months. Also, Mr. Castain testified he gave the
22 applicant \$10 as a birthday present. Mr. Grimes notes --
23 when he was trying to contact Mr. Castain, in his notes
24 he said Mr. Castain bought a cell phone as a present for
25 the applicant.

1 I would submit Mr. Grimes was not ineffective
2 and ask that you deny the application.

3 THE COURT: I'll tell you what: I'm going to
4 take it under advisement, and I'll give you each three
5 weeks to come up with proposed orders, if you would like
6 to, all right?

7 MR. PARRISH: Thank you, Your Honor.

8 THE COURT: Thank you.

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10 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 24th of January 2011.

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

March 30, 2011



Circuit Court Reporter



PHOTOGRAPHIC LINE-UP ADMONITION



(Officer will read the following admonishment to the witness.)

I am going to show you a group of photographs. These photographs may or may not contain a photo of the person who committed the crime being investigated. Please keep in mind that photographs may not always show the true complexion of an individual. It's possible they may be lighter or darker than shown in the photos. Also remember that hair styles, beards, and mustaches are features that can easily change. When you have finished looking at all of the photos, tell me if you can make a positive identification of the person who committed the crime. If you are positive in your identification, I will ask you to sign and date the back of the photograph.

Upon viewing these photographs do not discuss your results or this procedure with other witnesses.

Do you understand these instructions?

YES

NO

CASE #: 0906293

DATE 5-12-89 / 1:35PM

[Signature] 1247

Officer's Signature

Bethany Suta

Witness Signature

Comments:

I was unable to make a positive identification from these photographs.

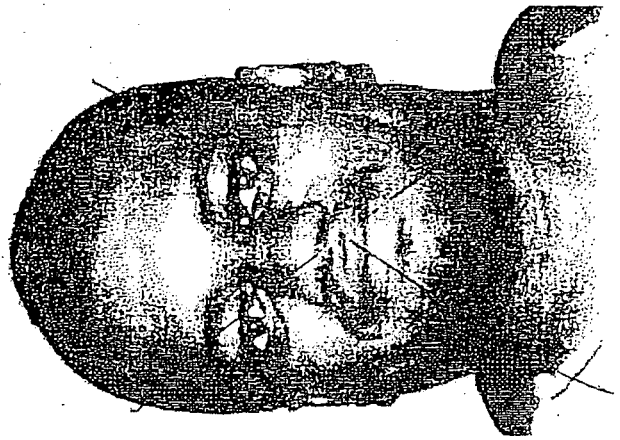
Signature

I have made a positive identification of the individual in photo number 2

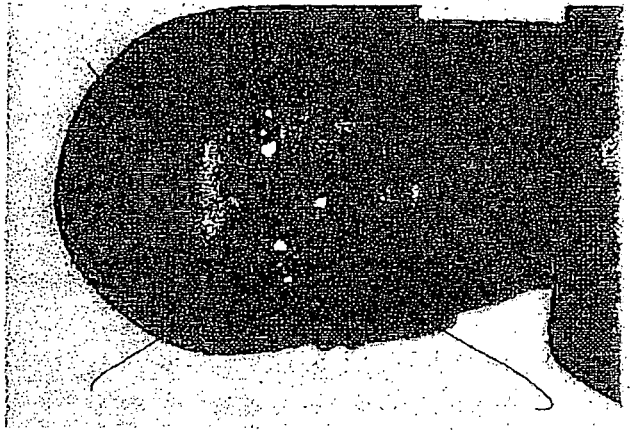
Bethany Suta

Signature

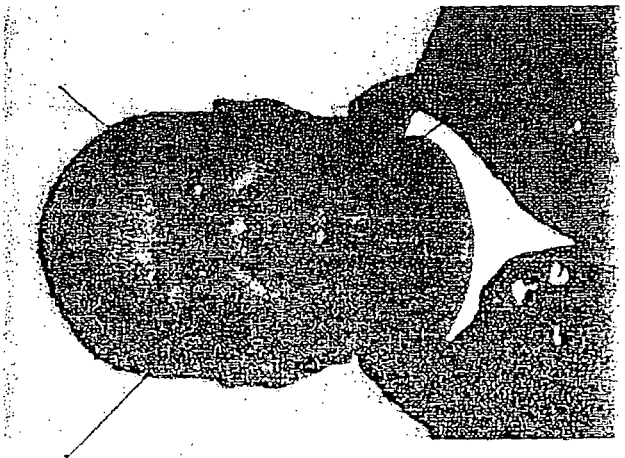
Other comments: I chose #2 because he is most like the person I remember walking the street. BT



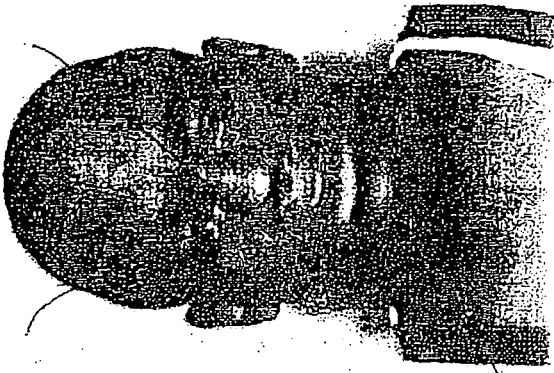
9



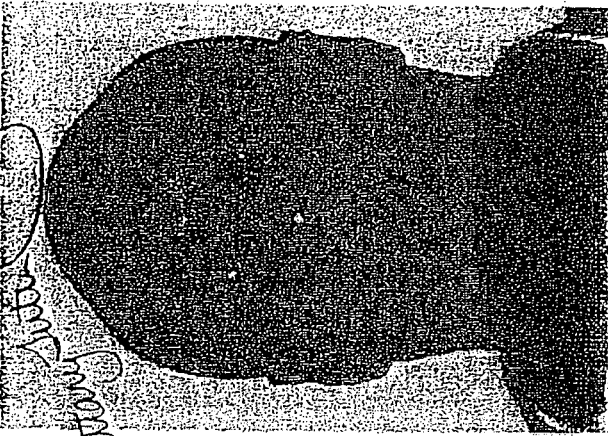
5



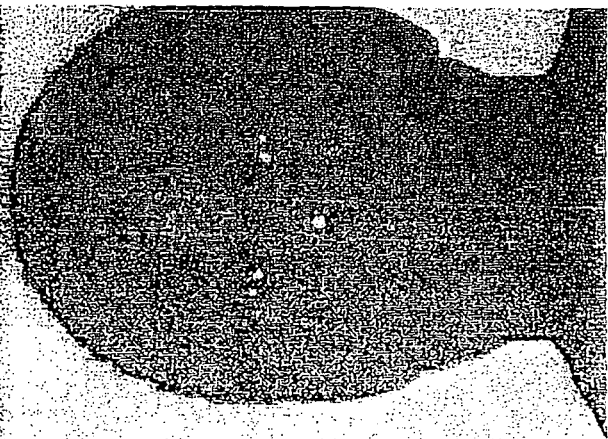
4



3



Butt
Ante
3



1



PHOTOGRAPHIC LINE-UP ADMONITION



(Officer will read the following admonishment to the witness.)

I am going to show you a group of photographs. These photographs may or may not contain a photo of the person who committed the crime being investigated. Please keep in mind that photographs may not always show the true complexion of an individual. It's possible they may be lighter or darker than shown in the photos. Also remember that hair styles, beards, and mustaches are features that can easily change. When you have finished looking at all of the photos, tell me if you can make a positive identification of the person who committed the crime. If you are positive in your identification, I will ask you to sign and date the back of the photograph.

Upon viewing these photographs do not discuss your results or this procedure with other witnesses.

Do you understand these instructions?

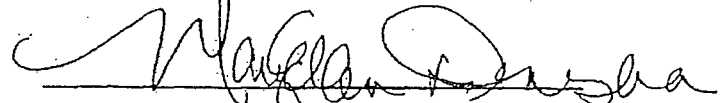
YES

NO

CASE #: 0906293

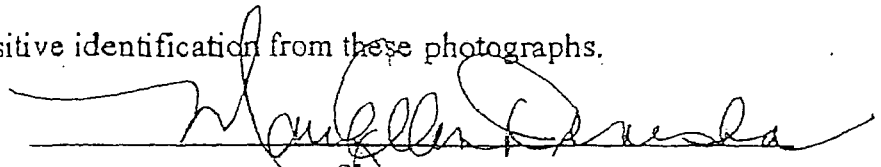
DATE 5-12-09 1:25 PM


Officer's Signature


Witness Signature

Comments:

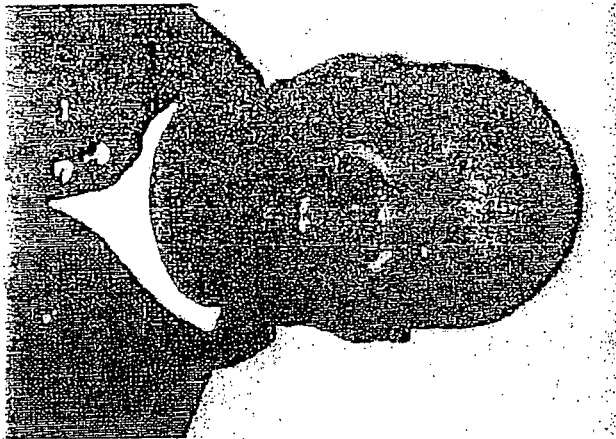
I was unable to make a positive identification from these photographs.


Signature

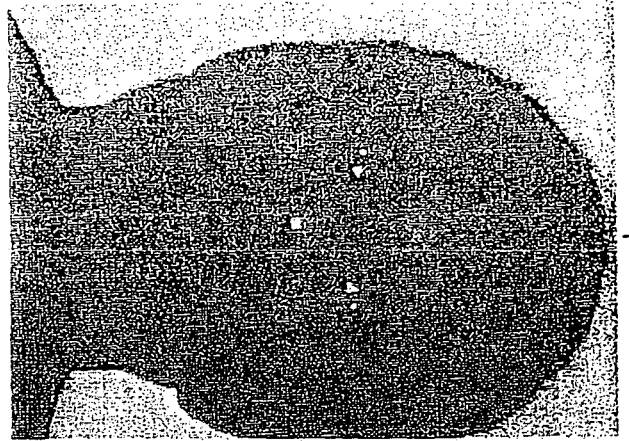
I have made a positive identification of the individual in photo number _____

Signature

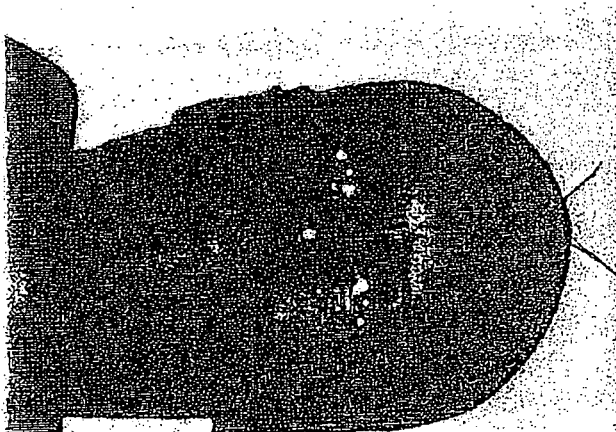
Other comments: _____



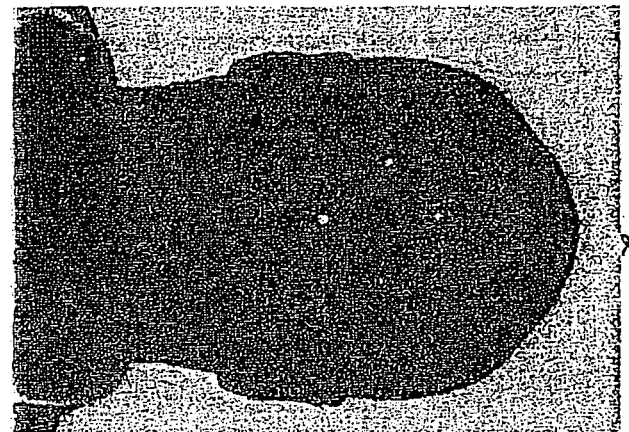
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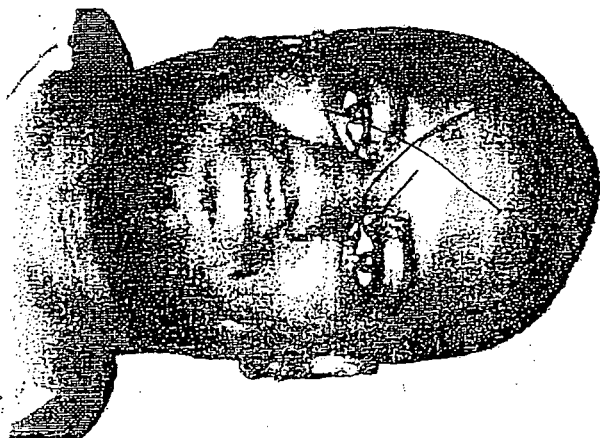
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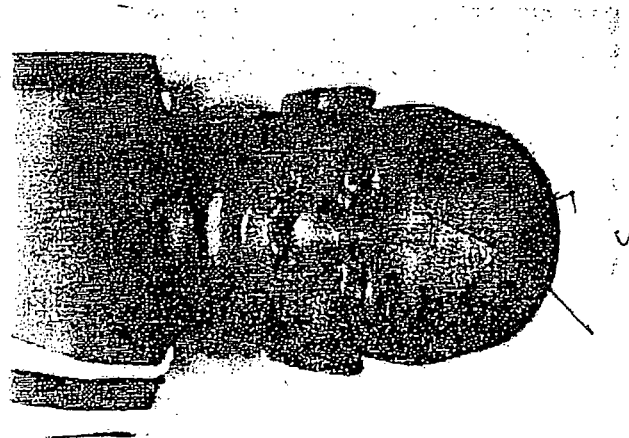
5



2



6



3

RULE 5 WTL 88874



PHOTOGRAPHIC LINE-UP ADMONITION



(Officer will read the following admonishment to the witness.)

I am going to show you a group of photographs. These photographs may or may not contain a photo of the person who committed the crime being investigated. Please keep in mind that photographs may not always show the true complexion of an individual. It's possible they may be lighter or darker than shown in the photos. Also remember that hair styles, beards, and mustaches are features that can easily change. When you have finished looking at all of the photos, tell me if you can make a positive identification of the person who committed the crime. If you are positive in your identification, I will ask you to sign and date the back of the photograph.

Upon viewing these photographs do not discuss your results or this procedure with other witnesses.

Do you understand these instructions?

YES

NO

CASE #: 0906293

DATE 5-12-09/1:18 PM

[Signature]

Officer's Signature

[Signature]

Witness Signature

Comments:

I was unable to make a positive identification from these photographs.

Signature

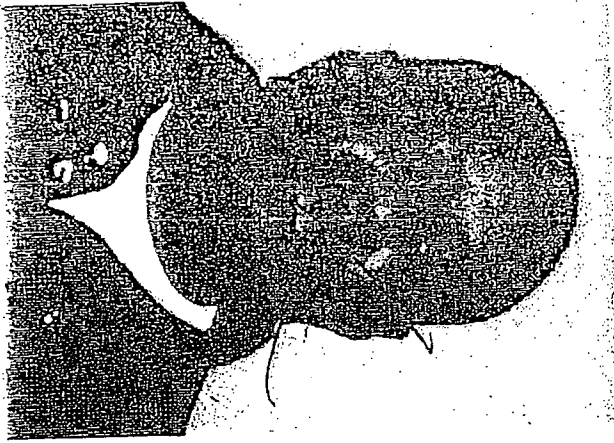
I have made a positive identification of the individual in photo number 2

[Signature]

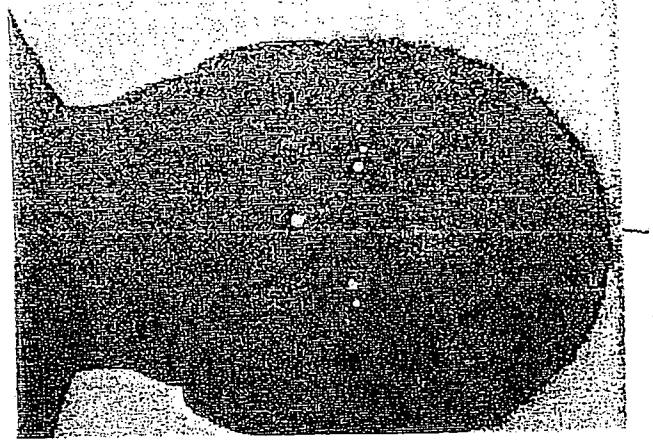
Signature

Other comments:

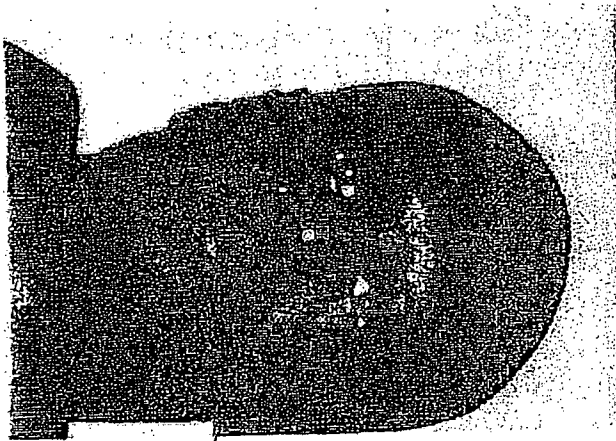
Not Positive Not Certain



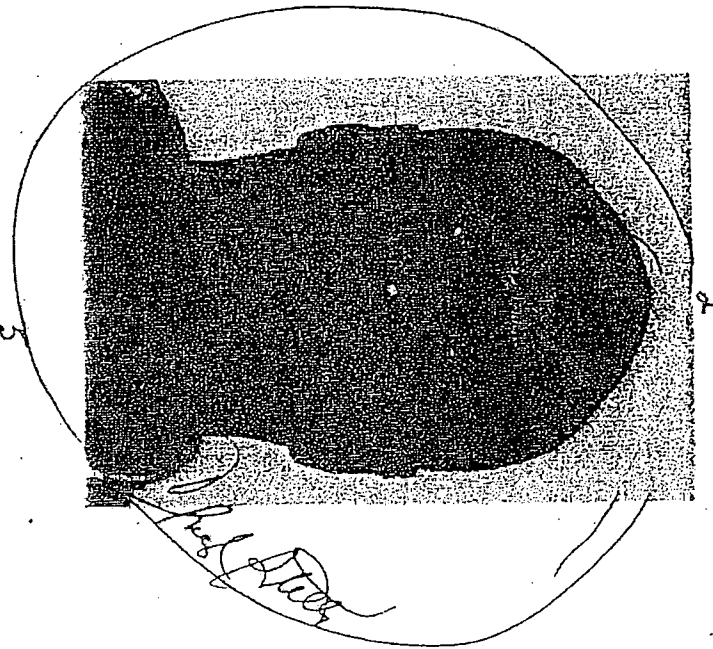
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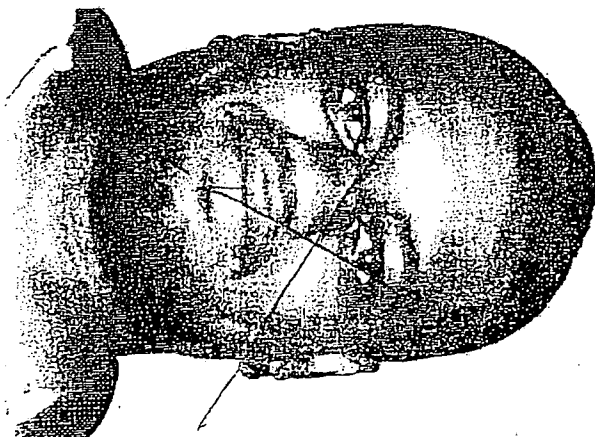
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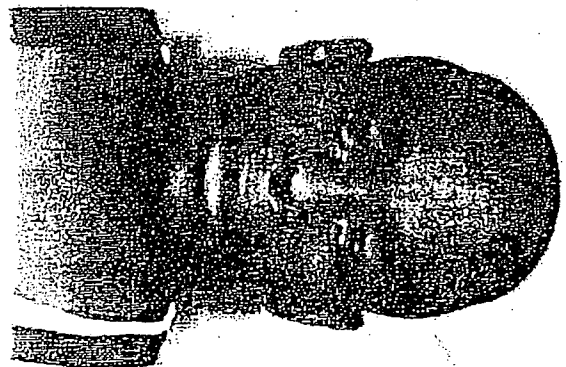
5



2



6



3

RULE 6 WTL: AEWYR

AD 6

TO: Ashley Pennington; Esquire

From: Silvester Scott, 208652

Mr. Pennington I'm writing you ABOUT my lack of confidence AND trust in Andrew Grimes. I've BEEN in CHAS. Co. Detention Center since 5-17-09; for 3 counts of entering a bank with intent to steal. My initial visit with Mr. Grimes was not a positive one due to the fact he hadn't check into statements AND my violation of my Constitutional Rights. From the BEGINNING Mr. Grimes has BEEN reluctant to Assist me with PROVING the errors in my case.

My position has ALWAYS BEEN not to plea guilty, however Mr. Grimes has other reservations CONCERNING my case. I'm REQUESTING that Mr. Grimes BE REMOVE from REPRESENTING me; Also I HAVE a CO-DEFENDANT that's BEING REPRESENTED BY the Public Defender office AND I feel it's A conflict of interest due to the fact that my ATTORNEY is not WORKING in my BEST interest.

IN closing I'm not satisfied NOR AM I confident with Mr. Grimes approach to my case; in other words I DON'T trust Mr. Grimes judgement AT ALL; so I would APPRECIATE it if I WAS given another lawyer that's not in the same office my CO-DEFENDANT lawyer. THANK YOU!

Sincerely,
Mr. Silvester Scott 208652



Scott0078

3/3/10

Meeting with Shepherd Scott

I would take >

But does not know of any other robberies

Has not talked to her

Witnesses

① Malice Strabazz - in North C

② Soname Wilson - 225-6841
ex-SF

③ Anthony Scott - brother
722-7023

④ Michael Castain - bought a phone for a present
wants to get receipt
bought phone from Barrett
in meeting

PLAINTIFF'S
EXHIBIT

3

127

PLAINTIFF'S
EXHIBIT
5

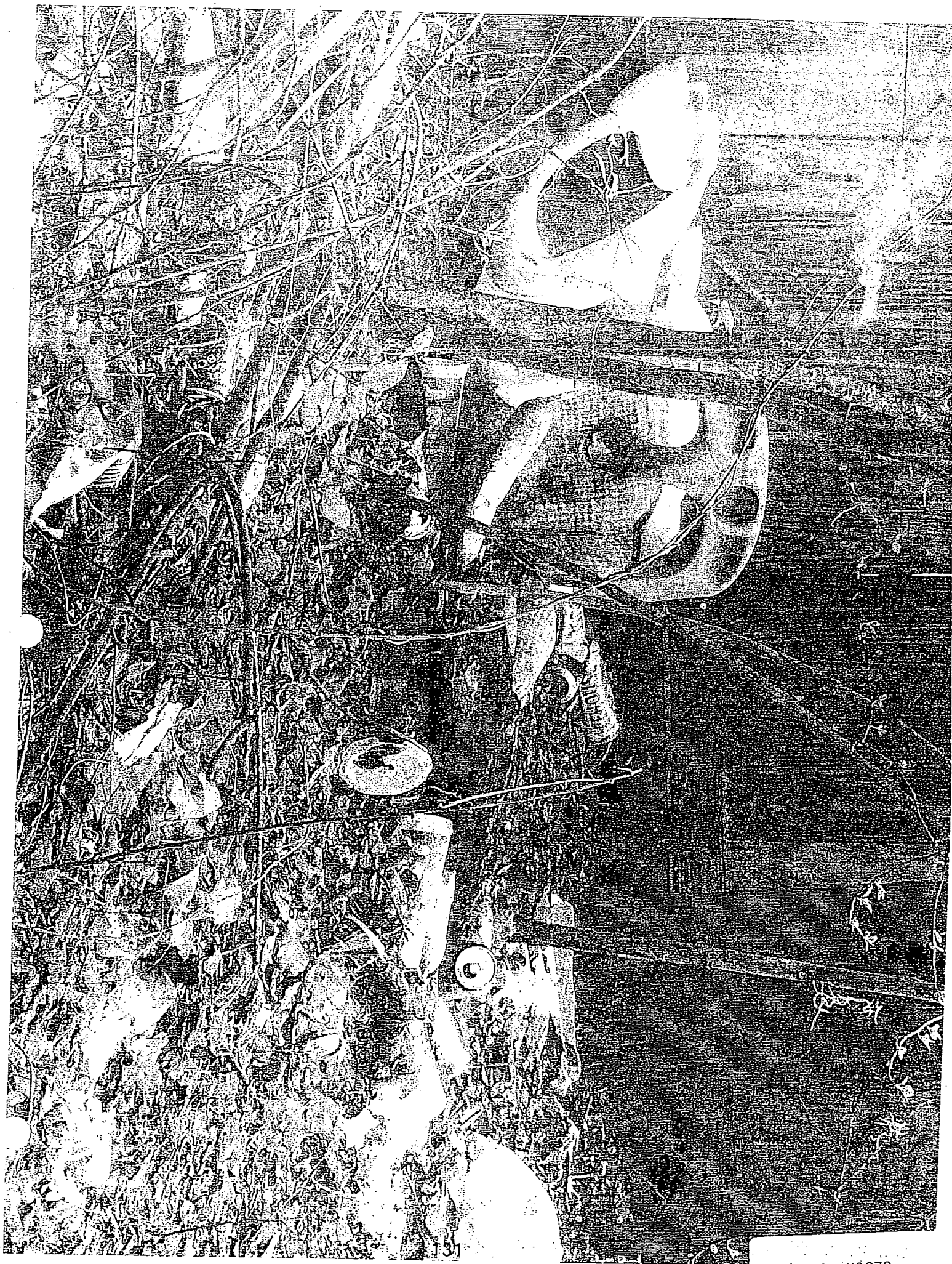
SC0110674





Scott0677

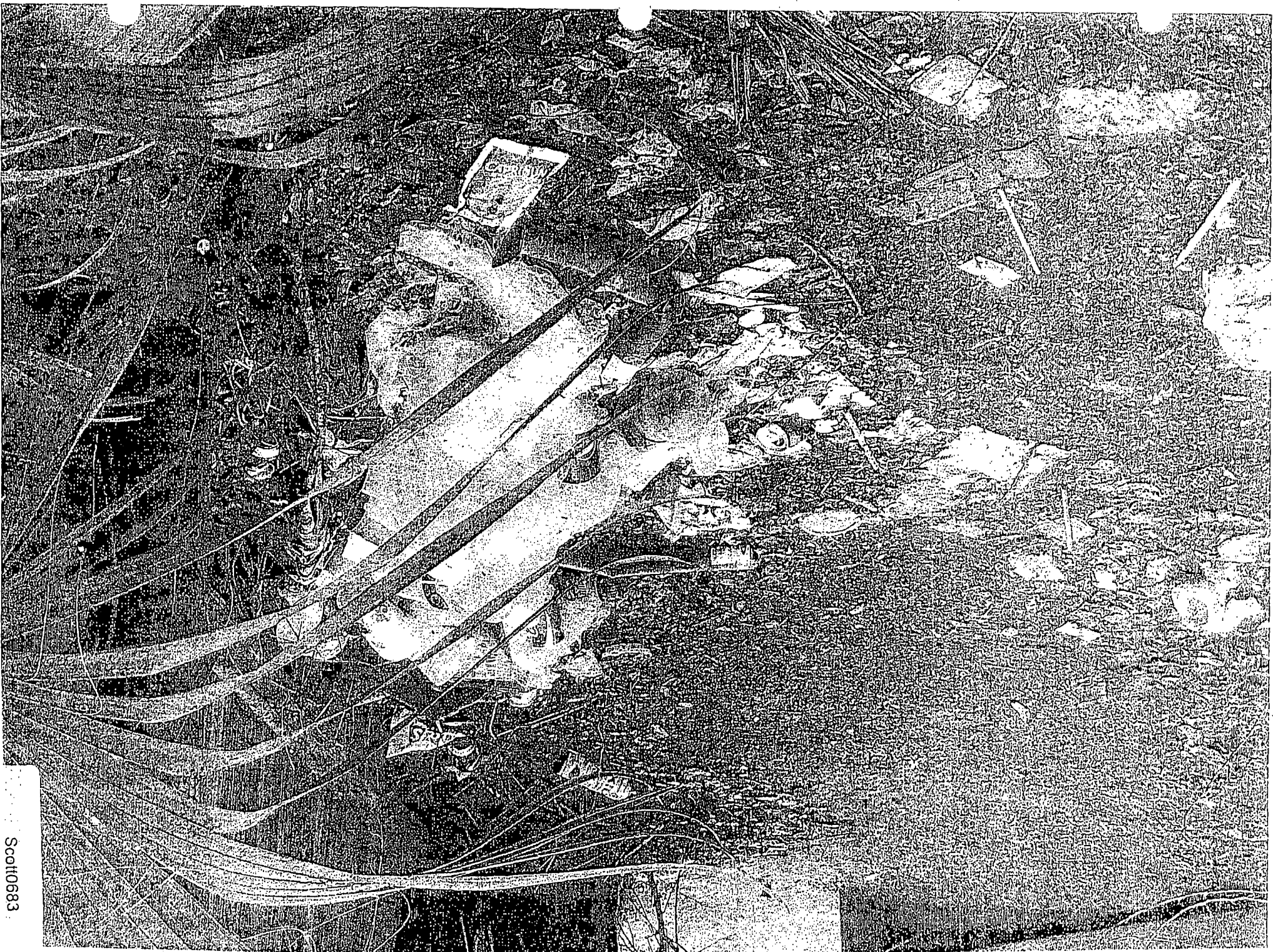






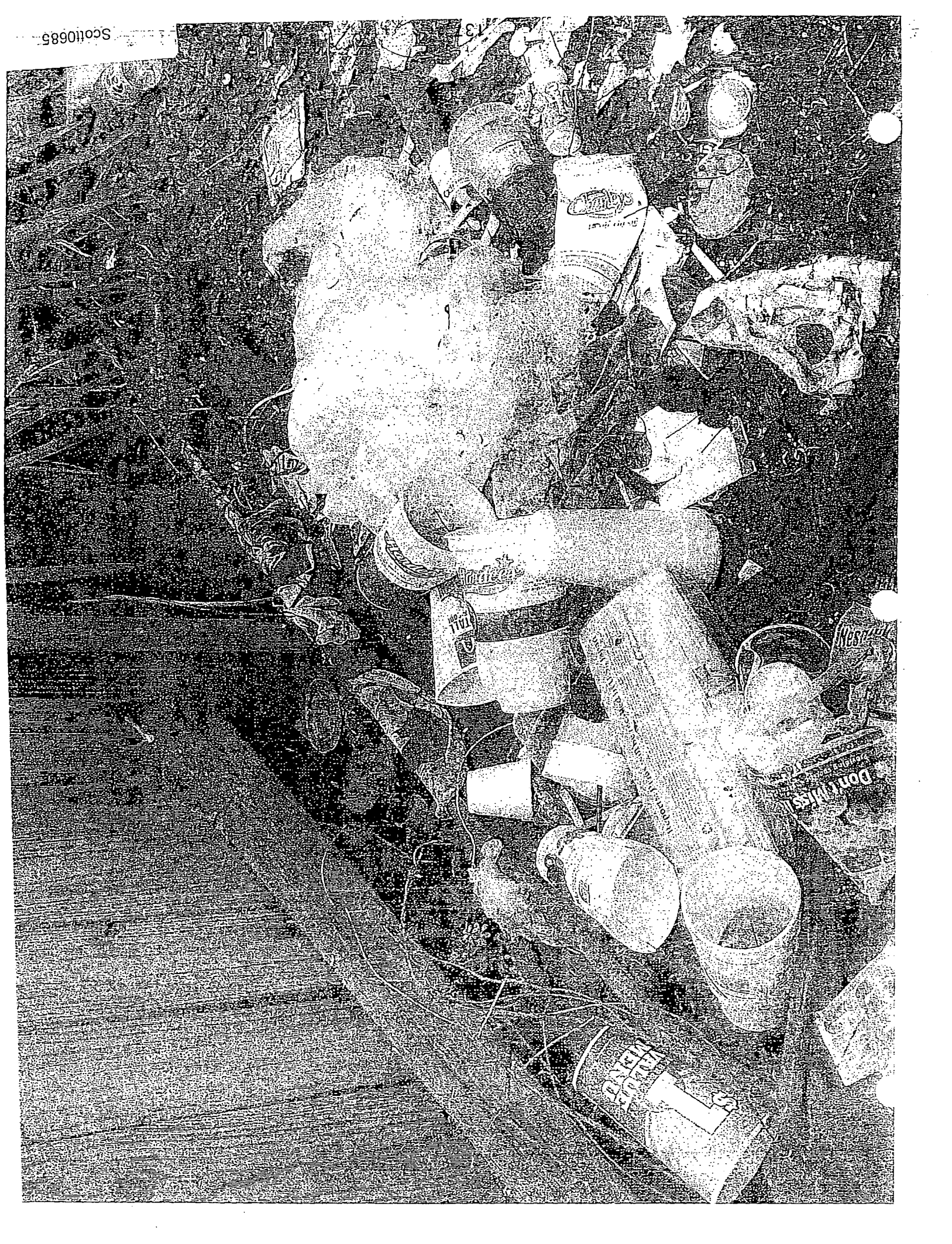
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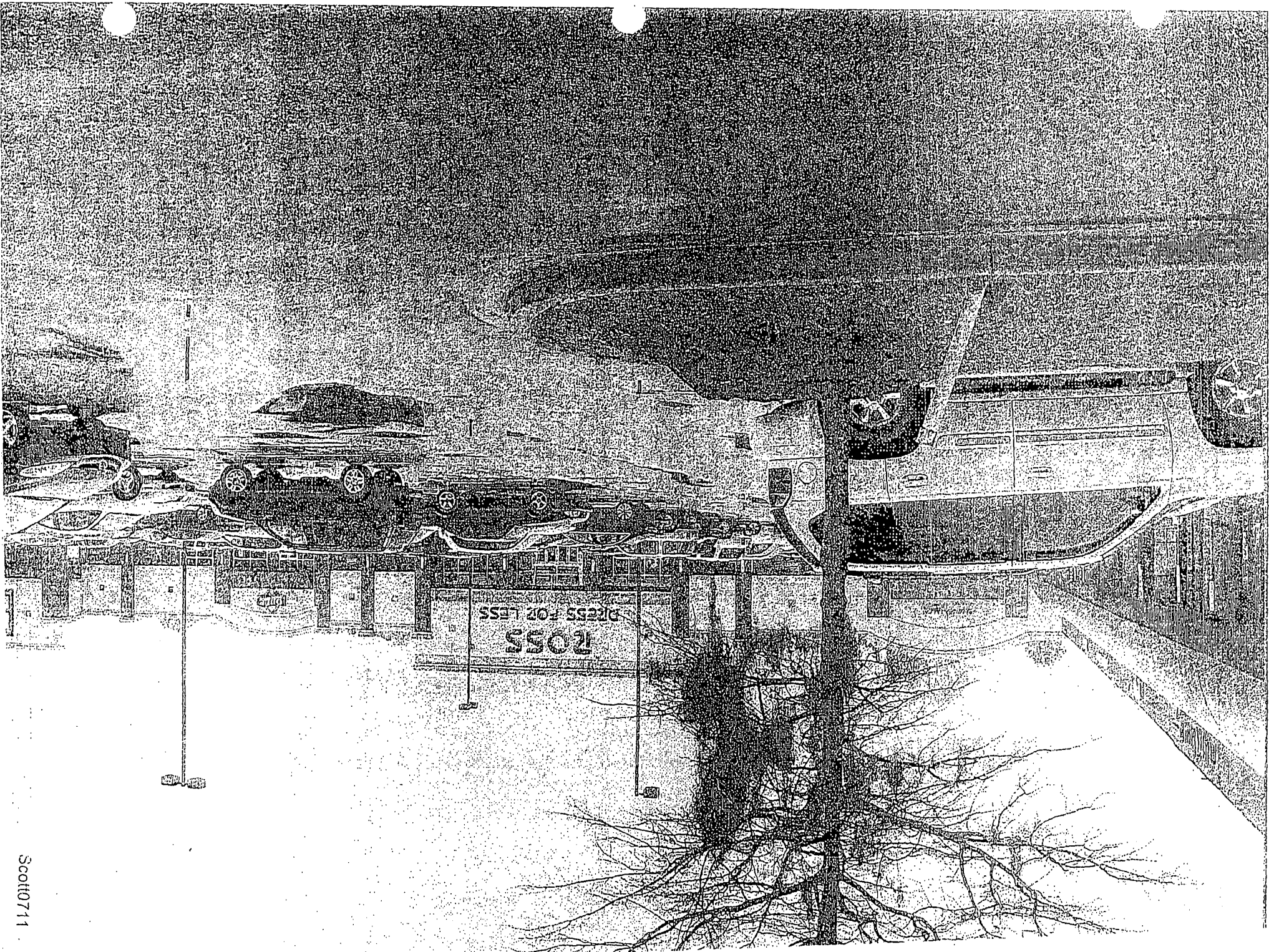
Scott0684







Scott0686



Andrew Grimes

From: Lee Ginn
Sent: Monday, March 15, 2010 2:36 PM
To: Andrew Grimes
Subject: State v. Sylvester Scott

Andrew (FYI) -

I spoke with Josh Boyd at Chatman Communications (724-5126), d.b.a. Cricket Communications, located at 472 Meeting Street. Josh said that, if defendant purchased the telephone in the last two months, he had a box full of receipts on site he could go through, If longer than that, he was very doubtful he could locate anything, especially if dated over a year.

Elbert Lee Ginn, Jr.
Criminal Defense Investigator
Ninth Circuit Public Defenders Office
Charleston County, S.C. 29401
Office: 843.958.1850
Cellular: 843.509-1179
E-mail: elginn@charlestoncounty.org

CC
AT
AG
SOL
GS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Sylvester Scott #296019,

Case No. 2010-CP-10-6960

Applicant.

vs.

State of South Carolina,

Respondent.

ORDER

BY

2011 FEB 23 AM 8:53
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Date of Hearing: January 24, 2011
Presiding Judge: Roger M. Young
Applicant's Attorney: David J. Parrish
Respondent's Attorney: Matt Friedman
Court Reporter: Amanda Kelly Haffenden

This matter came before the Court for a hearing on the application of Sylvester Scott ("Scott") for Post-Conviction Relief (PCR) based on an involuntary guilty plea arising from ineffective assistance of counsel.

FACTS

Scott's arrest and guilty plea stemmed from three unarmed bank robberies that occurred in the Charleston Area in 2009. The dates of the robberies and banks were as follows:

<u>Date of Robbery</u>	<u>Bank</u>
03-18-2009	Tidelands Bank – 946-J Orleans Road
04-02-2009	Heritage Trust – 2030 Sam Rittenberg Blvd
04-15-2009	Ameris Bank – 834 Savannah Highway

The Tidelands Bank robbery occurred at 10:50 a.m. (Scott Bates 0041) and was conducted by a black male wearing a dreadlocks wig and fake beard. (Bates Scott 0074). The Heritage Trust robbery was conducted by a black male wearing a dreadlocks wig and a surgical mask. The Ameris Bank robbery was conducted by a black male wearing a dreadlocks wig and a

R

fake beard. In each case the perpetrator passed the bank teller a note demanding money, but did not display a weapon.

Following the robbery at Tideland Bank, a police tracking dog hit on a plastic bag located among a lot trash scattered in wooded lot behind the bank. The plastic bag contained a dreadlock wig, a fake beard, and a cash register receipt from the store where wig/beard disguise was purchased. One of the employees at the store recalled that a "white couple"¹ purchased the wig/beard disguise, and the other employee did not recall who purchased the disguise. Detectives sent the wig/beard to SLED for a DNA analysis, and the robberies were committed at Heritage Trust and Ameris Bank while SLED was still processing the DNA.

Following the Ameris Bank robbery, Tonya Toomer was developed as a suspect after detectives identified her as being the black female that the manager of Ameris Bank had described as being in the bank and acting "suspiciously" on the day of the robbery, and after another witness informed detectives she had seen a black male wearing gloves walking in the direction of the bank and coming from the direction of a white Toyota Camry automobile driven by Tonya Toomer that was parked at or near the bank at the time of the robbery. Toomer was arrested and jailed for the robbery.²

Sooner thereafter detectives developed Sylvester Scott as a potential suspect in the Ameris Bank robbery after undisclosed confidential informants told police that Sylvester Scott was the father of one of Toomer's children and that Scott had visited Tonya while she was in jail for the bank robbery.

After developing Scott as suspect, detectives showed the employees at Ameris Bank a

¹ Mr. Scott is an African-American.

² The charges against Tonya Toomer were later dropped.

six-person photographic line-up array that contained a photograph from Scott's driver's license records. Two Ameris Bank employees signed witness photographic line-up admonition forms indicating that, of the six persons shown in the photo array, Scott's picture most resembled the perpetrator (who was wearing a fake dreadlocks wig and beard disguise). However, both witnesses add notes to their statements indicating that they could not positively identify Scott as the perpetrator. Specifically, one employee wrote "I chose #2 [Scott's picture] because he is most like the person I remember robbing the bank," and the other employee wrote: "Not positive." The third employee was unable to identify any of the pictures the photograph lineup.

Around this time SLED finished processing the DNA on the wig/beard found after the Tideland Bank robbery and issued a report indicating that the DNA matched Scott's DNA profile in the SLED computer database. No witnesses at Tideland Bank ever identified Scott as the perpetrator.

Scott was arrested and charged with all three bank robberies. The evidence connecting him to the Tideland robbery consisted of his DNA match to the wig/beard found behind the bank. The evidence connecting him to the Ameris Bank robbery consisted of the witness photo array statements. No evidence was developed connecting him to the Heritage Trust robbery.

A Public Defender (hereinafter "Counsel" or "Scott's Counsel") was appointed to represent Scott. On the eve of trial and based on the recommendation of Counsel, Scott pled guilty to the charge of entering Tideland Bank with intent to steal (the State having dropped the charges for the other two bank robberies), and Scott was sentenced to 12 years in jail without the possibility of parole.

In support of his claim of an involuntary guilty plea based on ineffective assistance of counsel, Scott contends that his counsel failed to investigate an alibi witness and other evidence

B

that would exonerate of the charges, failed to prepare for trial, and coerced him to plead guilty upon the threat of him facing a 90-year sentence for the three robberies and having "no defense" to the "overwhelming evidence" against him.

At the PCR hearing Scott testified that Counsel informed him that employees of Ameris Bank had "positively" identified him as the perpetrator on a witness photo array statement, and he never received copies of those statements prior to his plea hearing. After he was sentenced Counsel sent Scott a copy of his file, at which point Scott learned that that the statements supposedly "positively" identifying his photograph actually contained notes indicating that the witnesses were equivocal and "not positive" in identifying him.

As to his DNA being found on the wig/beard disguise located in a wooded lot behind the Tideland's Bank, at the PRC hearing Scott testified that he lived in the apartments located next to those wood, and the wood are next to the bus stop. On the morning of the robbery he smoked a joint (i.e., marijuana) in those woods with an acquaintance from the neighborhood while they were on the bus. While they were smoking pot in the woods, the acquaintance asked Scott to help him open a package that contained a disguise, which the acquaintance indicated he was going to wear to shoplift some clothes from a nearby Ross Department Store, and his DNA must have come into contact with the disguise when he opened the package. At the PCR hearing Scott, without contradiction, identified photographs showing that the wooded area where the disguise was found is littered with trash, indicating that people routinely linger in the wooded area while waiting at the bus stop.

At the PRC hearing Scott testified that when his Counsel refused to believe his explanation as to how his DNA was found on the disguise, Scott informed Counsel that the day of the Tideland's robbery (March 18th) was Scott's birthday, and at the time (10:50 a.m.) when

Tidelands was being robbed in West Ashley. Scott was miles away in downtown Charleston purchasing a cell phone from the Cricket Mobile cell phone store located on Meeting Street across from the Piggly Wiggly store. Scott testified that he told Counsel that he had to give a driver's license and sign a contract for the phone, and the contract should show that he was in the Cricket Store at the time of the Tidelands robbery. Scott testified that he also informed Counsel that he ran into a friend, Michael Castine, outside the Cricket cell phone store, and that Castine could verify that Scott was in downtown Charleston when Tidelands was being robbed in West Ashley.

At the PRC hearing Michael Castine credibly and with contradiction testified that around 10:45 a.m. on 3/18/2009 he saw Scott at a bus stop by the Cricket cell phone store on Meeting Street. Castine recalled that date was March 18th because Scott said it was his birthday and Castine gave him \$10.00 as a birthday gift. Castine recalled the time was around 10:45 a.m. because Castine was waiting on the 10:45 a.m. bus to take him to his job as line cook. Castine testified that Scott's Counsel never contacted him.

At the PRC hearing Scott testified that he became concerned about Counsel's failure to investigate his case, and Scott sent a letter to the Public Defenders office requesting another attorney. A copy of his letter was introduced at the PRC hearing. His request for a different attorney was denied.

At the PCR hearing Scott's testified that he repeatedly refused Counsel's admonishment that he should plead guilty. According to Scott, as the case was approaching trial, Scott had no intention of pleading guilty and thought he was picking a jury. Accordingly to Scott, at that point Counsel told Scott the evidence against him was "overwhelming" and that he had "no defense." Accordingly to Scott, Counsel told Scott that he had thought the "feds were going to

takeover the case" and he was not prepared for trial, and Counsel urged Scott to enter a plea because he did not want to see Scott get sentenced to 90 years in jail. Scott testified that Counsel told him that if he pled guilty he would receive a sentence of 5-7 years at a medium security prison.³ Scott testified he reluctantly agreed with Counsel's recommendation to plea guilty. Scott was sentenced 12 years without the possibility of parole, and he is currently serving his sentence at Lieber Correction Institute, which is a Level 3 (highest security level) maximum-security facility.

Scott Counsel testified at the PRC, and his testimony corroborated certain important aspects of Scott's testimony. Scott's Counsel testified that he believes he gave Scott copies of the witness photo array statements prior to the plea hearing, he could not definitely recall doing so. Regardless, Counsel agreed those photo identification statements were the only direct evidence connecting Scott to the Ameris Bank robbery, and he agreed that evidence was very weak in light of the uncertainties expressed by the witnesses on their photo statements.

Most importantly, Counsel agreed that the DNA was the only evidence linking Scott to the Tideland Bank robbery, and Counsel agreed that the testimony of Scott's alibi witness (Michael Castine) and the Cricket cell phone records placing Scott at another location at the time of the robbery were "critical" to the defense of Scott's case. Nonetheless, Counsel indicated that he never attempted to contact Castine. Counsel indicated that he had been waiting on Scott's brother to provide him with Castine's contact information;⁴ however, Counsel conceded that he never attempted to follow up with Scott to obtain the information, and Counsel conceded that he

³ The charge against Scott, entering a bank with intent to steal, is considered a non-violent offense.

⁴ Scott could not meet the high bail set for his bond and remained in jail from the time of his arrest.

should have made more of an effort to locate Castine in light his importance to Scott's defense. Counsel also conceded that there was some delay in his preparing Scott's case based Counsel's belief that the federal government would take the case. By the time Counsel sent a subpoena to the Cricket cell phone store, the store had changed ownership and the records were not available.

Counsel agreed that Scott was reluctant to plead guilty, and Counsel conceded that Scott's guilty plea on the eve of trial was not knowing and voluntary on Scott's part ^{in my} ~~the~~ light of the Counsel's failure to investigate a witness (Castine) and documents (cell phone) that would have established a credible alibi defense.

At the PRC hearing Scott's PCR counsel informed the Court that several weeks prior to the hearing he had issued subpoenas to the local cell phone store and to Cricket Communication national corporation seeking copies of Scott's cell phone records, but the store manager had informed PCR counsel that the records were not available in light of the change of ownership of the store in 2010 and that the manager was could not locate accurate information concerning the date on which Scott's cell phone service was established. Scott's PCR counsel subsequently filed an affidavit with the Court indicating that on January 27, 2011--three days after the PRC hearing was held—PRC Counsel received an email from Cricket Communications in response to his subpoena. A copy of the email and documents in the email from Cricket were attached to the affidavit. The first page of those documents (i.e., the page titled "MDN Search Results") indicates that Scott's cell phone service started on "3/18/2009." That is the date of the Tideland Bank robbery, and that information tends to corroborate Castine's testimony and Scott's alibi claim that he was at the cell phone when Tideland Bank was being robbed across town.



DISCUSSION

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Kolle v. State, 690 S.E.2d 73, 78 (S.C. 2010) (citing Strickland v. Washington, 466 U.S. 668 (1984)). "To establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) that, but for counsel's errors, there is a reasonable probability the result would have been different." Martinez v. State, 304 S.C. 39, 403 S.E.2d 113, 114 (S.C. 1991) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984) and Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989)).

A defendant who has entered a guilty plea on the advice of counsel may attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but-for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Kolle v. State, 690 S.E.2d 73, 78 (S.C. 2010). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Kolle, 690 S.E.2d at 79 (quoting Hill v. Lockhart, 474 U.S. 52 (1985)). In other words, when determining the validity of a guilty plea, the issue is whether, but-for counsel's errors, a reasonable probability exists that the defendant would not have pled guilty. Alexander v. State, 402 S.E.2d 484, 485 (S.C. 1989) (citing Hill v. Lockhart, 474 U.S. 52 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Kolle, 690 S.E.2d at 78 (quoting Johnson v. State, 480 S.E.2d 733, 735 (S.C. 1997)).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as

well as evidence at the PCR hearing.” Kolle, 690 S.E.2d at 78 (quoting Suber v. State, 640 S.E.2d 884, 886 (S.C. 2007).) “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Id. 690 S.E.2d 78-79 (quoting Roddy v. State, 528 S.E.2d 418, 420 (2000)).

The present case is factually similar to Martinez v. State, 403 S.E.2d 113 (S.C. 1991). In Martinez, our Supreme Court held that the PRC petitioner was deprived of effective assistance of counsel by counsel's failure to subpoena a witness to testify at trial when the attorney had reason to know the witnesses' potential benefits to his client based on interviews and the establishment of an alibi defense. Here, Scott's Counsel agreed that Scott's alibi witness (Michael Castine) and cell phone records that would place Scott at another location at the time of the robbery were “critical” to the defense of Scott's claim. Nonetheless, Counsel conceded that he never attempted to contact the alibi witness and did not attempt to follow up with Scott to obtain that the witness' contact information. Counsel also did not obtain any the cell phone records, and he conceded to some delay in preparation of the case based on his belief that the federal government was going to take over the case.

At the PCR hearing Scott's alibi witness (Castine) provided credible testimony that corroborated Scott testimony that he was purchasing a cell phone store when Tideland was being robbed across town. The cell phone records obtained and produced by Scott's PCR attorney indicate that Scott cell phone service started on the date of the robbery, thus providing further corroboration of Scott's alibi defense.

Counsel's failure to investigate and develop this alibi evidence before trial cannot be considered harmless error in light of the admittedly “critical” aspect of this evidence to Scott

defense. The absence of this evidence presented Scott with no meaningful means of defending himself at trial. As Scott's Counsel candidly conceded at the PRC hearing, Scott's reluctant guilty plea made on the eve of trial cannot be considered "a voluntary and intelligent choice among the alternative courses of action open to the defendant" in light of Counsel's failure to investigate and develop this evidence, which was "critical" to Scott's defense.

Under these circumstances, Scott has met his burden of proof of establishing an unknowing and involuntary guilty plea arising from ineffective assistance of counsel based on Counsel's failure to investigate and develop available alibi evidence that was critical to Scott's ability to defend himself at trial.

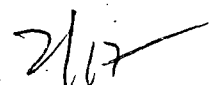
CONCLUSION

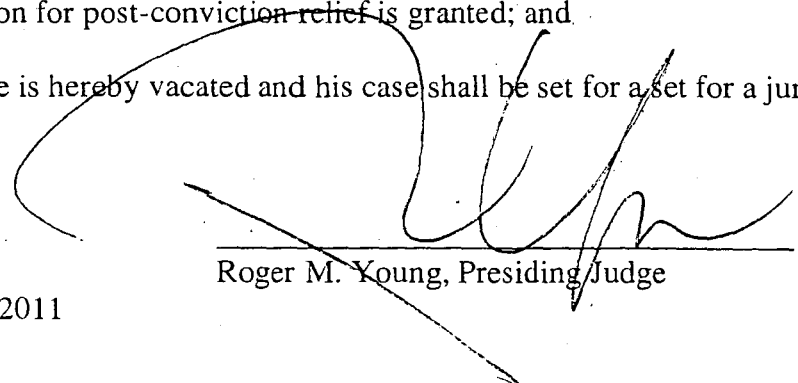
For the above reason, Scott's Application for post-conviction relief should be GRANTED. Accordingly,

IT IS ORDERED that:

- a. The application for post-conviction relief is granted; and
- b. Scott sentence is hereby vacated and his case shall be set for a set for a jury trial.

SO ORDERED.


_____, 2011
Charleston, SC



Roger M. Young, Presiding Judge

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 10/04/10
 OMCOMITA RELEASE DATE SCREEN C023981
 SCDC# > 296019 LOC: LIEBER
 SCOTT, SYLVESTER - SCDC CLASSIFICATION... VIOLENT
 OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY... N
 SEXUAL PREDATOR...: NOT APP
 DNA STATUS.....: COMPLETED
 GPS REQUIREMENT...: N
 PREA DECISION.....
 CURRENT SENTENCE: 012-00-000 CONSECUTIVE SENTENCE ...: N
 012-00-000 CURRENT SENT START DATE: 05/20/2009
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 07/29/2019 CURRENT EWC ..: 2 F 5
 YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
 INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000
 INELIG FOR PAROLE-MULT VIOL OFFENSES.
 TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000176 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
 TOTAL EXTRA EARNED CREDITS ..: 000
 TOTAL SERVICE TIME EARNED ...: 000494

PFKEYS: 5:HISTORY OF DATE CHANGES
 4-© 1 Sess-1 167.7.50.33 SCDC1134 3/11

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 10/04/10

C0239

COTT, SYLVESTER - FBI # 178490JAB SID# SC00634279 SCDC # 294019

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION... LIEBER CORRECTIONAL INST.

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 12 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #...: [REDACTED]

DORM.....: EA0057A

RACE....: R SEX....: M

PROJ MAXOUT DATE: 07/29/2019

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: WARDKEEPER ASSISTANT

EDUC PGH.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: BUILDING #1

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 44 DATE OF BIRTH...: 3/18/66

PREVIOUS NUMBERS:

00199725

Y00165983

00165983

00278729

CURRENT OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	U/NU	CATEGORY	
ENTERING BANK/INT STEAL	12	0	0	CHARLESTON	5/20/20 9	N	3	
BURGLARY-2ND DEGREE	3	0	0	CHARLESTON	8/ 2/20 7	U	4	

PREVIOUS SCDC OFFENSES (COMPLETE)	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	U/NU	CATEGORY	
SHOPLIFTING	0	0	90	CHARLESTON	11/ 4/20 5	N	2	
BURGLARY-2ND DEG/NON-VID	3	0	0	CHARLESTON	3/14/20 5	N	3	
SHOPLIFTING	3	0	0	CHARLESTON	3/14/20 5	N	2	
LARCENY	3	0	0	CHARLESTON	3/14/20 5	N	2	
RESISTING OFFICER	0	6	0	CHARLESTON	7/ 8/20 3	N	3	
SHOPLIFTING	1	0	0	CHARLESTON	7/ 8/20 3	N	2	

PRIOR COMMITMENTS OVER 90 DAYS:

10/ 3/ 1	SHOPLIFTING	3 YRS	0 MOS	0 DYS
4/ 6/ 1	*RESIST ARREST/ASLT OFF.	1 YRS	0 MOS	0 DYS
2/ 6/98	*BURGLARY-2ND DEGREE	0 YRS	0 MOS	204 DYS
2/ 6/98	GRAND LARCENY	0 YRS	0 MOS	204 DYS
12/14/97	SHOPLIFTING	0 YRS	0 MOS	204 DYS
12/14/97	FAIL TO STOP FOR OFFICER	0 YRS	0 MOS	204 DYS
3/ 5/96	FORGERY	2 YRS	0 MOS	0 DYS
5/25/95	SHOPLIFTING	1 YRS	0 MOS	0 DYS
8/28/93	CRACK POSSESS	4 YRS	0 MOS	0 DYS
8/28/93	*BURGLARY-2ND DEG/NON-UTOL	4 YRS	0 MOS	0 DYS
7/22/91	GRAND LARCENY	3 YRS	0 MOS	0 DYS
7/22/91	*BURGLARY-2ND DEGREE	3 YRS	0 MOS	0 DYS
4/ 4/90	FORGERY	4 YRS	0 MOS	0 DYS
2/17/89	GRAND LARCENY	4 YRS	0 MOS	0 DYS
2/17/89	*BURGLARY-2ND DEGREE	4 YRS	0 MOS	0 DYS

DETAINEES (HOLD, WANTED, NOTIFY):

ABANDONMENT/NON-SUPPORT

WANTED

JUDGE P. GARFINKEL

CATEG: 1

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

3/19/ 0 POSSESSION OF A WEAPON NOT GUILTY MAJOR

00199725

NON-ASSAULTIVE DISCIPLINARIES:

6/28/10 POSSESSION OF CONTRABAND CONVICTED ADMIN

11/16/ 3 DAMAGE, DESTROY, PROP. VALU DROPPED MINOR

10/27/ 3 OUT OF PLACE OTHER

10/15/ 3 I/M UNDER INFLUENCE/POSS DROPPED MAJOR

SCOTT, RYLUESTER - FBI # 178490JAB SID# SC00634279 SDC # 296019 (CONTINUED)

10/ 4/ 0	REFUSING OR FAILING OBEY	OTHER	0019972
9/29/ 0	OUT OF PLACE	DROPPED	0019972
7/15/ 0	OUT OF PLACE	OTHER	0019972
2/ 8/ 0	REFUSING OR FAILING OBEY	OTHER	0019972
1/24/ 0	REFUSING OR FAILING OBEY	CONVICTED	0019972
12/10/99	REFUSING OR FAILING OBEY	CONVICTED	0019972
11/19/99	REFUSING OR FAILING OBEY	DROPPED	0019972
10/20/99	REFUSING OR FAILING OBEY	NOT GUILTY	0019972
9/23/99	DAMAGE, DESTROY, PROP. VALU	DROPPED	0019972
8/ 9/99	OUT OF PLACE	CONVICTED	0019972
5/27/99	USE OBSCENE, VULGAR, PROFA	CONVICTED	0019972
5/24/99	FALSE STATEMENT TO HARM	NOT GUILTY	0019972
5/24/99	OUT OF PLACE	CONVICTED	0019972
10/ 4/98	IN LIVING QUARTERS W/OUT	CONVICTED	0019972
8/26/97	USE OBSCENE, VULGAR, PROFA	DROPPED	0019972
8/26/97	OUT OF PLACE	DROPPED	0019972
9/18/90	REFUSING OR FAILING OBEY	CONVICTED	Y00165983
7/28/90	USE OBSCENE, VULGAR, PROFA	CONVICTED	Y00165983
7/28/90	OUT OF PLACE	CONVICTED	Y00165983
10/30/ 2	REFUSING OR FAILING OBEY	OTHER	00278729
9/25/ 2	POSSESSION OF CONTRABAND	CONVICTED	00278729
9/22/ 2	USE, POSS NARC, MARIJ, UNAU	CONVICTED	00278729
4/ 9/ 2	GAMBLING AND LOAN SHARK	OTHER	00278729
12/ 3/ 1	OUT OF PLACE	CONVICTED	00278729

HISTORY OF MOVEMENTS:

5/17/10	LIEBER	INCARCERATED	ADMINISTRATIVE
3/17/10	KIRKLAND	INCARCERATED	RAE PROCESSING
3/17/10	LIEBER	INCARCERATED	NEW SENT W/O PR/CS/SF REV
2/27/ 9	CHARLESTON CO	PROBATION	RELEASED TO PROBATION
4/28/ 8	LIE	INCARCERATED	ADMINISTRATIVE
3/20/ 8	KIRKLAND	INCARCERATED	RAE PROCESSING
3/20/ 8	LIEBER	INCARCERATED	NEW ADMISSION
11/ 1/ 6	INK	RELEASE	EXPIRATION OF SENTENCE
9/ 5/ 6	WATKINS	PRE-RELEASE	PRE-RELEASE
8/ 9/ 6	WATEREE RIVER	INCARCERATED	ADMINISTRATIVE
3/13/ 6	MACDONIGALL CORR	INCARCERATED	ADMINISTRATIVE
2/ 8/ 6	KIRKLAND	INCARCERATED	RAE PROCESSING
2/ 8/ 6	LIEBER	INCARCERATED	NEW SENT W/O PR/CS/SF REV
12/31/ 3	CHARLESTON CO	PROBATION	RELEASED TO PROBATION
9/30/ 3	LIEBER	INCARCERATED	ADMINISTRATIVE
9/ 9/ 3	KIRKLAND	INCARCERATED	RAE PROCESSING
9/ 9/ 3	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	JOB
DESCRIPTION	DATE	DATE	REASON	LVL
WARDKEEPER ASSISTANT	05/19/10	0/ 0/ 0		2F5
FOOD SERVICE AIDE	10/29/08	2/27/ 9	RELEASED/PAROLED	2F5
FOOD SERVICE AIDE	04/05/08	10/28/ 8	INMATE REQUEST	2F7
FOOD SERVICE AIDE	04/29/08	6/ 4/ 8	PROMOTION	2F5
GENERAL WORKER	08/25/06	11/ 1/ 6	RELEASED/PAROLED	2F5
FOOD SERVICE AIDE	08/11/06	8/24/ 6	LATERAL TRANSFER	2F5
SENIOR CUSTODIAN	05/09/04	8/ 9/ 6	INSTIT TRANSFER	2F5
LANDSCAPE LABORER	04/13/04	5/ 8/ 6	INMATE REQUEST	2F5
AGRICULTURE SPECIALT	03/14/04	4/12/ 6	UNSAT JOB PERFORM	2F7
WARDKEEPER ASSISTANT	10/13/03	12/31/ 3	RELEASED/PAROLED	2F5

HISTORY OF EARNED EDUCATION CREDITS:

ED	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
BONUS 4-7 HRS/WK	09/02/08	10/ 1/ 8	POOR ATTENDANCE
BONUS 4-7 HRS/WK	07/20/04		

208657

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.
SYLVESTER SCOTT

INDICTMENT/CASE#: 2009GS1006471
A/W#: K404031
Date of Offense: 3/18/2009
S.C. Code §: 16-11-0380(A)
CDR Code #: 0257

AKA:
Race: B Sex: M Age: 39
DOB: 03-18-1970 SS#: [REDACTED]
Address: [REDACTED]
City, State, Zip: CHARLESTON, SC 294070000
DL#: [REDACTED] SID#: SC00634279

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Entering a Bank with Intent to Steal 0-30 years

☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-11-0380(A) of the S.C. Code of Laws, bearing CDR Code # 0257
☒ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

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

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

ATTEST: Tripp Lato 73720 S. Scott Andrew Gromes 8743
Lawton, Trip SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 300 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ Set by SCDPPPS _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____
*Fine: \$ _____
§ 14-1-206 (Assessments 107.5 %) \$ _____
§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
§ 56-5-2995 (DUI Assessment) \$12 \$ _____
§ 56-1-286 (DUI Breath Test) \$25 \$ _____
§ 47.12 (Public Def/Prob) \$500 \$ _____
§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00
§ 14-1-213 (Drug Court Surcharge) \$100 \$ _____
§ 50-21-114 (BUI Breath Test Fee) \$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
§ 90.7 (SCCA Surcharge) 35 \$ 5.00
3% to County (if paid in installments) \$ 3.90
TOTAL \$ 133.90

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk [Signature]
Court Reporter: D. Garrison
SCCA/217 (11/2009)

Presiding Judge [Signature]
Judge Code: 2060
Sentence Date: 3/16/10

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