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STATE OF SOUTH CAROLINA
In the Supreme Court

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Certiorari from Anderson County
The Honorable C. Hayes, III, Circuit Court Judge

S.C. Supreme Court

THOMAS CHAD HEATON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA

PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
Honorable John C. Hayes, III, Judge
2004-CP-04-00767

THOMAS CHAD HEATON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

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STATE OF SOUTH CAROLINA)
) #2003-DR-10-262, 263, 264, 265
COUNTY OF ANDERSON)

STATE OF SOUTH CAROLINA,)
)
VS.) COURT TRANSCRIPT
) (COPY)
THOMAS CHAD HEATON.)
_____)

DATE: MONDAY, MARCH 10, 2003

LOCATION: ANDERSON COUNTY COURTHOUSE
100 South Main Street
Anderson, South Carolina 29624

PRESIDING JUDGE: THE HONORABLE CORDELL MADDOX

APPEARANCES: ANDERSON COUNTY ASSISTANT SOLICITOR
Anderson County Solicitor's Office
100 South Main Street
Anderson, South Carolina
Attorney for the Plaintiff

R. GAMBLE, ESQUIRE
Anderson, South Carolina
Attorney for Defendant

REPORTED BY: DEBORAH S. THOMAS, CVR
Circuit Court Reporter

DEBORAH S. THOMAS, CVR
5th Judicial Circuit, Richland County
Columbia, South Carolina

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PROCEEDINGS

THE CLERK: Thomas Chad Heaton.

THE COURT: Yes, ma'am.

THE SOLICITOR: Your Honor, comes before you is Thomas Chad Heaton. He's been indicted in case #2003-GS-04-262 for possession of controlled substance, specifically diazepam; case #2003-GS-04-263, possession of controlled substance, specifically methadone; case #2003-GS-04-264 has been indicted for felony D.U.I. causing the death on or about September 9, 2002 of Angela Carter. And case #2003-GS-04-265, also indicted for felony D.U.I. causing the death of Venissa Renfield.

Each of these have been to the grand jury, Your Honor. They are true bills, and he is pleading without negotiations or recommendations and is represented by Mr. Gamble of the public defender's office.

Your Honor, one thing I'd like to put on the record. Case #263, the C.D.R. code on the indictment was incorrect. Actually, the correct C.D.R. code is #176, both on the face as well as on the back of the indictment and initialed it. I put my my initials, K.J.H., as well as today's date.

I don't know if there's any objection from the Defense as to -- just to that amendment to the indictment.

THE COURT: Any objections to amending that indictment?

GAMBLE: No, sir. It's clear on it's face what it

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1 charges, and I don't think I would have a valid objection to
2 it.

3 THE COURT: All right. Thank you. Without objection.
4 All right. Mr. Heaton, if you would raise your right hand.

5 THOMAS CHAD HEATON, being duly sworn,
6 testifies as follows:

7 THE COURT: All right. You need to really speak up.
8 She's taking down everything you say --

9 THE WITNESS: All right.

10 THE COURT: -- for the record. All right. How old are
11 you?

12 THE WITNESS: Twenty-nine years old.

13 THE COURT: And how far did you go in school?

14 THE WITNESS: Twelfth grade. Graduated.

15 THE COURT: Where did you last work?

16 THE WITNESS: G.B.S. Lumber.

17 THE COURT: What did you do there?

18 THE WITNESS: I was a supervisor over drivers and
19 shipping and receiving.

20 THE COURT: Are you married?

21 THE WITNESS: Yes, sir.

22 THE COURT: Is this your wife?

23 THE WITNESS: Yes.

24 THE COURT: Do you have any children?

25 THE WITNESS: Yes, sir.

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5th Judicial Circuit, Richland County
Columbia, South Carolina

1 THE COURT: How many children do you have?

2 THE WITNESS: Three children.

3 THE COURT: And how old are they?

4 THE WITNESS: Nine, seven, and two.

5 THE COURT: Boys? Girls?

6 THE WITNESS: Two girls. One boy.

7 THE COURT: And they live at home?

8 THE WITNESS: Yes, sir.

9 THE COURT: All right. Have you had any drugs or alcohol
10 in the last twenty-four hours.

11 THE WITNESS: No, sir, just my pain medication for my
12 foot.

13 THE COURT: And I understand they brought that out. What
14 was that? What kind of pain medication is that?

15 THE WITNESS: Loratab.

16 THE COURT: And you've got some kind of infection?

17 THE WITNESS: Yes, sir. I have an I.V. pump running
18 antibiotics up in my arm.

19 THE COURT: All right. Does that prescription medicine
20 -- either the pump or the pain medication, does that keep you
21 from knowing what you're doing here today?

22 THE WITNESS: No, sir.

23 THE COURT: And does it make you so that you feel like
24 you're -- do you feel like you're capable of pleading guilty
25 here today?

1 THE WITNESS: Yes, sir.

2 THE COURT: Has anybody promised you anything or
3 threatened you to get you to plead guilty here today?

4 THE WITNESS: No, sir.

5 THE COURT: All right. You understand that on the two
6 felonies D.U.I. cases, the sentence range under the statute is
7 one year -- one year to twenty-five years?

8 THE WITNESS: Yes, sir.

9 THE COURT: And a fine?

10 THE WITNESS: Yes, sir.

11 THE COURT: And on the possession of controlled substance
12 that's a maximum of two years and a fine, being in the
13 possession of a controlled substance, diazepam, and six months
14 and a fine. Do you understand that one?

15 THE WITNESS: Yes, sir.

16 THE COURT: Nobody's promised you any sentence
17 whatsoever?

18 THE WITNESS: No, sir.

19 THE COURT: All right. Do you understand that in order
20 to plead guilty you have to waive certain constitutional
21 rights? You have to waive those rights.

22 THE WITNESS: Yes.

23 THE COURT: Do you waive your right to remain silent?

24 THE WITNESS: Yes, sir.

25 THE COURT: Are you waiving your right to request a jury

1 trial?

2 THE WITNESS: No, sir. Yes.

3 THE COURT: All right. You have to waive your right to
4 request a jury trial. Are you doing that?

5 THE WITNESS: Yes.

6 THE COURT: You understand that the State would have to
7 take this case to a jury and convince twelve of them, a
8 unanimous verdict, that you were guilty beyond a reasonable
9 doubt? And you're going to waive that right?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Are you waiving your right to
12 raise any defenses that you might have or to confront any
13 witnesses against you?

14 THE WITNESS: Yes, sir.

15 THE COURT: All right. Have you had plenty of time to
16 talk to your lawyer?

17 THE WITNESS: Yes, sir.

18 THE COURT: Have you asked him all the questions that you
19 need to ask him?

20 THE WITNESS: Yes, sir.

21 THE COURT: Do you have any questions for him now?

22 THE WITNESS: No.

23 THE COURT: All right. Mr. Gamble, have you had plenty
24 of time to talk to him?

25 MR. GAMBLE: I have, Your Honor.

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5th Judicial Circuit, Richland County
Columbia, South Carolina

1 THE COURT: And do you think he understands his waiver of
2 constitutional rights?

3 MR. GAMBLE: Yes, sir. I went over those with him
4 Thursday. Thursday afternoon we went over completely the
5 facts of this case and his rights. And I then went over them
6 with his wife so everybody would understand what we're doing,
7 and everyone was in agreement. He understood. And he
8 understood the facts of the case.

9 THE COURT: And you think -- you think pleading guilty is
10 in his best interest.

11 MR. GAMBLE: Yes, sir.

12 THE COURT: All right. Mr. Heaton, on 2003-GS-04-265,
13 which is a felony D.U.I. death, and 2003-GS-04-264, which is
14 also a felony D.U.I. death, do you want to plead guilty?

15 THE WITNESS: Yes, sir.

16 THE COURT: And are you guilty?

17 THE WITNESS: Yes.

18 THE COURT: All right. On 2003-GS-04-263 and 2003-GS-04-
19 262, which is possession of a controlled substance diazepam,
20 do you also want to plead guilty on those charges?

21 THE WITNESS: Yes.

22 THE COURT: And are you guilty of those charges?

23 THE WITNESS: Yes.

24 THE COURT: Yes, ma'am.

25 THE SOLICITOR: Your Honor, this incident occurred on

1 September the 9th, 2002, in Anderson County at the
2 intersection of Wooten Road and Old Dobbins Bridge Road. He
3 pulled off at Bridge Road; Judge -- Your Honor. It's
4 basically a two lane road. It's a -- in a rural part of the.
5 Wooten Road is also two lane, but not marked. It's wide
6 enough for two cars to pass by, but it's a very rural area.

7 The victims were in a 1989 Mazda 626, turning off of
8 Wooten Road onto Old Dobbins Bridge Road. The driver of the
9 car was Venissa Renfield. The passenger in the rear seat was
10 Angela Carter. In the rear seat was -- behind the driver was
11 Brianna Mitchell, who is the daughter of Angela Carter, as
12 well as another passenger on the other side, right behind the
13 passenger seat was Bobby Woochoski who is a family friend.

14 When the Ms. Renfield came up to the stop sign at Wooten
15 Road, she turned left. The Defendant's car was traveling at a
16 high rate of speed. It's a 1995 Buick SENTRY. When the MAKE
17 team did their reconstruction, they determined that his rate
18 of speed of the time of the beginning of the skid marks prior
19 to impact was eighty-one miles per hour. On Old Dobibns
20 Bridge Road, the speed limit there is actually posted at
21 fifty-five.

22 At impact when the Buick hit the driver side door of the
23 Mazda, the impact speed was sixty-three miles per hour, the
24 minimum.

25 THE COURT: At impact?

1 THE SOLICITOR: At impact. The victims' car was
2 traveling, at most, five miles an hour because they had just
3 been at a standstill and that was kind of a sluggish car. And
4 it had basically -- it basically just kind of -- almost had
5 finished making it's turn.

6 In talking with the reconstruction experts on this case,
7 had the Defendant been going the speed limit, none of us would
8 be here today. The significance of a second difference in
9 time in this case really literally is the amount of forty feet
10 per second had -- you know, had he been going even just
11 slightly above the speed limit, we wouldn't be here today.

12 Because he is going significantly above the speed limit,
13 there was no way the victims car could have cleared the lane
14 of travel.

15 When his blood was drawn and sent to SLED, it was
16 analyzed. The SLED report came back at a .077 blood alcohol
17 level. There was diazepam, nordiazepam, temazepam, oxazepam,
18 and lorazepam all found in his blood. Some of those are
19 derivatives of what's in the diazepam. Once the diazepam, the
20 valium starts breaking down in his blood, some of that is a
21 derivative effect of that breaking down in his blood.

22 In addition, when I talked to the SLED toxicologist, she
23 said that because of the levels of the chemicals that were in
24 his blood in addition to the alcohol, that she would be able
25 to testify that he was clearly taking two different types of

1 pills. It wasn't just the valium and the alcohol combined.
2 He was apparently taking something else because of the levels
3 because each of these are active components in his blood. And
4 they just couldn't all be derivatives. So, it might be
5 attributed to that, but there was definitely enough type of
6 pill in his blood.

7 When he was arrested and the trooper searched him, there
8 were two types of pills found on him. Those tested positive
9 in the Anderson/Oconee Regional Forensic's Lab as having
10 diazepam and methadone. And those receipts from him on the
11 day of the wreck.

12 SLED also did an analysis of fibers that were found on
13 the airbag of the Buick Sentry that he was driving. And the
14 fibers on the airbag were consistent from the shirt that he
15 was wearing. The fibers found on the airbag were consistent,
16 and the analyst felt that she could testify that they came
17 from the same shirt.

18 He was the only person in that Buick Sentry. At the
19 hospital, he admitted to Trooper Hanks, who was investigating
20 the wreck, that -- he admitted to drinking a six pack of beer
21 earlier that day.

22 There was also a Crowne Royal bottle that an eyewitness
23 saw him throw something out of the car when the wreck
24 occurred. There was a Crowne Royal bottle that was found at
25 the scene. It was marked. It was photographed. It

1 disappeared during the course of the investigation. It
2 appears that the bottle was unopened, but we don't know for
3 sure because we don't have the bottle to actually look at it.
4 And there was an eyewitness that had said that he had bought
5 the bottle of Crowne Royalit at the liquor store earlier that
6 afternoon.

7 Given the timing of when his blood was taken, it is
8 arguable and I think the toxicologist would have been able to
9 place him at over a .10 at the time of the wreck given the
10 delay and from when the wreck happened, when the blood was
11 drawn, and the rate of expiration out of his system.

12 His prior record, Your Honor, is a prior D.U.I. in 1984.
13 He had pending charges. He was out on bond while -- when this
14 wreck occurred.

15 Ms. Carter, Angela Carter, the passenger in the car, was
16 declared dead on scene by Greg Short, coroner's office.

17 Venissa Renfield was air flighted to Greenville Memorial
18 Hospital. She was in intensive care for two days, and she
19 died on the eleventh and was taken off life support. Her her
20 organs were donated, but that she was -- she died as a result
21 of the injuries that she had in this collision.

22 At the appropriate time, Judge, there's several people
23 that are here from the victims' family that would like to
24 address the Court. But those are the facts we have.

25 I also have pictures, Judge, I wanted to give you just to

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1 show you the damage to the cars. The first series of
2 photographs are the victim's car. Then there's the
3 Defendant's car Mr. Heaton was driving. It was actually his
4 grandmother's car that he was driving.

5 And then I just have pictures of the liquor bottle where
6 it was found as well as the point of impact. You can see from
7 the picture on the point of impact that, you know, they were
8 almost of the lane travel. Almost, you know --

9 THE COURT: All right. Yeah, give me just one minute.

10 THE SOLICITOR: Judge, I'll just mark all of them
11 collectively as State's Exhibit 1.

12 THE COURT: Okay. Good.

13 THE SOLICITOR: And tender them for the record.

14 THE COURT: All right. Are you going to mark all those
15 as one exhibit?

16 THE COURT REPORTER: Yes, sir.

17 (MARKED STATE'S EXHIBIT NO. 1)

18 THE COURT: All right. Yes, sir.

19 MR. GAMBLE: Your Honor, Chad Heaton has told me when he
20 worked for G.B.S. Lumber he possessed a C drivers license,
21 commercial grade, which means that from the time he went to
22 work there the last five years at G.B.S. Lumber he's been
23 constantly tested by D.O.T. for any drugs or -- and/or for
24 other use.

25 He tells me that after the '94 stop for D.U.I. he ceased

1 drinking and was taking care of his mother. Immediately prior
2 to this incident she had Hepatitis C. He was having to carry
3 her for liver work in Charleston at the medical university.

4 Immediately before this accident, she died and one of his
5 uncles gave him some Valium. And he had taken the Valium, and
6 he took some beer, and he was driving, and he was headed back
7 home when this accident occurred at the intersection of Wooten
8 Road.

9 Also, Your Honor, there's a mailbox and there was some at
10 the time -- at the time of this incident some brush blocked
11 the view from Wooten Road up on Dobbins Bridge Road. And it
12 was, according to the preliminary hearing a contributing
13 factor also.

14 However, the rate of speed at eighty miles an hour would
15 be a heavy contributing factor. I acknowledge that.

16 When I spoke with him, he told me that was truly, truly,
17 truly sorry for what happened. The passenger victim was
18 actually his cousin, the grandmother's first sisters -- the
19 driver. He did not know the passenger. He had heard of her,
20 but didn't know her.

21 He has a son by his present wife. And his prior wife is
22 won't come, but she has two children -- two girls by him. And
23 I think they are probably also real victims in this matter.

24 It's just a sad, terrible case in my opinion. I feel
25 sorry for everybody concerned here.

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Columbia, South Carolina

1 THE COURT: Anything further?

2 MR. GAMBLE: No, sir.

3 THE COURT: I'd be happy to happy to hear from whomever.

4 THE SOLICITOR: Your Honor, I have some written impact
5 statements that have been submitted to our office previously.
6 They also include some restitution figures, and there are
7 several people that would like to speak to the Court today.

8 I'll just kind of turn it over and kind of just one by
9 one if you'll make sure you give your name first to the court
10 reporter so that she can have it for the record.

11 Judge, this is Sandra Morgan, she is Angela Carter's
12 mother.

13 MS. MORGAN: My name is Sandra Morgan. I'm Angela
14 Carter's mother. This is a picture of Brianna, Angie's
15 daughter. She was also at the wreck. Luckily, she only had a
16 scratch. She turned two years old two and half months after
17 her mother's death.

18 My daughter was so excited about Brianna's upcoming
19 birthday party that she had already laid away her presents and
20 was planning a birthday party. On Brianna's birthday,
21 November 29th, she received her presents, but her mother was
22 not there to help her open them or see the smile on her face
23 as she blew out the candles.

24 Even though she's only two years old she has not
25 forgotten her mother. She thinks she sees her on the T.V., in

1 the grocery store, or while we're at restaurants. When she
2 sees someone with dark hair that resembles her mother, she
3 will call out for her. It breaks my heart when this happens.

4 My own children's father died when they were only one and
5 two years old. Their only memories of him are the ones that
6 we have. As a single parent, I prayed to God every night to
7 let me live long enough to see my children grown.

8 Now, I pray to God long enough to see my granddaughter
9 grow and to be there for her as her mother would have been.

10 My daughter started Tri-County Tech in 1999. She also
11 became pregnant with her first child. She was so happy and
12 even more determined to graduate and get a good job. She
13 wanted to provide a good life for her child.

14 On January 17, 2000, after her thirty hours of labor she
15 gave birth to a beautiful eight-pound baby girl named Selena.
16 Only minutes after her birth, Selena died from Group B strep.
17 My husband, Brandon, and I were present during the birth, but
18 there wasn't anything we could do.

19 My daughter was devastated. I think she always blamed
20 herself. I watched her hold her baby and cry for what would
21 never be.

22 On November 29, of the same year, my daughter gave birth
23 to Brianna, a beautiful healthy baby girl. Angie was so proud
24 of Brianna. Almost every day she would come over or call to
25 tell me something new or funny that Brianna had done.

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1 Angie worked part-time and went to school and was a full-
2 time mother. I know it couldn't have been easy on her, but
3 she was determined to graduate. She would have graduated this
4 summer with a degree in business computer science, and she had
5 intended to go to Clemson for education.

6 On Friday, September 6th, my daughter and I were at the
7 hospital. This is also the last day I saw my daughter alive
8 where she met her new nephew for the first time. They took
9 this picture together, and I can remember thinking that my
10 life couldn't be any better than this. Three days later my
11 happy smiling daughter would be killed by a drunk driver. She
12 was only 21 years, 5 months, and 3 days old. Part of me died
13 with her.

14 On Monday, September the 9th, Angela called and asked me
15 to watch Brianna while she and Venissa had went to Wal-Mart.
16 She had to take her cousin to her grandmother's first. They
17 were a tenth of a mile from my mother's driveway when that
18 wreck occurred.

19 About forty-five minutes later, my son-in-law called and
20 said someone had told him there had been a bad wreck near
21 mama's. I picked him up on my way up there, but I knew my
22 daughter was gone before I even reached the accident. We live
23 only seven miles from my mother, but when we got there the
24 rescue squad was only there.

25 I ran calling my daughter's name over and over. I saw

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1 the paramedics working on Venissa and could tell was real bad.
2 My baby was curled up in ball in the floor of the car and
3 covered up with a sheet. No one would let me see her. I
4 could hear my granddaughter cry for her mother. I picked her
5 up and she squeezed me so hard. Brianna was alive and my
6 daughter (inaudible). And I could only hope Angie knew she
7 was okay before she died.

8 Whoever said that time goes heals all wounds has never
9 lost a child, never dressed their daughter for her funeral, as
10 they dressed her when she was a baby to come home from the
11 hospital. They could never imagine how it feels to have their
12 child talking to them and wondering if you're going crazy.

13 Your Honor, Thomas Heaton made the choice to take drugs
14 and drink and drive. Our children never got a choice to make
15 the decision whether to live or die. I would like to see
16 Thomas Heaton pay for what he did to our children by receiving
17 the maximum sentence of twenty-five years each to be run
18 consecutively.

19 This was two lives lost and not one, two families torn
20 apart. And he should have to pay for them both. I'm begging
21 the Court for justice for our girls. It's the least they
22 deserve, and this is the least this little girl deserves.
23 She's only two years old, and she lives in the same community.
24 Our children will be going to school together.

25 THE COURT: All right. Thank you.

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5th Judicial Circuit, Richland County
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1 MR. MITCHELL: First, I'd like to say that I have known
2 Chad for about ten years, and I've known him well. And my
3 name is Brandon. I'm Angie's husband.

4 THE SOLICITOR: Brandon Mitchell.

5 MR. MITCHELL: As far as him not drinking since '94 is
6 crazy. I was at a party with him in 2000. He was drinking
7 plenty.

8 But I'd like to just tell you a little bit about Angie.
9 She was twenty-one when he killed her, but in this limited
10 time she was able to become a wonderful, loving wife and
11 mother. She was going to college to make a better life for
12 us. There wasn't much she wouldn't do for any of us. We were
13 together for almost six years and had planned to get married
14 after she graduated.

15 We also talked about having another baby sometime down
16 the road. But, now none of this will happen because Chad
17 decided to drink and drive and not obey the speed limits and
18 for this we will suffer everyday. I went from being with
19 someone that I love to never seeing her again. No more hugs
20 and kisses or nicknames, for missing the way she looked at me
21 when she wanted something, and not having her to hold me and
22 tell me it's alright when I need her the most, and not having
23 the joy of watching her play with our little girl.

24 Chad didn't only take two lives. He took a big part of
25 all of our lives and this is why he should pay. I have a

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1 daughter that will never know her mother. She will never be
2 loved like only a mother loves a daughter. She will never,
3 know her touch or just what it's like to be hugged and kissed
4 by her. She will not even remember the sound of her voice.
5 This will affect her for the rest of her life, and she will
6 miss out on a lot of things she shouldn't have to because of
7 you.

8 She will miss out for the rest of her life and so should
9 he. Please consider this when you sentence him. Please run
10 sentences consecutively and make him suffer for as long as we
11 have to suffer. Thank you.

12 MR. CARTER: I'm Angie Carter's brother. This is my son.

13 THE SOLICITOR: This is Curtis Carter.

14 THE COURT: All right. Thank you.

15 MR. CARTER: Words can't describe the pain and the loss
16 that my family and I have been through since Angie got killed.
17 I feel that my life has changed. She was stolen from us.
18 Angie was full of life and love. Everyone that knew her loved
19 her. Every time that I was around her she made me smile. Me
20 and Angie were very close.

21 We were to watch our children grow up as we did. Angie
22 was a terrific mother. Words can not describe the bond that
23 her and Brianna had. Our father died when we were very young.
24 We had to grow up not knowing who our father was. Angie
25 didn't want that for Brianna. Brianna is two years old now,

1 and she will not know her mother other than what we tell her.

2 Angie was twenty-one years old when she -- she had her
3 whole life ahead of her. The day that she was stolen from us
4 was the worst day of my life. It still hurts me so much that
5 I can't talk about it because it makes me cry.

6 The reason I say she was stolen from us is because she
7 did nothing wrong. It wasn't an accident. Someone's
8 carelessness caused her life to end. It makes me sad to see
9 the pain that my parents are going through.

10 My stepfather has been with us for thirteen years, and he
11 loved Angie like his own. My mother seems depressed like
12 she's lost a part of her life. She worries me because she
13 doesn't sleep any. I don't think she'll ever get over the
14 loss of her daughter.

15 I always knew that when my parents were gone I would have
16 Angie to help me get through it. Now, I will have no one.

17 MS. GLEN: Your Honor, I'm Rosa Glen. Angie was my
18 granddaughter. I babysat for Angie when she was little. She
19 was my only granddaughter for eight years, and I helped Sandra
20 because her husband had died. I babysat Angie and Curtis both
21 and we were very close.

22 Angie's death has hit our family very hard. You don't
23 expect to lose a grandchild. They're supposed to out live
24 you.

25 Angie had so much to live for. She worked to help pay

1 her way through college and would have graduated this year.

2 I helped my daughter to care for Angie and her brother,
3 like I said. She was always (inaudible) and happy when she
4 was a baby and she stayed that way as she grew up. You see
5 her in the picture of her laughing each time. She was always
6 laughing and teasing. She enjoyed life.

7 And Angie was cheated at the right to go to her little
8 girl when she cries for her in the middle of the night. And
9 my daughter has to try to hush her up. Angie was cheated of
10 coming down the aisle on her wedding day and any grandchildren
11 she might have given us.

12 I pass the crosses every day. I'll have to look at them
13 for the rest of my life. I've lived where I live for all my
14 life, and I can't move away from there. Now, I can't bring
15 Angie and Venissa back.

16 They were cheated out of fifty-six years of their life.
17 It's not too much to ask for twenty for each one of them? We
18 ask that from you. It was just that one time (inaudible).
19 But I've lived there for forty-something years. He rode the
20 school bus I drove. That's not his first time.

21 All we ask is justice so that maybe it won't hurt our
22 neighbors child the next time. I have eleven grandchildren.
23 I'd like to keep the rest of them. Thanks.

24 THE SOLICITOR: Your Honor, this is Tonya Holbrook.
25 She's Venissa's Renfield's mother.

1 MS. HOLBROOK: Hello, Your Honor.

2 THE COURT: Hi.

3 MS. HOLBROOK: This is a picture of my daughter's
4 portfoio when she was a senior in high school. As you can
5 see, she was a beautiful girl. But she was not only pretty on
6 the outside, she was beautiful on the inside. And her and
7 Angie were inseparable.

8 She would always drop anything she was doing if Angie
9 needed her, or anybody else. This is her fourteen year old
10 sister that spent the last weekend of her life with her. She
11 went to the very first Clemson football game and her first
12 school dance. I have a booklet of impact statements I would
13 like for you to look at.

14 Dear Judge -- Your Honor, my child's death robbed me of
15 her future. She is woven through the tapestry of my life and
16 an intrical part of the whole design. When they ripped her
17 from that tapestry, the design is forever changed beyond
18 repair.

19 I've lost the pleasure and pride that comes from watching
20 her life unfold and her potentials flower like a beautiful
21 rose. I have lost whatever th blessing she was to her
22 sisters, her step-father, and I. Her very essence and her
23 cheerful way of looking at life is gone forever.

24 Holidays and birthdays have already passed for her, and
25 they are hollow, exquisitely painful reminders of her absence

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1 in our family. I am desperately holding onto the fabrics of
2 my tapestry for at the time of this wreck my youngest child
3 was three weeks old.

4 Venissa was my oldest daughter of four. She also has a
5 seven year old sister. It tortured to be so torn watching her
6 die and being torn between both of daughters, one beginning
7 her life and one saying goodbye to this life and into
8 eternity. Venissa

9 was in beauty pageants, won many titles. She would stop
10 and tutor her friends with math which was a subject came very
11 easy for her. We both took certified nursing school together
12 and N.H.C in Anderson and that's really where she decided to
13 become a nurse. I was a single parent at the time, and we
14 would work -- she would work third shift, and I would work
15 first, and we shared a car.

16 She still a maintained a 4.0 average despite helping me
17 as much as she could raise her smaller sisters. She never
18 complained because we didn't have a lot of extras. That's why
19 when she finished tech she was accepted to Clemson to be a
20 pharmaceutical rep.

21 This is the jacket she would have worn for her
22 graduation. She had already purchased her pin to wear with
23 her hat. And now I'll give it to my mother who's a nurse, and
24 my mother can wear her jacket. She had her uniforms layed
25 across her bed. She was getting ready. She had two months to

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1 go to graduate.

2 She was very determined to be self-sufficient. She was a
3 (inaudible) cheerleader. She was not just my daughter. She
4 was my best friend. Everyday I get up praying that this is
5 all a terrible mistake and a nightmare, but it's not.

6 Venissa had been through a lot of things in her life that
7 could have made her bitter. Her father and I were divorced
8 when she was very young, but she chose to turn lemons into
9 lemonade. Her smile could light up the room. Our favorite
10 saying was, Have we hugged today?

11 I keep her greeting from her phone nearby so I can listen
12 and still hear her happiness in her voice that is silent
13 forever. I have wonderful memories and sweet times which no
14 one can take from me. Venissa now lives on in the lives of
15 six other people because she was an organ donor. She's at
16 peace, and I have that assurance everytime my baby smiles at
17 me.

18 I hope we have given you some idea of what a beautiful
19 star we had in our lives for such a short time. She will be
20 in my heart forever and will never be forgotten. I have a
21 book I would like for you to look at please.

22 THE COURT: Yes, ma'am.

23 MS. HOLBROOK: If you don't mind. Would you like to see?

24 THE COURT: Please. Yes, ma'am.

25 MR. HOLBROOK: My name is Gregory Holbrook. I was

1 Venissa's step-father for seven years. That picture that you
2 see of a small child, that's the only picture I have of
3 Venissa and that small child.

4 That day Chad had a choice, but the day I come home that
5 afternoon and got a phone call and I went and seen my step-
6 daughter on a stainless steel table, broken from one end to
7 the other and her head caved in, she didn't have anymore
8 choices.

9 I hope that justice will just do the best that it can.
10 Her mother, her fourteen year old sister, her seven year old
11 sister, they're going through some times that a lot of people
12 in this courtroom just don't understand it. It's totally
13 unbelievable. She's got a six-month-old sister that I'm going
14 to have to explain all about it to her with that little
15 picture I'm going to have to explain.

16 It's been a terrible tragedy, and I just hope justice is
17 done. That's all I've got to say. Thank you.

18 THE COURT: All right. Thank you.

19 THE SOLICITOR: Your Honor, this is Terry Renfield and
20 and his wife, Denise. Terry is Vinessa's father and Denise is
21 her stepmother.

22 MR. RENFIELD: Good afternoon. What I've got here is a
23 box of photo albums from Venissa from the time she was born
24 until she died. The last time I was in this county courthouse
25 was in 1985 when I custody of her, and I raised her by myself

1 for seven years. And then Denise and I were married and
2 raised her another four years until she was sixteen and wanted
3 to come back with her mom.

4 I invested everything I had in that girls life. I took
5 her on short-term mission trips, sung in the choir. The girl
6 taught me more stuff.

7 I've got no bitterness towards Chad. I knew Chad when he
8 was that big. I used to play football with him when he was a
9 little boy, but I can forgive him for what he's done. The
10 state of South Carolina cannot.

11 I'm a certified public accountant, and the reason the
12 I.R.S. is such a fear and the reason people obey the law is
13 because of the consequences of actions. The reason people
14 come in and pour their heart and soul out to be in private in
15 my office is because they're terrified that they might do
16 something wrong. And some people are so -- I mean, they won't
17 even take legitimate deductions because they're so afraid.

18 But there are consequences to the actions. And I can
19 forgive Chad. The state of South Carolina cannot. If we let
20 him off with a short-term or a lenient term that sets a
21 precedence for the rest of the State and for the rest of what
22 goes on here.

23 He needs to be punished. He needs to serve his time, not
24 only for this crime, but to set the tone for other people who
25 may think about it again.

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1 And, Chad, I want you to know, I forgive you. I've got
2 nothing against you.

3 MR. GRINDLE: Thanks, Terry.

4 MR. RENFIELD: But he does need to serve his time.

5 UNKNOWN SPEAKER: Your Honor, may I say one more thing?
6 This is the third time that we've been in courtroom with Chad,
7 and this is the first time that he's ever looked me in my
8 eyes. He's never said so much as one word of remorse or
9 regret. I've never heard him say anything.

10 Judge, ask him if he has anything to say. Sentencing day
11 come, he's full of remorse, but I'll never have my daughter
12 again for the rest -- until she gets old enough to truly
13 understand.

14 My grandbaby ask me, Where's mama. And before I can
15 answer she'll say, She's in heaven with Jesus. I don't like
16 Jesus. I want my mama. Please give us a sentence that we can
17 all live with. We have so much to live with already. Thank
18 you.

19 THE COURT: All right. Anything further?

20 THE SOLICITOR: Nothing from the State, Your Honor.

21 MS. HOLBROOK: I would like to say something? He did
22 invest a lot of time with Venissa, but Vinessa rebelled to
23 come and live with me, and I did the best that I could. She
24 loved Chad. There is a picture in her photo album she did for
25 her high school in eleventh grade, and he is in the photo

1 album with a broke arm with his arm around her as a child.
2 There was seven, eight years difference.

3 And, just a week before this happened, he turned around
4 at a station to speak to her. And she told me of it. She
5 said that Chad was doing good, and she was concerned about
6 him. I hope she doesn't know who hit her because it would
7 really took a toll on her, and she wouldn't have wanted to
8 live without her best friend. But what's done is done. Thank
9 you.

10 THE SOLICITOR: Your Honor, the only other thing I would
11 submit is the impact statements and the restitution, funeral
12 expenses and medical expenses

13 THE COURT: (Inaudible).

14 MR. GAMBLE: I'll just submit them, I guess, as Court's
15 Exhibit 1 or State's 2.

16 THE COURT: Yeah. Just do a Court's Exhibit 2.

17 THE COURT REPORTER: We did State's 1.

18 THE COURT: I'm sorry. The pictures were --

19 THE COURT REPORTER: You want it State's 2?

20 THE COURT: Yeah.

21 (MARKED STATE'S EXHIBIT NO. 2)

22 THE SOLICITOR: Judge, in fact, I think all of the
23 statements that were read to you are being tendered as part of
24 State's -- did you decide State's 2 -- as part of State's 2.

25 THE COURT: All right.

1 THE SOLICITOR: Including the booklet you've already
2 read.

3 THE COURT: All right. Okay. Anything further?

4 MR. HEATON: Your Honor, I just want to say to both the
5 families, I've been away from my family, too, for five or six
6 months. And I miss them. And the reason I haven't said
7 anything to either family, I'm hoping it's a dream, a
8 nightmare. I would never hurt nobody in their life.. And
9 Venissa I didn't (inaudible). But me and Venissa were very
10 close. I wouldn't hurt her. And I am sorry for my family.
11 (Inaudible).

12 THE COURT: All right. We'll take a quick break. Let
13 everybody sit back down. Do you have anything else further?

14 THE SOLICITOR: No, Your Honor. Do you want to take that
15 information with you?

16 THE COURT: No, I actually read it. All right. Five or
17 ten minutes. Be right back. We'll call you back up.

18 (BREAK)

19 THE COURT: Thanks. Have a seat. All right. Just to
20 make sure I've got this right, he had a prior D.U.I. in '94?

21 THE SOLICITOR: That's correct, Your Honor. It was July
22 7th of 1994, he was driving under the influence. He was
23 convicted. The sentence is not known. And then there was
24 larceny of a motor vehicle and a failure to stop for blue
25 light that was pending from July of 2002, when this wreck

1 occurred. But he had not been convicted on those charges.
2 They're still pending.

3 THE COURT: All right. Did he serve any time in jail?

4 MR. GAMBLE: Yes, sir, he's been in jail since September
5 16th.

6 THE SOLICITOR: He's been in the custody of the -- since
7 September the 9th, I believe.

8 MR. GAMBLE: Right. He's been in the hospital since
9 September 9th, but was in custody at that time.

10 THE COURT: All right. How many days is that since
11 September 9th?

12 THE SOLICITOR: 182 days, Your Honor.

13 THE COURT: All right. Anything further.

14 MR. GAMBLE: No, Your Honor.

15 THE COURT: All right. I'm going to accept the pleas and
16 find that they were freely and voluntarily made, based upon
17 the advice of council, that he knowingly waived his
18 constitutional rights, and that he was satisfied with his
19 attorney.

20 On 2003-GS-04-263 and 262, which are the possession of a
21 controlled substance, on 262, which is the diazepam, the
22 maximum sentence is six months. I'm going to sentence you to
23 six months and that is to run concurrent with the rest of the
24 sentences.

25 On possession of controlled substances, methadone,

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1 maximum sentence is two years. I'm going to sentence you to
2 two years to run concurrent.

3 You know, this is one of the saddest things I think I've
4 ever heard in my life for the families, the community, the
5 future, you, your family. It's just kind of unbelievable.
6 And what really bothers me is the previous D.U.I., quite
7 frankly. I'm real concerned with that.

8 So, these two sentence for 2003-GS-04-264 -- and by the
9 way, I don't want to hear anything from the courtroom from
10 either side, period. If you do, I'm going to have you taken
11 into custody. And 2003-GS-04-265 and 264 those are the D.U.I.
12 -- felony D.U.I., death felony cases, sentences are to run
13 consecutively. It's twenty years. Thank you.

14 (PROCEEDING CONCLUDED)

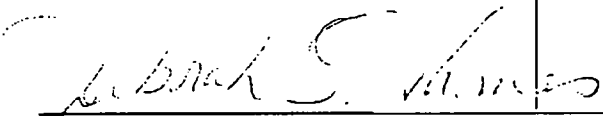
CERTIFICATE OF REPORTER

I, Deborah S. Thomas, CVR, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing transcript is a true, accurate, and complete transcript of record in the trial/hearing of the herein captioned case, relative to appeal, in the Circuit/Family Court for Anderson County, on the 10th day of March, 2003, to the best of my ability.

I further certify that I am neither related to nor counsel for any party to this case or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 3rd day of April, 2004, at Columbia, Richland County, South Carolina.


Deborah S. Thomas, CVR
Official Circuit Court Reporter,
Notary Public in for the
State of South Carolina at Large
My Commission expires
January 20, 2008

DEBORAH S. THOMAS, CVR
5th Judicial Circuit, Richland County
Columbia, South Carolina



FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

 THOMAS CHAD HEATON, #291537
 Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2004-CF-04-0767

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institute, 386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence Anderson County General Sessions Court, Tenth Judicial Circuit, 100 S. Main St., Anderson County, South Carolina 29621
3. Name(s) of co-defendant(s) (if any) n/a
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2003GS0400262 Possession of Controlled Substance
 - (b) 2003GS0400263 Possession of Narcotic in Schedule I(B)
 - (c) 2003GS0400264 and 00265, DUI/Felony DUI (2 charges)
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3, 2003

- (a) March 11, 2003-6 months, \$100 surcharge
- (b) March 11, 2003-2 years, \$100 surcharge
- (c) March 11, 2003-00264 20 years consecutive with 00265 20 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- 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) I thought my attorney was filing an appeal on my behalf as I had requested. The time had lapsed before I found out that no appeal had been filed.

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attached
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

- (a) _____
- (b) _____
- (c) _____
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? n/a
- (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. Robert Gamble, Public Defender for Anderson County
301 Camson Road, Anderson, SC 29625 (864) 260-4048
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Bond Hearing
- ii. Plea
- iii. _____
19. State clearly the relief you seek in filing this application:
- I seek to have an evidentiary hearing in this matter. I believe I was sentenced improperly and was lead to believe that I would receive a sentence much less than the one I received and that is the ONLY reason I plead guilty. I believe that because the Court had a personal conflict in this case, he should have recused himself and/or my attorney should have objected and asked the Judge to recuse himself at the time it was learned he would be presiding over my plea hearing. I do not believe that my attorney investigated the allegations against me, and did not protect my rights at the time of the plea, sentencing and appeal.
20. Are you now under sentence from any other court that you have not challenged?

Attachment

My attorney, Robert Gamble, informed me that I should plead guilty to the Felony DUI charges which were pending against me. Even though I had other charges, the Felony DUI charges were the "big" charges of any issue. He advised me that I would get between 10 - 12 years imprisonment.

Prior to my attorneys negotiating my plea, I had requested a preliminary hearing and also prepared discovery motions. No preliminary hearing was ever held and there were also much discovery that I never received. I felt that some type of investigation other than the State's accident reconstruction should have been done. It is my belief that my attorney failed to perform his duties in representing my rights. I felt that the toxicology results of the driver of the other vehicle may be an issue and I did not want to plead until we received the reports and an investigation was done. My attorney, however, assured me that things were worked out and that I would receive a 10 - 12 year sentence and that it would be better that I plead rather than take the risks of going to trial.

It was my understanding that the plea was taking place before Judge Nicholson because Judge Maddox had a conflict in that a member of his staff was personal friends with one of the victims. On the day of the plea, members of my family appeared and spoke with my attorney who assured them that I would receive 10-12 years. My attorney advised me that the Judge would question me about my willingness to plea, that I would loose certain rights, etc. and that I was to agree that I understood what rights I would loose upon my entering a guilty plea. All of my trust was in my attorney and that he would look after my best interest. At the time of my plea, I was also taking powerful prescriptions from injuries I received in the accident.

On the day of my plea hearing, court was called to Order and Judge Maddox came to the bench. I was shocked that he was the one who would be hearing my case because I knew he had a conflict. I felt that since my attorney knew, he would take care of whatever needed to be done. At one point Judge Maddox made the statement to the effect that Judge Nicholson was suppose to be the one hearing my case but was tied up in another court. The State put the case before Judge Maddox and had members of the victim's family who also made statements. My family was not allowed to address the Court. My attorney never objected to Judge Maddox hearing the case and I felt he should have

objected to him hearing my case or asked for a continuance for another judge to hear my case. At the conclusion of the hearing, Judge Maddox sentenced me to twenty years imprisonment on one Felony DUI charge and then twenty years imprisonment on the other Felony DUI charge to run consecutively. I was sentenced to 40 years imprisonment when I thought I was being sentenced to twelve years at the most. I would have only received ten additional years had I went to trial, been convicted and sentenced to the maximum. I would never have agreed to plead guilty knowing the Judge could sentence me maximum time. I felt that my attorney should have withdrawn my plea. During the whole plea process, my attorney said very little to the Court. He never objected to anything that was being done. He said nothing and objected to nothing. I feel like all of my rights were violated.

After my sentencing, I kept calling for my attorney to come and talk to me so that we could correct the error and file an appeal. He never came to see me. I thought he would go ahead and file an appeal and found out when it was too late that he not filed an appeal. In conclusion, I hereby respectfully request that an evidentiary hearing be set in my case and for any and all relief as applies under the PCR statutes.

Cases supporting, but not limited to:

Strickland v. Washington, 466 US 668

Johnson v. State, 325 SC 182

Butler v. Sea Pines Plantation Co., 282 SC 113

State v. Hoffman, 312 SC 386

Code of Judicial Conduct, Rule 501, SCACR

Christy v. Christy, 314 SC 145

STATE OF SOUTH CAROLINA)

County of MCCORMICK)

VERIFICATION

I, Thomas Chad Heaton, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Thomas Chad Heaton

SWORN to and subscribed before me this 27th
day of February, 2004.

Deborah Anne Fagg (L.S.)
Notary Public for SC

My Commission Expires: 11-8-06

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

I, Thomas Chad Heaton, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Thomas Chad Heaton

Applicant

SWORN or affirmed to and subscribed before me this
27th day of February, 2004.

Deborah Camp Fagg
Notary Public for SC

My Commission Expires: 11-8-06

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

)
) IN THE COURT OF COMMON PLEAS
)

04-CP-04-0767

Thomas C. Heaton, No. 291537,

Applicant,

V.

State of South Carolina,

Respondent.

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RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed March 5, 2004, would respectfully show this Court:

1.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. The Applicant was indicted at the January 2003 term of the Anderson County Grand Jury for possession of controlled substance (03-GS-40-0262), possession of narcotic in schedule 1(B) (03-GS-04-0263), and felony DUI (03-GS-40-0264, 0265). He was represented by Robert Gamble, Esquire. On March 11, 2003, the Applicant pled guilty as indicted. He was sentenced by the Honorable J. Cordell Maddox to six (6) months to run concurrent, two (2) years to run concurrent, and two twenty (20) years sentences to run consecutively. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the

South Carolina Department of Corrections, the guilty plea transcript, and the application for PCR. Any of the above not so attached will be forwarded upon receipt.

II.

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

- I. Ineffective assistance of counsel.

III.

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness

under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

IV.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

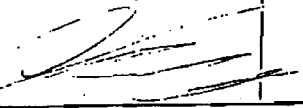
WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

CHRISTOPHER L. NEWTON
Assistant Attorney General

By: 
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6/25, 2004.

STATE OF SOUTH CAROLINA

)
) IN THE COURT OF COMMON PLEAS

COUNTY OF Anderson

2004-CP-04-0767

Thomas C. Heaton, No. 291537,

Applicant,

vs

State of South Carolina,

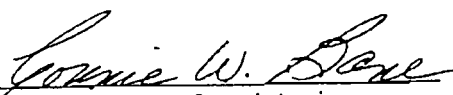
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)

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

Robert A. Bugos, Esquire
Post Office Box 1207
Anderson, South Carolina 29622

DATED this 30th day of June, 2004.


Connie W. Bane, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) 10TH JUDICIAL CIRCUIT

THOMAS HEATON,) TRANSCRIPT OF RECORD
APPLICANT,) 04-CP-04-767
-VS-)
STATE OF SOUTH CAROLINA,)
RESPONDENT.)

NOVEMBER 15, 2007

ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. HAYES, III, JUDGE

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

RICKY HARRIS, ESQUIRE
ATTORNEY FOR THE APPLICANT

DANIEL E. GRIGG, ASSISTANT ATTORNEY GENERAL
ATTORNEY FOR THE STATE

SHARON L. VIZER-HANKS
CIRCUIT COURT REPORTER

I N D E X

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NO EXHIBITS WERE INTRODUCED

1 Thursday, November 15, 2007

2 MR. GRIGG: Your Honor, if I may. This is Thomas
3 Heaton vs. The State of South Carolina. Mr. Heaton filed his
4 application for post-conviction relief on March 5, 2004. It's
5 arising out of a guilty plea dated March 11th, 2003 in front
6 of Judge Maddox.

7 Mr. Heaton was originally indicted for possession of
8 controlled substance, possession of a scheduled 1-B narcotic,
9 and 2 counts of felony D. U. I. He pled guilty to those
10 charges and received 2 consecutive, I believe, 20-year
11 sentences on the felony D. U. I.'s, 2 years concurrent on the
12 possession of a scheduled 1 narcotic, and 6 months concurrent
13 on the possession of a controlled substance.

14 There was not an appeal in this matter either, Your
15 Honor

16 THE COURT: Mr. Harris?

17 MR. HARRIS: Please the Court, Your Honor. Of
18 course, Mr. Heaton is here and present. If the Court pleases,
19 I'd be happy to outline what Mr. Heaton's contentions are or
20 we can go directly to the testimony.

21 THE COURT: Give me a little quick outline.

22 MR. HARRIS: Thank you, Your Honor. As the attorney
23 general has indicated, Mr. Heaton was represented by
24 Mr. Gamble at the time, who I understand was the Public
25 Defender for Anderson County, appeared before the Honorable

1 Cordell Maddox to enter pleas to guilty as charged on 4
2 separate indictments; 2 alleging felony D. U. I. death, and
3 the other 2 alleging drug possession charges.

4 Your Honor, Mr. Heaton, after the plea, formalities
5 of the plea, was sentenced to 2 consecutive 20-year sentences
6 for a total of a 40-year sentence on the felony D. U. I.
7 indictments and then concurrent more minor sentences on the
8 drug possession charges.

9 Mr. Heaton challenges his conviction by way of
10 post-conviction relief in a pro se petition. So I'm going to
11 attempt to translate Mr. Heaton's language in what we would
12 recognize more formally in court as being essentially a
13 challenge to his sentence on the basis that his plea was
14 involuntary in the sense that he was not aware and therefore
15 could not appreciate the consequences of his plea.

16 In particular -- and I say these things not to
17 detract from other things that may arise from the testimony or
18 other evidence, but in particular Mr. Heaton challenges his
19 conviction and sentence on the basis that he was unaware,
20 completely, that he could receive consecutive sentences.

21 Mr. Heaton indicates that he believed that in
22 discussions with trial counsel that he was going to receive a
23 sentence of 10 to 12 years. Be that as it may, beyond that,
24 that he believed that and was led to believe in no event could
25 he receive a sentence of greater than 25 years, which of

1 course is the maximum sentence for felony D. U. I. death.

2 Mr. Heaton asserts that he never knew, never had any
3 idea of the possibility of consecutive sentences being imposed
4 in this case at all, which of course is exactly what happened
5 to him.

6 So, Your Honor, Mr. Heaton's case, I think, raises
7 perhaps not an entirely novel question but one that I can't
8 find has been addressed in any of the case law. There's
9 plenty of case law that states clearly that absolute minimum
10 requirements to consider the voluntariness of a plea is laid
11 out, well laid out in the cases.

12 I have the cases. I'll hand them up. I know the
13 Court is familiar with them, that the plea -- that the
14 defendant must appreciate the consequences of his plea and
15 that in order for that to be the case and for the Court to
16 find that's the case that a court must find that the defendant
17 at the time he was entering the plea knew the minimum and
18 maximum sentence he could receive, was apprised of and aware
19 of the nature of the charges against him, including the
20 essential elements that had to be proven in order to find him
21 guilty of that charge.

22 Mr. Heaton therefore asserts that -- and the
23 question would be whether or not in a guilty plea setting
24 whether the failure of the plea judge to advise the defendant
25 of the possibility of consecutive sentences would render the

1 plea involuntary in the sense that the defendant would not be
2 able to comprehend and appreciate the possibility of that
3 consequence.

4 Your Honor, I will also state that -- parade
5 reference essentially to the plea transcript. I believe the
6 other things to point out in the transcript would be that if
7 the Court looks at the transcript, of course reviews the
8 transcript that the statement made by the plea judge
9 unfortunately could be considered completely misleading as to
10 what the maximum sentence could be imposed and --

11 THE COURT: What page is it?

12 MR. HARRIS: Your Honor, we're looking now on page 6
13 of the transcript.

14 THE COURT: I got it.

15 MR. HARRIS: Beginning at line 5, and the Court
16 advises all right. You understand that on the 2 felony
17 D. U. I. cases the sentence range under statute is 1 year, 1
18 year to 25 years.

19 That's probably an unfortunate phraseology there by
20 the plea judge in the sense that I think most people could and
21 might interpret that as meaning on these 2 charges you could
22 get 25 years, total.

23 Of course, Mr. Heaton asserts that that was exactly
24 his understanding, that he could get 25 years. Of course, he
25 felt that trial counsel was holding out the hope of promise

1 that he was going to get significantly less time, but
2 nevertheless only 25 years.

3 Now, Your Honor, nowhere in the plea transcript is
4 there any colloquy between the Court and the defendant as to
5 whether or not he understood the essential elements of the
6 charge against him, particularly the indictments for felony
7 D. U. I.

8 Further, the plea transcript would disclose some
9 other irregularities in the formalities of the plea, that
10 meaning that the solicitor was asked to and did provide a
11 recitation that was designed to elicit the factual basis for
12 the plea but nowhere in the transcript does the trial judge
13 make a finding on the record that the factual basis, thus
14 proffered, was sufficient in order to accept the plea.

15 Nowhere did the trial judge acknowledge that a
16 substantial factual basis existed for the plea or that the
17 facts as recited by the solicitor made up such a factual
18 basis.

19 Also, and rather unusual, I think, given the pleas
20 that I've observed and participated in, in now a number of
21 years practicing law, is that the defendant was never asked to
22 acknowledge the facts or to acknowledge in an effort to admit
23 or deny that those facts were the facts that would go to make
24 up either the proof against him at trial or a factual basis
25 for the plea.

1 I do say this, although I think it might -- in this
2 connection. It is very interesting that in this I think what
3 was somewhat a sensational case and certainly a tragic case
4 that the factual basis recited by the solicitor while
5 explaining that blood had been taken and resulted in a reading
6 of .077. At that time, Your Honor, the inference level for
7 impairment in our state was still at the .10 level. So
8 substantially less than the inference level.

9 And then the solicitor makes a mention about some
10 other substances being found in the blood but no averment, no
11 allegation whatsoever that that was impairment, that there was
12 impairment as a result of that.

13 Actually, it seems like both sides rested on the
14 fact that the M. A. I. T. Team investigation of the case
15 alleged excessive speed as the primary factor in the
16 collision.

17 So I think it's kind of odd that you have a sort of
18 especially sensational felony -- double felony D. U. I. case
19 and in the guilty plea proceeding no direct allegation that
20 the defendant was impaired. There was an allegation that he
21 had consumed substances, but no allegation that he was
22 impaired by it.

23 So, Your Honor, those are the things that appear on
24 the record already in the transcript. And given those things,
25 essentially boil down to the issues, would be whether or not

THOMAS HEATON - DIRECT BY MR. HARRIS

1 the plea itself on the record comported with legal
2 requirements for the acceptance of a plea, and that the plea
3 was voluntary, the defendant appreciated the consequences of
4 the pleading.

5 And I think tagging along with that Mr. Heaton has
6 made some, what amounts to allegations of ineffective
7 assistance of trial counsel, both related to the formalities
8 of the plea and in counsel that was received from trial
9 counsel and given to Mr. Heaton about what he could expect at
10 the plea in terms of a sentence.

11 I think those things basically bolster the idea that
12 Mr. Heaton was unaware that he could receive consecutive
13 sentences. Having said all that, that would be the case in a
14 nutshell. We would like to present Mr. Heaton's testimony
15 when the Court sees appropriate.

16 THE COURT: Do you want to respond or do you want to
17 wait?

18 MR. GRIGG: We can go to testimony, Your Honor.

19 THE COURT: All right. Call Mr. Heaton.

20 MR. HARRIS: Mr. Heaton.

21 THOMAS HEATON, after having been duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MR. HARRIS:

25 Q. State your name, please.

THOMAS HEATON - DIRECT BY MR. HARRIS

1 A. Thomas Chad Heaton.

2 Q. Mr. Heaton, I'm going to ask for you, I know you're
3 probably not used to speaking into microphones, but pull the
4 microphone a little closer to you. Be comfortable and speak
5 loud enough so everyone in the courtroom can hear you, okay?

6 A. Yes, sir.

7 Q. And your name is Chad Heaton; is that correct?

8 A. Yes.

9 Q. Mr. Heaton, where are you serving time at the
10 moment?

11 A. McCormick, South Carolina.

12 Q. You are serving a 40-year sentence for convictions
13 for 2 counts of felony D. U. I. death and 2 counts of drug
14 possession; is that correct?

15 A. Yes.

16 Q. Mr. Heaton, prior to coming here today, of course
17 what got this proceeding started is you filed an application
18 for post-conviction relief seeking to have the Court overturn
19 your guilty plea and sentence; is that right?

20 A. Yes.

21 THE COURT: I can not find where I have a copy of
22 that in my package.

23 MR. GRIGG: Of what, I'm sorry?

24 THE COURT: The application. I've been through it
25 several times. It's not the thickest pack, but I can not find

THOMAS HEATON - DIRECT BY MR. HARRIS

1 it. I find all kind of stuff about supplemental answers to
2 request for disclosure.

3 MR. HARRIS: Your Honor, I have what's been stamped
4 a true copy that was sent to me. I can hand that up.

5 THE COURT: I've got the original file. I'll find
6 it.

7 MR. GRIGG: We can make a copy. I apologize if you
8 didn't get one, Your Honor.

9 THE COURT: All right. We'll get it out of here.

10 MR. HARRIS: Go ahead, Your Honor?

11 THE COURT: Yeah.

12 BY MR. HARRIS:

13 Q. And, Mr. Heaton, you filed an application for
14 post-conviction relief on your own seeking to have the Court
15 overturn your guilty plea and sentence; is that correct?

16 A. Yes.

17 Q. And is it your desire today to have the Court, after
18 considering all of the arguments and evidence in the case, to
19 have the Court vacate, that is overturn your guilty plea and
20 sentence and order a new trial for you?

21 A. Yes.

22 Q. Now, sir, do you understand and realize that if the
23 Court grants that relief to you -- I say this before we go any
24 further. If the Court grants the relief you seek that in fact
25 it is conceivable that you can receive a harsher sentence

THOMAS HEATON - DIRECT BY MR. HARRIS

1 after a trial?

2 A. Yes.

3 Q. And bearing that in mind you nevertheless wish to
4 proceed with your hearing today?

5 A. Yes.

6 Q. Now, is it correct that one of the issues that
7 you've raised is that your sentence far exceeded the maximum
8 sentence you ever thought you could receive?

9 A. Yes.

10 Q. And by that I'm meaning now that it exceeded a
11 maximum allowable sentence by law, not anything to do with
12 what your lawyer may have represented to you could be the
13 sentence?

14 A. Right.

15 Q. At the time you were standing in front of Judge
16 Maddox pleading guilty what did you believe was the maximum
17 sentence you could receive under the law?

18 A. 25 years.

19 Q. 25 years?

20 A. Yes.

21 Q. In the guilty plea proceeding when the Court advised
22 you the following; you understand that on the 2 felony
23 D. U. I. cases the sentence range under the statute is 1 year,
24 1 year to 25 years, when the Court made that statement to you
25 did you believe that it meant that you could get a maximum of

THOMAS HEATON - DIRECT BY MR. HARRIS

1 25 years or 50 years?

2 A. A maximum of 25 years.

3 Q. Did anybody at any time during the plea -- I'm
4 talking now during the plea in front of the Judge, did anybody
5 at any time ever explain to you the possibility of receiving
6 consecutive sentences?

7 A. No, sir.

8 Q. Do you know what a consecutive sentence is?

9 A. I do now.

10 Q. All right. And is it your understanding that a
11 consecutive sentence would be that you are sentenced to a
12 number of years on one charge and then sentenced to an
13 additional number of years on another charge?

14 A. Yes.

15 Q. That is, those are added up to make a total. In
16 your case, 20 plus 20 is 40.

17 A. Right.

18 Q. But you didn't know at the time of your plea that
19 you could even receive such a sentence as 20 plus 20 years?

20 A. Right.

21 Q. Do you ever recall the trial judge asking you if you
22 agreed with the facts as were stated by the solicitor during
23 the plea?

24 A. Repeat that, sir.

25 Q. Do you recall -- ever recall anybody during the plea

THOMAS HEATON - DIRECT BY MR. HARRIS

1 ever asking you whether you agreed or disagreed with the facts
2 as they were being presented at the guilty plea?

3 A. No.

4 Q. Now, Mr. Heaton, you were represented by Mr. Gamble;
5 is that right?

6 A. Yes.

7 Q. He was appointed to represent you; is that right?

8 A. Yes.

9 Q. And when you had discussions with Mr. Gamble prior
10 to your guilty plea did Mr. Gamble ever explain to you that
11 you could get consecutive sentences?

12 A. No, sir.

13 Q. Did Mr. Gamble make any representation to you as to
14 what you would get from the trial court on a guilty plea or
15 what sentence you might get?

16 A. Might, he said I could get 10 to 12 years, and that
17 it was in my best interest to plead guilty. That's why I was
18 trusting him, when I pled guilty.

19 Q. I'm going to ask you, please, remember to keep your
20 voice loud enough.

21 But your answer was that Mr. Gamble told you that
22 you could get 10 to 12 years or that you would get 10 to 12
23 years?

24 A. That I would.

25 Q. He wasn't giving you a lawyerly guess or judgment

THOMAS HEATON - DIRECT BY MR. HARRIS

1 about what could happen he was telling you what would happen,
2 at least as far as you were concerned?

3 A. Yes.

4 Q. All right. And so were you willing to essentially
5 accept that outcome or that consequence for your plea that you
6 would get 10 or 12 years?

7 A. Yes.

8 Q. If you had known that there was even a chance of
9 getting 50 years or 40 years on consecutive sentences would
10 you have pled?

11 A. No, sir.

12 Q. Why not?

13 A. I would have took it on to trial, because I was
14 thinking I was only going to get up to 25.

15 Q. You were willing to accept the consequences of
16 receiving a 10 to 12-year sentence but you would have never
17 agreed to accept as a result of a guilty plea the consequence
18 of consecutive sentences totaling 40 years like you got?

19 A. No.

20 Q. Now, did Mr. Gamble advise you that although he
21 believed that you would get 10 to 12 years or told you you
22 would get 10 to 12 years did Mr. Gamble advise you that the
23 maximum sentence was 25 years?

24 A. 25 years, yes.

25 Q. Now, did Mr. Gamble explain to you it was 25 years,

THOMAS HEATON - DIRECT BY MR. HARRIS

1 plus 25 years, plus whatever the controlled substance
2 violations were?

3 A. No, sir.

4 Q. Not at all?

5 A. Not at all.

6 Q. Okay. Now, in terms of the pretrial discussions
7 that you had with Mr. Gamble, was it explained to you what the
8 State had to prove in order for you to be found guilty by a
9 jury?

10 A. No, sir.

11 Q. Did Mr. Gamble discuss with you some of the evidence
12 that could be presented against you of which he was aware of?

13 A. Yes, sir, he went over that.

14 Q. Did Mr. Gamble ever discuss with you what the legal
15 inference for impairment in the State of South Carolina was at
16 the time your case was going on?

17 A. No, sir.

18 Q. All right. So was it explained to you prior to
19 trial that the inference level for impairment in the State of
20 South Carolina was what is commonly referred to as 10, 10 at
21 that time, and that your blood alcohol test came back to be
22 significantly less than that; was that explained to you prior
23 to your plea?

24 A. No, sir.

25 Q. If that had been explained to you, that your blood

THOMAS HEATON - DIRECT BY MR. HARRIS

1 alcohol level was less than the legal inference for impairment
2 would you have pled guilty?

3 A. No, sir.

4 Q. Was it explained to you that in a felony
5 D. U. I. case that the State must prove that you committed
6 some act of negligence or recklessness or committed a traffic
7 violation which was the proximate cause, that is the direct
8 legal cause of the collision that resulted in the deaths?

9 A. No, sir.

10 Q. When this collision happened it was obviously a very
11 serious collision, you went to the hospital yourself; is that
12 correct?

13 A. Yes, sir.

14 Q. Were you conscious of going to the hospital?

15 A. No, sir.

16 Q. So you were out. You only woke up after surgery?

17 A. Yes, after surgery.

18 Q. So you were not able to explain to your lawyer the
19 circumstances under which your blood was taken or any of these
20 tests were done or whatever. You just weren't physically,
21 mentally able to explain those things; is that right?

22 A. Right.

23 Q. So you had to rely on somebody else --

24 A. Yes, sir.

25 Q. -- to find out how these things were done, whether

THOMAS HEATON - DIRECT BY MR. HARRIS

1 they were done appropriately and then after those things are
2 known what it means legally to you in your case; is that
3 right?

4 A. Right.

5 Q. When you were asked by the trial judge in the plea
6 if you felt like you had had enough time with your lawyer,
7 that you had been able to ask whatever questions, those kinds
8 of things; you remember that, don't you?

9 A. Yes.

10 Q. When you answered those questions did you have it in
11 your mind that you asked what you knew to ask, given the fact
12 that you were ignorant to most of it?

13 A. Yes, sir, I was ignorant to the law. At that time,
14 I was under the impression that pleading guilty would have
15 been in my best interest from what I'd known so far about my
16 case.

17 Q. Okay. But in terms of asking questions, finding out
18 more information about your case, you didn't know enough to
19 ask the questions?

20 A. Correct.

21 Q. Okay. Now, there are also parts in the guilty plea
22 transcript where the Court asked you if you had been promised
23 anything in order to get you to plead guilty; do you remember
24 that?

25 A. Yes.

THOMAS HEATON - DIRECT BY MR. HARRIS

1 Q. And you indicated that nothing had been promised to
2 you?

3 A. Right.

4 Q. Well, if Mr. Gamble had essentially told you that
5 you would get 10 to 12 years why didn't you speak up and say
6 that?

7 A. I was told not to speak up because he might not go
8 along with that, at the time.

9 Q. Okay. Setting that aside, in any event, did you
10 ever imagine that you could get consecutive sentences?

11 A. No.

12 Q. Now, in your application for post-conviction relief
13 you have stated that you believe that the trial court may have
14 had a potential conflict of interest in that the trial judge
15 was acquainted or someone on his staff was acquainted with one
16 of the victims or his family?

17 A. Yes.

18 Q. Do you wish to continue to pursue that allegation
19 today?

20 A. No, sir.

21 Q. There's something you've heard and you are concerned
22 about but there's really nothing more than just your feeling
23 about that?

24 A. Yes. Yes, sir.

25 Q. I see. So the allegation -- the issues that you

THOMAS HEATON - DIRECT BY MR. HARRIS

1 want the Court to consider today, whether your plea was
2 voluntary in that you understood that a potential consequence
3 of the plea was consecutive sentences; is that right?

4 A. Yes.

5 Q. And you would like for the Court to consider whether
6 your plea was proper, given the lack of the factual findings
7 by the trial court and the lack of your acknowledgment of the
8 sufficiency of the facts; is that right?

9 A. Yes, sir.

10 Q. And further, the lack of -- the understanding and
11 belief that you had that you were essentially being told by
12 trial counsel that the result was going to be 10 to 12 years
13 but in no event more than 25 years?

14 A. Right.

15 Q. I ask you again for clarity, had you known that you
16 could get the kind of sentence you got would you have pled
17 guilty?

18 A. No, sir.

19 Q. Had you of known more about the law and what had to
20 be proved in terms of your impairment would you have pled
21 guilty?

22 A. No, sir.

23 MR. HARRIS: Thank you, Mr. Heaton. Please answer
24 any questions that the assistance attorney general or the
25 Court have for you.

THOMAS HEATON - CROSS BY MR. GRIGG

1 CROSS-EXAMINATION

2 BY MR. GRIGG:

3 Q. Mr. Heaton, on March 11, 2003 you entered a guilty
4 plea for possession of a controlled substance, possession of
5 scheduled 1 narcotic and 2 counts of felony D. U. I., correct?

6 A. Yes, sir.

7 Q. That was you were indicted for 4 separate
8 indictments, were taken out, correct?

9 A. Yes.

10 Q. So that wasn't all written on 1 indictment, or 2, or
11 3. There were 4 separate indictments.

12 A. Four separate indictments.

13 Q. And so when you entered a guilty plea it never
14 dawned on you that there was going to be a sentence attached
15 to each one of those separate charges?

16 A. No, sir, I was ignorant to that.

17 Q. But you knew you had 4 separate charges?

18 A. No, sir.

19 Q. You just said you did, which is it?

20 A. I can't hear you, sir.

21 Q. You just said you knew there were 4 separate
22 indictments and now you're saying no, which is it?

23 A. Yeah, I knew there was 4 separate indictments.

24 Q. But you never thought that maybe you ought to ask
25 your attorney since he obviously, as you are testifying,

THOMAS HEATON - CROSS BY MR. GRIGG

1 didn't inform you of it? You never thought I got to find out
2 if there are going to be 4 separate sentences that go with
3 those 4 separate charges?

4 A. No, sir.

5 Q. But you pled guilty to 4 separate charges?

6 A. Right.

7 Q. You also admitted you were, in fact, guilty,
8 correct?

9 A. Yes.

10 Q. Are you?

11 A. No, sir.

12 Q. You're not guilty? You took an oath on March 11,
13 '03 to tell the truth to Judge Maddox, didn't you?

14 A. Yes, sir.

15 Q. You weren't telling him the truth, you lied, or are
16 you lying today?

17 A. I don't feel that I'm guilty, sir.

18 Q. I'm sorry?

19 A. I don't feel that I'm guilty.

20 Q. So you were lying to Judge Maddox? You put your
21 hand on that Bible and took an oath and you looked the Judge
22 in the eye and you lied to him?

23 A. (There was no response).

24 MR. GRIGG: Your Honor, may we get an answer?

25 MR. HARRIS: Your Honor, I feel like I probably

THOMAS HEATON - CROSS BY MR. GRIGG

1 should -- I am going to interpose an objection here. The
2 question itself, I think, is probably framed improperly in
3 terms of did you lie to the Judge. The record clearly is what
4 it is. That's why we have a transcript.

5 The whole point of a post-conviction relief hearing,
6 of course, is to explain why it is that what happened then is
7 not proper, not appropriate, or as Mr. Heaton is alleging
8 here, he didn't know at the time some of the essential
9 elements and what necessary proof, and therefore he couldn't
10 have known then that he had a better defense to the case than
11 as he knows now.

12 I understand why the attorney general was asking the
13 question. I think we can concede that he pled guilty then but
14 he doesn't believe that under the law, what he knows about the
15 law and the facts of case now that he is guilty. That's all
16 there is to it.

17 THE COURT: Mr. Heaton, you accept that as your
18 answer?

19 MR. HEATON: Yes, sir.

20 THE COURT: Okay.

21 MR. GRIGG: Your Honor, if I may. With all due
22 respect, in regard to our objection our Supreme Court has held
23 that this transcript is a solemn judicial admission of the
24 truth unless we're given the reason not to believe that. By
25 getting up here, filing this application today, by taking the

THOMAS HEATON - CROSS BY MR. GRIGG

1 stand and testifying he is pitting his credibility today
2 against what he's testified to here.

3 In addition, if there are any errors, which the
4 State obviously does not support the theory that there are,
5 opposing counsel stood up at the beginning of this thing and
6 argued several points of contention that he saw wrong with the
7 transcript.

8 If this Court should take this matter under
9 advisement, go back and look at transcript and find that there
10 is an error, whether it's Mr. Gamble's fault or whether it's
11 the trial judge's fault. Overwhelming evidence of guilt
12 overrides any error in a P. C. R. matter, and Your Honor would
13 have the right at that point and I believe the obligation at
14 that point to still deny this P. C. R.

15 I think his truthfulness is at stake in this matter
16 and I think it is important that we find out under oath if
17 he's being truthful to the Judge then or if he's being
18 truthful today. The State didn't file this application, Your
19 Honor. The applicant did.

20 THE COURT: Go ahead and ask the question again and
21 let me see.

22 BY MR. GRIGG:

23 Q. I believe my question, Mr. Heaton, was were you
24 telling the truth at the guilty plea or are you telling the
25 truth today?

THOMAS HEATON - CROSS BY MR. GRIGG

1 A. Telling the truth today, sir.

2 Q. So you were not truthful with Judge Maddox at your
3 guilty plea?

4 A. The day of my guilty plea I was going by --
5 Mr. Gamble had me -- I was going -- my trust was in him when I
6 pled guilty that day.

7 Q. Did you have drugs and/or alcohol in your system at
8 the time of this incident?

9 A. Sir?

10 Q. Did you have drugs and/or alcohol in your system at
11 the time of this incident?

12 A. Yes, sir.

13 Q. How fast were you going that day, sir?

14 A. I think 60 miles per hour.

15 Q. I believe the record reflects that you were doing
16 81. Did you hear the solicitor say that in Court?

17 A. 81, yes, sir.

18 Q. Did you dispute that at any point?

19 A. No, sir.

20 Q. So, in fact, you did what the solicitor said you
21 did, right?

22 A. Yes, sir.

23 MR. GRIGG: No further questions, Your Honor.

24 MR. HARRIS: Your Honor, I'll clear it up.

25 THE COURT: Okay.

THOMAS HEATON - REDIRECT BY MR. HARRIS

REDIRECT EXAMINATION

1

2 BY MR. HARRIS:

3 Q. Mr. Heaton, at the time of your guilty plea had it
4 been explained to you that your blood alcohol level was
5 significantly less than the legal inference level for
6 impairment would you have pled guilty?

7 A. No.

8 Q. Would you have admitted guilt in any way if the
9 legal significance of that had been explained to you properly?

10 A. No.

11 Q. If it had been explained to you that -- all the
12 essential elements of the crime, that you have to be shown to
13 beyond a reasonable doubt to have committed violations of the
14 law that proximately caused the accident that caused the death
15 would you have pled guilty?

16 A. No, sir.

17 Q. So when you were answering the trial court during
18 your plea you were answering in ignorance; is that right?

19 A. Yes.

20 Q. And you are not that ignorant today, are you?

21 A. No, sir.

22 Q. You have been informed?

23 A. Right.

24 Q. And you are trying to answer as truthfully as you
25 can now, given what you know now that you didn't know then?

THOMAS HEATON - REDIRECT BY MR. HARRIS

1 A. Right.

2 MR. HARRIS: Thank you, sir.

3 Thank you, Your Honor.

4 THE COURT: Any recross?

5 MR. GRIGG: No, Your Honor.

6 THE COURT: You can step down. Have a seat with
7 your attorney.

8 Call your next witness.

9 MR. HARRIS: Your Honor, if I could have just a
10 moment to speak with them. Someone was trying to talk to me.

11 THE COURT: We'll take about a five-minute break.
12 Just a refresher break to give you time to talk with them.

13 (WHEREUPON, a brief recess was taken.)

14 THE COURT: All right, Mr. Harris.

15 MR. HARRIS: Thank you, Your Honor. I appreciate
16 the opportunity to speak with the family and I've addressed
17 their concerns.

18 Your, Honor we have no more testimony or other
19 evidence but I would like for the Court to consider four cases
20 that express the legal principles that we proceed on, and I
21 have copies for counsel as well if I could hand them up.

22 THE COURT: That would be greet.

23 MR. HARRIS: Your Honor, these are, I'm confident,
24 cases the Court is well familiar. State vs. Hazel, Pittman
25 vs. State, Burnette vs. State, Morehead vs. State often cited

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 for outlining the principles that our court and the United
2 States Supreme Court recognizes as factors to be considered on
3 the issue of the voluntariness of a plea and whether a
4 defendant offering a plea is aware of the consequences of the
5 plea. That's the petitioner's showing, Your Honor.

6 THE COURT: All right. Mr. Grigg?

7 MR. GRIGG: Thank you, Your Honor. The State would
8 call Robert Gamble.

9 THE COURT: Mr. Gamble, please come up and be sworn.

10 ROBERT GAMBLE, after having been duly sworn,
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. GRIGG:

14 Q. Mr. Gamble, you represented Thomas Heaton; is that
15 correct?

16 A. That's correct.

17 Q. And Mr. Heaton pled guilty or entered a guilty plea
18 on March 11, 2003, correct?

19 A. That's correct.

20 Q. Do you recall approximately how long prior to that
21 plea that you represented him?

22 A. My initial interview was with my investigator, was
23 on September 23rd, and I went down --

24 Q. I'm sorry. If I may interrupt. Was that September
25 23rd of --

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 A. I have a note that I saw --

2 THE COURT: What year?

3 A. Oh, '02.

4 Q. In '02?

5 A. I have a note that I saw him in September of '02,
6 and at that point in time I didn't know what all the State
7 had. So once I got the State information by discovery we went
8 back and discussed the Valium, and Methadone, and Crown Royal.

9 Q. Now, you said Valium, Methadone and Crown Royal?

10 A. Valium, Diazepam, which is Valium, Methadone and
11 Crown Royal, whisky.

12 Q. Is that what Mr. Heaton had in his system at the
13 time of the wreck?

14 A. That's what the liquor store owner stated that he
15 sold to him, was a half pint of Crown Royal.

16 Q. I believe you were stating that that's what the
17 liquor store guy testified?

18 A. Well, he gave a statement.

19 Q. I'm sorry. I said testified. You're right.

20 A. He and, luck would have it, another client of mine
21 saw and knew Mr. Heaton, saw him driving earlier before the
22 wreck, Renee, Tammy Renee Thacker, and she gave a statement
23 with regard to his reckless driving. And I questioned her
24 about it and she knew Mr. Heaton. They lived in the same
25 area, Townville area.

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 Q. In addition to those statements you stated you
2 received discovery, correct?

3 A. That's correct.

4 Q. What else did you do by way of investigation?

5 A. I reviewed the M. A. I. T. Team findings putting the
6 speed at impact at 63 miles per hours, and there were skid
7 marks. But the estimated speed I think was not 81 but 83
8 miles per hour prior to impact.

9 Q. And I'm sorry to interrupt you. If you'll back up
10 for just a second. Explain what the M. A. I. T. Team is.
11 Just explain that for me, please.

12 A. The M. A. I. T. Team is a team of highway patrol
13 personnel who are trained in -- basically trained in what's
14 quaternion physics which is full force -- four force physics.
15 And you can take a formula and put the known impact and the
16 vector analysis of that and -- I might ought to tell you I
17 majored in chemical engineering for the first three years of
18 college. So if you take these vectorial analyses you can
19 determine the speed at impact and the speed prior to impact by
20 the brakes, and the brake shoe wear and several other factors
21 play into it.

22 I have not found a M. A. I. T. Team -- and I'll tell
23 you what M. A. I. T. Team stands for, Multi-discipline
24 Accident Investigation Team. It's M-A-I-T. You can take
25 their findings and determine how fast the car was going when

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 it hit the object.

2 You also have the factor of the brake coefficient of
3 friction on the brake; the push of the second car, that is how
4 far it went on impact; the distances the car traveled after
5 impact of the first car, that is the Buick. So you can find
6 out how fast they were going.

7 Q. And did you obtain a -- was that obtained through
8 discovery? Was that how you got a copy of that?

9 A. Yes.

10 Q. What else did you get through discovery? Did you
11 get any SLED reports?

12 A. SLED report, the forensic lab report which showed
13 the drugs, what was in there. I've got the blood report. He
14 was unable to sign for that. This accident happened at 15:45
15 or thereabout, 3:45 in the afternoon. The blood was drawn at
16 19:27 at the Anderson Memorial Hospital.

17 So you had almost 4 hours from impact to drawing of
18 the blood, which means that the blood would have been lower
19 than -- at that time, than it was -- lower meth and alcohol
20 than it was at the time of the accident. You can back it up.
21 There's a formula that you can back up blood alcohol level to
22 the date of time of the incident.

23 Q. And I'm not smart enough to get into all that. I
24 didn't have any chemistry education, but needless to say the
25 .077, is that what was found 4 hours later; is that correct?

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 A. .077 Diazepam and Methadone.

2 Q. So the Methadone and the Diazepam are in addition to
3 the .077 blood alcohol?

4 A. Yes.

5 Q. And that's 4 hours after the wreck?

6 A. Yes.

7 Q. So that's not an accurate representation of what he
8 had in his system at the time of the wreck; is that correct?

9 A. No, it's not an accurate representation of what he
10 had.

11 Q. It would have been higher at the time?

12 A. Would have been higher.

13 Q. In addition to that he's bleeding?

14 A. He's bleeding.

15 Q. Would that have affected the rate of decline?

16 A. I would have to ask a pathologist that, but I don't
17 know. I think it would, but I don't know.

18 Q. Fair enough. Did you discuss that with your client?

19 A. Yes.

20 Q. Did you discuss the 4 indictments, the 4 charges
21 against him with him?

22 A. I have written on the front of my file sheet a
23 notation that says 25, 25 with a line drawn under it, which
24 means 50.

25 Q. Did you explain that to him?

ROBERT GAMBLE - DIRECT BY MR. GRIGG

1 A. That's why I'm telling you that, that would
2 indicate. I wouldn't put it for my own edification. That
3 would be to tell him he's looking at 2 times 25?

4 Q. So is it your opinion on March 11 -- I'm sorry,
5 March 10, 2003 that Mr. Heaton understood that he was looking
6 at a sentence on both -- separate sentences of up to 25 years
7 on each of those felony charges, D. U. I. charges?

8 A. I don't know what he understood but that's what I
9 told him.

10 Q. Okay. Did he ever tell you he did not understand
11 that?

12 A. No, he did not. I knew -- let me tell you trial
13 strategy problem here. We were having an influx of Judge Dean
14 Hall, affectionally known back then as maximum Dean Hall. I
15 wanted to avoid him, and he was coming in next after Cordell
16 Maddox to judge. I knew that Maddox was more lenient than
17 Hall. So I was judge shopping, to be honest with you, and
18 went before Judge Maddox with no recommendation. This was a
19 wild card plea.

20 Q. Did you explain that to your client, that there's no
21 recommendation?

22 A. If I recall our conversation I told him that Maddox
23 would be his only choice as far as plea goes.

24 Q. If he had wanted to go to trial would you have
25 proceeded to trial on his behalf?

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 A. I never knew that he wanted a trial.

2 Q. He never told you he wanted to trial?

3 A. Not that I recall. We discussed trial work and what
4 would be proven. And that's what I've just told you here,
5 that they would prove that he had liquor and drugs in his
6 system and 2 dead girls. You just can't get around those
7 facts.

8 Q. Did Mr. Heaton ever ask you once he was sentenced to
9 withdraw his plea?

10 A. No, I don't have any notation of it. I don't recall
11 it.

12 Q. Did he ever ask you to appeal his conviction and
13 sentence?

14 A. No.

15 Q. Did you ever tell him he would only get 10 to 12
16 years?

17 A. No. Without a recommendation I wouldn't dare tell a
18 client he's going to get X time because I don't know.

19 MR. GRIGG: I have no further questions, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. HARRIS:

22 Q. Mr. Gamble, of course you indicated at the time of
23 the plea to the Court that you believed that it was in
24 Mr. Heaton's best interest to enter the pleas; is that
25 correct?

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 A. That's correct.

2 Q. And did you -- certainly you wouldn't have said that
3 unless you believed it was in his best interest, legal
4 interest to enter the pleas?

5 A. No, I wouldn't.

6 Q. Had you known that he was going to get 40 years
7 would you have thought it in his best interest to enter a plea
8 at that time?

9 A. Well, I don't mean to give you a short answer but if
10 I would have waited for Dean Hall it would have been 50, plus
11 2, plus 30 -- 6 months rather.

12 Q. Yes, sir. My question was had you known that the
13 result of a plea in front of Judge Maddox, the Judge for whom
14 you said you shopped, was going to be 40 years would you have
15 still thought it in Mr. Heaton's best interest to plead guilty
16 and get the 40 years?

17 A. Well, no, unless I knew that I was going to be
18 facing the next judge with a trial.

19 Q. You've stated that you believe that Judge Maddox
20 would be significantly more lenient in this matter than Judge
21 Hall?

22 A. Yes, sir.

23 Q. And based upon that did you explain to Mr. Heaton
24 that you felt that the Judge Maddox would, for whatever
25 reasons, be significantly more lenient than the next, Judge

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 Hall?

2 A. I don't think I used significant. I said he was an
3 easier sentencing judge.

4 Q. Did you ever in any meaningful way explain to Chad
5 Heaton that there was a realistic possibility of receiving a
6 40-year sentence?

7 A. I did not. I told him that there was a possibility
8 -- at the very beginning I told him there was a possibility of
9 2, 25's; 50 years.

10 Q. When you say that you said you've written on your
11 folder, as apparently is your custom from listening to your
12 testimony earlier today, to write out on your folder the
13 minimum and maximums for purposes of discussing those things
14 with your client; is that accurate?

15 A. Sometime I do not put the minimum on. I put the
16 maximum on because if you give a person murder is 30 years to
17 life they hear 30, and you're going to be fighting like the
18 devil to get them to understand you probably are not going to
19 get 30, you know, and so I be careful putting minimums on.

20 Q. Well, being in the same boat as you for a number of
21 years I agree with you, sir, that when you say you have to be
22 careful not only what you tell a client but how you tell a
23 client if you hope that it's going to be fully appreciated and
24 understood; is that correct?

25 A. That's correct. You have to be both sober and

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 forceful with them to let them know the seriousness of what
2 they are facing, and the possibility of the seriousness.

3 Q. And like you've just said, that say if you were
4 discussing a murder case with somebody and you told them that
5 the sentencing range or the possibility of sentence is 30
6 years or life, or 30 years to life you would need to reenforce
7 the life for fear, and I guess for the practical knowledge of
8 dealing with clients over the years, that they are going to
9 latch on to that minimum number?

10 A. That's what I just said, and it's on murder I
11 generally say you're facing life without parole and leave it
12 at that.

13 Q. Right. It would often -- would it be your
14 experience, Mr. Gamble, that often in order to emphasize the
15 dire consequences of what a judge might do in a plea or after
16 a trial to tell -- even tell clients sometimes for purposes of
17 making this decision and giving up your rights you need to
18 assume that you can get the maximum. Have you ever told a
19 client that?

20 A. I have.

21 Q. Something like that?

22 A. I have told them. I said if we go to trial and we
23 miss you're going to get loaded.

24 Q. Well, even on a plea situation if the case is bad
25 enough, aggravated enough, if you believe that that

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 possibility even remotely exists you might explain to a client
2 to emphasize to them; look, we hope for better but you can
3 just assume that you might come out of there with a maximum
4 sentence.

5 A. There again, that depends on the trial judge.

6 Q. Well, I understand that but my question, sir -- and
7 I appreciate your patience with my line of questioning, is to
8 emphasize this point and to make sure that a client doesn't
9 misunderstand or fail to apprehend the real consequences that
10 could come, that you would say you've got to assume that you
11 could get the maximum sentence here, even pleading in front of
12 a judge you've shopped for successfully.

13 A. I don't recall any case that I've done that with.
14 The only time I advise them they could get more than what I've
15 told them is where there is a recommendation and not a
16 negotiation, and they would not allow recommendation or
17 negotiation in this case.

18 Q. What did you tell Chad Heaton that he could get?

19 A. I didn't tell him what I knew he could get. I mean,
20 I didn't know what he was going to get. I didn't tell him
21 anything about it, I don't think.

22 Q. On your file folder you said often you write down to
23 remind yourself and remind to be accurate with a client the
24 maximums in a case.

25 A. Right.

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 Q. And in this case you indicated you wrote down 25 and
2 25 and drew a line?

3 A. Right.

4 Q. But you didn't total it up though --

5 A. No.

6 Q. -- on your folder?

7 A. No.

8 Q. You didn't --

9 A. No.

10 Q. 50 is not written on your folder?

11 A. No. I know what that line means.

12 Q. Oh, I understand, sir. I understand. We're trying
13 to get whether Mr. Heaton knew what it meant. Do you have an
14 independent personal recollection sitting here today of
15 exactly what you in fact told Mr. Heaton as opposed to what
16 your standard practice would have been?

17 A. Do you know how many people I represent?

18 Q. Probably as many as me or more, if you're a public
19 defender, sir. I understand.

20 A. I don't have any independent recollection of sitting
21 down and talking with him at the jail. I know I did. I know
22 we were in a room with each other. I know I warned him that
23 this case was a bad case.

24 Q. Sensational in a way?

25 A. It was. But I don't recall the words that were

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 said. I know what I did but I don't know what I said.

2 Q. So without -- and I appreciate your honesty,
3 obviously. Without knowing and being able to say today
4 exactly what you told Mr. Heaton in that context you merely
5 have to rely on what your standard practice would be or what
6 you believed you may have said?

7 A. Right.

8 Q. So I take it, sir, that there's no way you really
9 can say today that you in fact told Chad Heaton in a way that
10 he could appreciate it that he could get 50 plus years on a
11 plea?

12 A. I can't swear that I emphatically told him 50 plus
13 50, 2 years and 6 months. I should have. I probably did. I
14 don't know.

15 Q. So when you say -- when you answered the attorney
16 general's question a moment ago in the context of do you
17 believe that Mr. Heaton knew that he could get 50 plus years
18 consecutive sentences, in other words there's no way you could
19 know whether or not he truly appreciated that that was a
20 possibility, a possible consequence of his pleas?

21 A. No, I can't.

22 Q. And, sir, is it fair to say that you probably
23 wouldn't have recommended he plead even in front of a judge
24 that you felt would be lenient if you believed for a minute
25 that he would in fact receive consecutive 20-year sentences?

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 A. I'll be honest with you, it kind of threw me for
2 loop, too.

3 Q. It threw everybody in this courtroom.

4 A. Yes.

5 Q. People are still talking about it.

6 A. But and I realize the next question is did you
7 appeal it.

8 Q. No, that wasn't my next question. We're not raising
9 an issue about not appealing.

10 A. Okay.

11 Q. But actually, and I don't want to stand here and
12 belabor the point, but you were shocked, Mr. Heaton was
13 shocked, just about everybody in the courthouse was shocked.
14 Nobody expected that Mr. Heaton -- there was any chance
15 Mr. Heaton was going to get 40 years; is that fair?

16 A. If I had to guess back then I would have guessed a
17 25, 1, because it arose from the same facts and circumstances
18 and it was closer related, and probably 25 would have been a
19 very -- probably a stiff punishment for this crime, in his
20 eyes, because of his age he would build -- probably build a
21 full 25.

22 Q. Going along with that, that certainly the sentence
23 existed exceeded any real expectation you had for the result
24 of the plea --

25 A. That's what I just said, yeah.

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 Q. Would it follow that in all likelihood you did not
2 really emphasize that potential to Mr. Heaton in terms of
3 enabling him to make a decision about whether to plead or not,
4 that you probably -- you probably advised him that this is a
5 good judge, a judge we can expect leniency, a judge that, you
6 know -- although you say you didn't mention a number of years.
7 Mr. Heaton has a different view of that, that you didn't
8 emphasize really the potential for consecutive sentences or
9 for maximum or near maximum sentences.

10 A. Unless I have some real kind of recommendation or
11 knowledge of what the plea is going to render I do not tell a
12 client you are going to get this, you are going to get that
13 because I can't get into the brain of the guy that's up there
14 in the robe.

15 Q. But in a sense you are trying to get in their brain,
16 aren't you? Any time you judge shop you're trying to
17 anticipate what's going to be in the heart, mind and soul of
18 that trial judge, aren't you?

19 A. That's right, and I'd rather go before Judge Cordell
20 Maddox than Judge Dean Hall with a D. U. I. and this than
21 anything else.

22 Q. Still?

23 A. No. Dean's off the bench.

24 Q. No, I mean Judge Maddox still, 40 years, 20
25 consecutive?

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 A. Still.

2 Q. Okay. Now, you answered a lot of questions on
3 direct examination about some of the facts of the case and I
4 want to go into that briefly with you, sir.

5 Do you have any recollection of specific discussions
6 you may have had with Mr. Heaton to explain the essential
7 elements of the offense of felony D. U. I.?

8 A. I don't have an independent recollection of it but
9 it's an easy offense to put forward. You're just drunk or
10 under the influence of pills or liquor, you're driving and
11 somebody is killed.

12 Q. Well, but so your answer would be that you probably
13 did not recite and explain to Mr. Heaton the essential
14 elements of the offense in a legal context?

15 A. You mean using legal terms?

16 Q. Well, no, saying, for instance -- I just suggest
17 this. Saying they have to prove you're diving, they have to
18 prove that it was in this county, this state, and at the time
19 that you were driving that you committed some act of
20 negligence or committed some traffic offense that was the
21 proximate cause of the accident that caused the deaths, and
22 that at that time in addition to all that other stuff they had
23 to prove that you were impaired according to the legal
24 definition of that term in this state.

25 A. Right.

ROBERT GAMBLE. - CROSS BY MR. HARRIS

1 Q. I mean, I know we all say it differently but did you
2 believe you said that to Mr. Heaton?

3 A. Not in those terms. I would have put it in layman's
4 terms as to what they would have to prove.

5 Q. And I know we have the transcript, but if you have
6 reviewed the transcript have you seen anything in the
7 transcript that would indicate that the trial judge did
8 anything like that?

9 A. I just got the transcript, to be honest.

10 Q. If you haven't viewed it that's fine.

11 A. I haven't looked at it.

12 Q. Okay.

13 A. Well, I have looked at pieces and parts of it but I
14 don't recall going into the elements of D. U. I. by the Judge.

15 Q. Okay. Now, do you recall specifically spending any
16 real time with Mr. Heaton explaining to him the inference
17 level for impairment in the State of South Carolina under the
18 implied consent law and that at least the blood test in his
19 case indicates that he was under that impairment inference
20 level?

21 A. I don't recall if I explained it to him or not, but
22 I think if you back that blood test 4 hours back you are going
23 to have one heck of a change.

24 Q. Well, did you ever do that extrapolation? I mean, I
25 know you say there's a formula for it and I'm aware of some

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 idea that there might be some way to do it but did you
2 actually do it? Did you do that work to see what it would
3 come out to be?

4 A. I don't remember if I did or not. I knew it was in
5 dangerous territory, and I think I didn't want to know, to be
6 honest with you.

7 Q. So --

8 A. I know the formula. You take the weight and you
9 take the hours and I think it's 1 for every -- 1 point, .01 --
10 no, .001 for every hour, I think it is, past the stop of
11 drinking.

12 Q. Okay. But, I mean, you didn't actually --

13 A. I didn't work it out.

14 Q. So you could tell Mr. -- you don't really even
15 remember having that conversation with Mr. Heaton?

16 A. No.

17 Q. You didn't say now look, Mr. Heaton, you are under
18 the inference level, that's good? The bad news is that the
19 State may come up with some evidence to show that through
20 extrapolation that your real blood alcohol level at the time
21 could have been this.

22 A. I know we had a discussion. He had a death in the
23 family --

24 Q. His mother?

25 A. -- right before this.

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 Q. Yes, sir.

2 A. That he had taken care of, taken her to Charleston
3 for the liver treatment. His uncle, I think it was, supplied
4 him with the Valium, and he took the Valium and then stopped
5 by this liquor store and bought a half pint, and the liquor
6 store owner gave a statement on him, knew him. And if you
7 take all of that, as you well know driving under the influence
8 of drugs doesn't require a quantitative amount. It just says
9 under the influence of drugs.

10 Q. There's no inference level?

11 A. Right. So I'm looking at a jury hearing this and
12 knowing that if a jury hears it and the Judge charges under
13 the influence of drugs, period, you're going to get hanged.
14 So I took the chance, and mostly lost, I guess you'd say.
15 That's what you are trying to say.

16 Q. Well, I guess, Mr. Gamble, I understand perfectly
17 well your reasoning on feeling that it was in Mr. Heaton's
18 best interest to plea. I'm not really asking you that though.
19 I'm asking what you discussed with Mr. Heaton to further his
20 understanding about what the State had to prove and what they
21 might be able to prove so that he could factor that into his
22 decision to plead.

23 And what I hear you saying, is it correct -- what I
24 hear you saying is in your mind you had this idea that 2 and
25 2, putting all these things together would lead to a bad case

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 to defend, but did you explain to Mr. Heaton all of that
2 thought process, including that, you know, you are under the
3 legal inference level, there's some other factors that would
4 come into it, so that he could decide the significance of that
5 to him? That's all. Did you explain all that thought process
6 to him?

7 A. I don't recall if I went through all those hoops and
8 loops. And you've already called me down on generalization.

9 Q. Please don't. I'm not. It's not my place.

10 A. I know but --

11 Q. Let me ask you this. The plea transcript along
12 about page 12, bottom of 11 and page 12 talks about the Crown
13 Royal bottle that you've mentioned, and at line 22 on page 11
14 this is the solicitor, part of solicitor's statement of facts.

15 "There was also a Crown Royal bottle and an
16 eyewitness saw him throw something out of the car when the
17 wreck occurred. There was a Crown Royal bottle that was found
18 at the scene. It was marked, it was photographed. It
19 disappeared during the course of the investigation. It
20 appears that the bottle was unopened but we don't know for
21 sure because we don't have the bottle to actually look at it.
22 There was an eyewitness that had said that he had bought the
23 bottle of Crown Royal at the liquor store earlier that
24 afternoon."

25 Is that the Crown Royal bottle you're talking about

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 in your testimony?

2 A. I would have to assume that it is.

3 Q. There wasn't but one that was mentioned. So did you
4 tell Mr. Heaton prior to his plea it looks bad that you had
5 bought Crown Royal but on the good side they've lost the
6 evidence and what they knew about it, it looked like it was
7 unopened?

8 A. I don't know if I did or not.

9 Q. That might have been significant to Mr. Heaton in
10 determining whether or not the State had a good case against
11 him or not; would you agree?

12 A. Well, I would agree to this, that they had the
13 photograph.

14 Q. Yes, sir. Then you take the statement from the
15 solicitor, it appears that the bottle was unopened, as meaning
16 that's what the photograph depicted, an unopened bottle of
17 Crown Royal.

18 A. I'll be honest, I don't remember if I have a copy of
19 the picture that would have been sent to me, and that's a
20 pretty good file of discovery right there. So I would think
21 that I knew the bottle was disappeared, but I would also think
22 there's a picture and a witness that saw it thrown and would
23 testify if we tried it that he threw the bottle.

24 Now, that is another indication of guilty knowledge
25 of something if you throw a bottle of liquor after a wreck.

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 It's kind of like running from a scene.

2 Q. True. Throwing a bottle out of car is one thing.

3 It certainly would be worse if it were opened, couldn't it?

4 A. That's true, or if it were empty.

5 Q. Now, on page 14 of the transcript is part of your
6 plea and mitigation. And you state starting at line 4,
7 immediately before the accident she died, meaning Mr. Heaton's
8 mother, this whole thing happened on the heels of his mother's
9 funeral.

10 A. That's correct.

11 Q. Immediately before this accident she died and one of
12 the uncles gave him some Valium, and he had taken the Valium
13 and he took some beer and he was driving and he was headed
14 back home when the accident occurred at the intersection of
15 Wooten Road.

16 So at least in your plea and mitigation the Crown
17 Royal bottle didn't seem to be as significant of the idea that
18 he may have had some beer before; is that a fair statement?

19 A. That's fair. I read somewhere that the Crown Royal
20 bottle wasn't opened.

21 Q. Was not opened?

22 A. Was not opened.

23 Q. Well, it's right here in the transcript.

24 A. All right.

25 Q. That's what the solicitor admitted, that it wasn't

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 open.

2 Now, on down you do make some emphasis about the
3 M. A. I. T. Team investigation and the speed being a heavy
4 contributing factor to the accident, and certainly that was a
5 concern, the M. A. I. T. Team investigation revealing perhaps
6 excessive speed at the intersection; is that right?

7 A. That's right. Another point in this, where these
8 ladies were pulling out of the driveway there was one of those
9 big mailboxes, plastic like mailbox, and it was on a blind
10 curve, and Mr. Heaton was coming around that blind curve and
11 they were pulling out of that driveway. Now, there's some
12 argument in there.

13 Q. Meaning that there was -- the car that the girls
14 were in had an obstructed view, and it was a bad intersection?

15 A. It was a bad intersection, and they pulled out. He
16 tried his best to stop and then swerve and it didn't work. I
17 don't know -- I'm sure the State would have made some comment
18 on his reaction time because of the liquor and the Valium and
19 the Methadone.

20 Q. But, now, Mr. Heaton was on a primary highway?

21 A. Yeah.

22 Q. So the girls pulled out from the stop sign?

23 A. Driveway, I believe.

24 Q. At a driveway onto a primary highway?

25 A. Right.

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 Q. So the victims, the alleged victims in one sense
2 essentially failed to yield the right-of-way to a car on a
3 primary highway?

4 A. Right. That's not going to be a strong argument but
5 it's an argument.

6 Q. Well, I mean, but that is the fact?

7 A. It is.

8 Q. That at least you do have -- it's not a head-on
9 collision. You do have a car pulling from a secondary highway
10 or a drive onto a primary highway that the accused is on. Of
11 course, excessive speed is against him.

12 But out of all of that could you have done it with a
13 little more emphasis to Mr. Heaton that he could have gone to
14 trial and because of the lost Crown Royal bottle and the
15 unopened Crown Royal bottle, and the .077 instead of the 10,
16 and the lack of true quantification for the drugs that
17 allegedly were showing up on a G. C. mass spec, a blood test,
18 that you got at least some opportunity here to successfully
19 defend the felony D. U. I. case, maybe not a complete
20 opportunity to walk but maybe reckless homicide or something,
21 or manslaughter or something less? Did you ever have that
22 discussion with Mr. Heaton?

23 A. I don't recall if I did or not.

24 Q. Okay. So we don't even get to the question. If you
25 didn't have the discussion we don't even get to the question

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 of whether, had you, Mr. Heaton's mind may have been different
2 about pleading?

3 A. May have been. May not have been.

4 Q. Mr. Heaton, you know, has stated in his application
5 and otherwise on the stand essentially he was ignorant of most
6 of this, what he could really get, what the case was really
7 about, and he was pretty much ignorant about those things and
8 just simply relied on his lawyer. Is that your understanding
9 of what he's basically saying here?

10 A. That's what he said on the stand.

11 Q. And would you agree that for the most part based on
12 what you've said about it, and I appreciate your honesty, that
13 that was pretty much the way it was, is that he was a young
14 person simply relying on his lawyer saying you better plead
15 guilty to this, this is a good judge, you better go, and that
16 he didn't really have in his possession a lot of the knowledge
17 of the things that we've talked about here in your testimony?

18 A. I couldn't impart to him the way we recite with each
19 other. I don't do that generally. I break it down into
20 layman's terms. They are going to prove that you were drunk,
21 you were driving, you were riding fast.

22 And instead of saying the elements of the crime are
23 this I set out the elements of the crime by the facts that are
24 in the case so they understand the simplicity. Actually,
25 felony D. U. I. is one of the simpler crimes to prove for the

ROBERT GAMBLE - CROSS BY MR. HARRIS

1 State. You got all those facts and figures and numbers and
2 things to play with to show that somebody was drunk.

3 Q. Would you agree that a fair summarization of your
4 testimony has been though that there are a lot of things you
5 could have discussed with Mr. Heaton that were significant to
6 evaluating the case that you didn't discuss?

7 As you've said, you had these things in your mind.
8 You didn't necessarily share them in any way with your client
9 so that he could make up his own mind about it, and sort of
10 out of all of that process you were convinced that he ought to
11 plead guilty. You told him that he ought to plead guilty,
12 this was a good Judge. Never expected the result you got.
13 And he trusted you, relied on you and went in there and did
14 it.

15 A. That's a pretty fair assessment.

16 MR. HARRIS: Thank you, Your Honor.

17 A. I might also add to you I made a habit of giving the
18 defendant all of their discovery prior to going to court, when
19 I know it's all in. I gave it to him on March the 7th before
20 the plea on March the 10th, and it's pretty much of a big
21 volume of stuff. I don't know if he could understand it or
22 not.

23 Q. Sometimes it's hard for us to understand it, isn't
24 it?

25 A. I generally deal in murder, and that's easy to

ROBERT GAMBLE - REDIRECT BY MR. GRIGG

1 understand, and it doesn't have but three or four elements
2 that you got to worry with. So it's not difficult to
3 understand those kind of cases, but where you got M. A. I. T.
4 Team, backing up alcohol consumption to the time, your body
5 weight, and all of that other stuff it's a complicated case.

6 MR. HARRIS: I understand. Thank you so much for
7 answering my questions.

8 Thank you, Your Honor.

9 MR. GRIGG: Real briefly, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. GRIGG:

12 Q. Mr. Gamble, I'm going to ask you to revisit your
13 notes there. I believe you stated it's on the cover of your
14 file, your file folder there, if I understood right, and I
15 believe you mentioned for both Mr. Harris and myself you wrote
16 25, 25 and a line under it, correct?

17 A. Yeah.

18 Q. And what does that mean to you?

19 A. 50.

20 Q. And it's your testimony that you had that discussion
21 with your client?

22 A. It indicates I've had it. I can't really remember
23 the exact discussion from '02 or '03.

24 Q. You represent a lot of people, correct?

25 A. Yeah, and have a lot of others that I have to

ROBERT GAMBLE - REDIRECT BY MR. GRIGG

1 counsel with that are lawyers that work for me and we have to
2 figure out what we're going to do with things. Yeah, I
3 represent somewhere around 2300 people in my office per year.

4 Q. It's fair to say you're not going to remember every
5 conversation, exactly what you stated in every conversation
6 that you had with them, correct?

7 A. I won't remember this next week.

8 Q. I won't either. But you took that note for a
9 reason, correct?

10 A. Right.

11 Q. To indicate what you had talked to your client
12 about, right?

13 A. That's why I put it there.

14 Q. At any time did he give you any indication that he
15 didn't understand what was going on at this plea?

16 A. Not that I recall.

17 Q. If you had thought that your client didn't
18 understand what was going on would you have allowed him to
19 continue?

20 A. If I thought he didn't understand what was going on
21 I sure wouldn't have been putting up a plea.

22 Q. You would or would not have been?

23 A. I would not have put up a plea if I didn't think he
24 understood it.

25 Q. And again, there's no recommendation or negotiation,

ROBERT GAMBLE - REDIRECT BY MR. GRIGG

1 period, right?

2 A. No.

3 Q. And your client understood that, correct? Or you
4 tried to explain that to him to the --

5 A. I don't think I tried to explain it to him because
6 there was none there. So I didn't explain what was not there.

7 Q. Again, I believe you testified -- is it accurate to
8 state that your testimony earlier was that you never knew this
9 was going -- that you never thought that this was headed to
10 trial? He never told you he wanted a trial; is that what you
11 testified to earlier?

12 A. I think I did. I didn't think it was going to
13 trial.

14 Q. Do you recall now? I'll ask you again. Do you
15 recall now him telling you he ever wanted to go to trial?

16 A. Did he tell me he wanted to go to trial? Not that I
17 remember.

18 MR. GRIGG: No further questions, Your Honor.

19 MR. HARRIS: Nothing else, Your Honor. Thank you.

20 THE COURT: You can step down. Thank you.

21 Anything else from the State?

22 MR. GRIGG: Nothing else, Your Honor.

23 THE COURT: Anything else, Mr. Harris?

24 MR. HARRIS: Nothing in rely, Your Honor.

25 THE COURT: I'm going to take this under advisement.

1 MR. GRIGG: I would like to make one brief comment,
2 if I can, as far as closing, Your Honor.

3 THE COURT: Okay.

4 MR. GRIGG: The only thing I want to say, you have
5 the transcript. Mr. Harris has pointed out what he's felt
6 have been things that weren't done in the transcript. You've
7 heard the testimony from Mr. Gamble.

8 I would simply submit, Your Honor, between the two,
9 you know, the purpose of a guilty plea, I would submit to the
10 Court, was preserved in this case.

11 I believe Mr. Gamble has explained what he and his
12 client talked about. He's not going to remember every single
13 conversation right down to the letter that he has with his
14 client, but he's told you what his notes reflect. He's told
15 you what his practice for doing those notes are, the gist of
16 the conversations he had with his client.

17 There may not be, I guess, magical words in here
18 that say, you know -- I believe one thing Mr. Harris pointed
19 out was nowhere in here does Judge Maddox say I find a
20 specific factual basis. But you have the conversations before
21 you from both Mr. Heaton and Mr. Gamble as to what they talked
22 about, and only Your Honor can weigh the credibility as to how
23 to weigh the testimony.

24 You have the fact that the solicitor stated a
25 summary. He waived the right for them to have to prove their

1 case at this point. They have to put up a sufficient summary
2 of the facts that they have, and you have his answers to the
3 Judge about his voluntariness, his truthfulness, and all that
4 together, Your Honor, I think intent of the plea is intact,
5 and based on that I'd ask Your Honor -- and the fact that I
6 stated previously, the overwhelming evidence of this case, I
7 would ask Your Honor to deny this P. C. R.

8 THE COURT: Let me focus on a couple of things. You
9 know, 90 percent of these are pretty much ineffective
10 assistance of counsel claims. Under 17-27-20 gives the
11 grounds upon which one may make a claim. A-1 is the
12 conviction or the sentence was in violation of the
13 constitution of United States or the constitution of the laws
14 of this State. That's pretty much where you are.

15 MR. HARRIS: Your Honor, and I believe the Boykin
16 case, the United States Supreme case.

17 THE COURT: Well, that's my next question. I'm
18 going to go back and read Boykin because I've already written
19 myself a note to do that, but I haven't read it in awhile, and
20 Judge Maddox did not say the magic words. He does accept the
21 plea on page 31, but he doesn't say I find it has factual
22 basis, but he did accept the plea. And I don't know if that
23 is enough to --

24 MR. HARRIS: The reason that I suggest the legal
25 authority that I do is I think first of all that of course

1 those cases arise in a post-conviction relief context
2 themselves.

3 THE COURT: Well, one of them. I think Hazel was a
4 direct appeal, wasn't it?

5 MR. HARRIS: I think one of them, then the other is
6 a post-conviction relief.

7 THE COURT: Yeah, the other two. But I think Hazel
8 was a direct appeal on a motion to withdraw a plea.

9 MR. HARRIS: And the appellate courts in construing
10 these P. C. R. cases, relying on Hazel and overall, relying, of
11 course, on the framework laid down in Boykin. In plea
12 formalities it's my understanding of the law, Your Honor, and
13 those authorities stand for the proposition that we cannot
14 assume that certain safeguards, procedural safeguards have
15 been observed. They must appear on the record.

16 We can't infer from the record these things were
17 done and said. They must appear on the record to be
18 efficacious. And I believe, of course, the Boykin decision
19 would indicate it's a procedural due process claim in essence
20 that a defendant makes when challenging the guilty plea on the
21 basis that he did not appreciate the consequences of the plea.
22 So certainly that would be a violation of the state
23 constitution and federal constitution.

24 So I certainly think it's a claim that's cognizable
25 under our state P. C. R. law, and I think the Boykin case

1 stands for the proposition that rises to the level of
2 constitutional claim.

3 THE COURT: Well, that's why I was asking because it
4 doesn't seem to fall into the other six groups except for the
5 catch-all one that says that the conviction or sentence is
6 otherwise subject to collateral attack upon any ground of
7 alleged error heretofore available.

8 Who knows what that means. But all the rest of them
9 are pretty specific. Sentence expired, new evidence sort of
10 thing, sentence exceeds maximum, lack of jurisdiction. None
11 of those apply.

12 MR. HARRIS: You know, I think actually the
13 formulation in the ineffective assistance of counsel realm is
14 that that is not specifically enumerated either but we
15 recognize that the Constitution of the United States requires
16 that the defendant have effective assistance of counsel.

17 THE COURT: That would be under 1-A.

18 MR. HARRIS: Yes, sir.

19 THE COURT: All right. Well, I'm going to take it
20 under advisement.

21 (WHEREUPON, a brief bench conference was had.)

22 THE COURT: There is an issue of whether or not one
23 of the victim's family can make a statement. Usually we don't
24 do it at this juncture.

25 Looking at the South Carolina Constitution Article

1 1, Section 24 does allow a victim, which includes a person's
2 spouse, parent, child or lawful representative may be heard at
3 any proceeding involving a post-arrest release decision, a
4 plea or sentencing.

5 I don't know if technically that is any of those but
6 out of an abundance of caution I'll be glad to hear whatever
7 value they have, anything from somebody on behalf of the
8 victim's family would like to say. Whoever it is you can just
9 stand up and -- you want to take the stand or just tell me
10 from there?

11 FAMILY MEMBER VICTIM: I'd really rather take the
12 stand.

13 THE COURT: You can just stand right there, and we
14 need your name.

15 FAMILY MEMBER VICTIM: Your Honor, my name is Sandra
16 Morgan. I'm Angie Carter's mother. I've sat here all day,
17 and I know I don't see how you all do it.

18 I mean, I quit school in the tenth grade. I mean,
19 you all all college graduates, all the attorneys. To claim
20 ignorance of the law I always heard is not an excuse. Were it
21 my life on the line I would want to know for sure. I would
22 ask. This about not knowing he was going to get 25 years, I
23 would want it -- it would be all put in writing before me.

24 All I know is Mr. Heaton got an opportunity for a
25 trial, chose to plead guilty for a crime that he was obviously

1 guilty of. The wreck occurred seven miles from my house, one
2 tenth of a mile from my mother's driveway, which was where my
3 daughter was going.

4 By the time I got to the wreck -- and I got to the
5 wreck before the ambulance -- well, the ambulance drivers were
6 there. The paramedic was straddling Vanessa Rayfelt, that was
7 the other girl that was killed in the wreck, trying to get a
8 tube in her throat.

9 There was a white sheet in the floorboard of the
10 car. I was running trying to find my daughter. I ran to the
11 back of the nearest ambulance which is where Mr. Heaton was
12 sitting getting his foot rapped up, laughing. He was not
13 unconscious. He was very conscious at that point.

14 He got the benefit of a trial. He pled guilty. He
15 got a 40-year sentence.

16 Mr. Heaton, I got a 40-year sentence right along
17 with you. Whether you get post-conviction relief or not,
18 there's no post-conviction relief for my family.

19 There's no post-conviction relief for my
20 granddaughter, and now I have to hear her calling another
21 woman momma. She was 1 year and 9 and a half months old when
22 her momma got killed, and she was in the car with her. She
23 doesn't remember her momma. All she remembers is what I can
24 tell her.

25 You got 40 years. I got the rest of my life, and I

1 may not live 40 years more, but my granddaughter will. And
2 she'll live without knowing her momma.

3 Her brother will live 40 years longer. Their father
4 was killed when they was 1 and 2 years old. And they grew up
5 together, and you'll never find a brother and sister closer.
6 He'll live the rest of his life without his sister, and it
7 messed his life up, too.

8 We don't have the opportunity to get any relief.
9 This is my only relief, being able to address this Court, and
10 ask that the conviction stands.

11 I cannot see that there's anybody that could say
12 they were ignorant of the law to the point that they weren't
13 going to ask what they were going to receive if they pled
14 guilty. That's just inconceivable to me.

15 And that's all I got to say, Your Honor. And I just
16 hope that this conviction will stand, and at least my family
17 now after all these years of coming to court, we've come, I
18 think, 4 times this year. I don't know how many last year. I
19 missed my finals in school because I had to come to court,
20 make my finals up. I'm just glad -- I just want it to be over
21 and I want the conviction to stand as is.

22 I understand it. Like I said, tenth grade education
23 at the time of that trial. I don't know how far Mr. Heaton
24 went to school but I'm sure he understood it as well as I did.
25 He took his chance, he lost. Maybe it did surprise him.

1 Maybe it surprised everybody else. Maybe he got what he
2 deserved. Thank you.

3 THE COURT: Yes, ma'am, thank you.

4 All right. We'll stand adjourned until tomorrow at
5 9:30.

6 (WHEREUPON, the hearing was concluded.)

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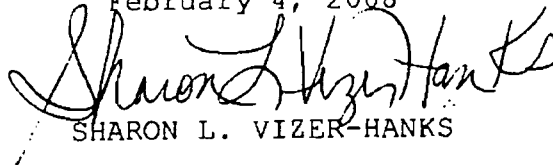
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I, Sharon L. Vizer-Hanks, Official Court Reporter
for the 10th Judicial Circuit of the State of South Carolina,
do hereby certify that the foregoing is a true, accurate and
complete transcript of record of all the proceedings had and
the evidence introduced in the hearing of the captioned case
in Circuit Court on the 15th day of November 2007.

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

February 4, 2008



SHARON L. VIZER-HANKS

CIRCUIT COURT REPORTER

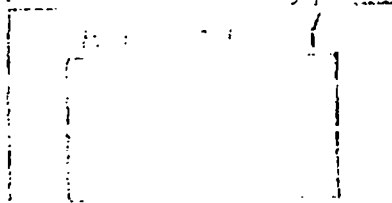
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2004-CP-04-0767
COUNTY OF ANDERSON	)	
	)	
Thomas Chad Heaton, # 291537	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Thomas Chad Heaton (hereinafter "Applicant") is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the January 2003 term of the Anderson County Grand Jury for felony DUI (03-GS-40-0264, 0265), possession of a controlled substance (03-GS-40-0262), and possession of a narcotic in schedule I (03-GS-04-263). He was represented by Robert Gamble, Esquire (hereinafter "Plea Counsel"). On March 11, 2003, Applicant pled guilty as indicted. He was sentenced by the Honorable J. Cordell Maddox, Jr. (hereinafter "Plea Judge") to six (6) months to run concurrent, two (2) years to run concurrent, and two twenty (20) year sentences to run consecutively. Applicant did not appeal his conviction or sentence.

This matter was heard at the Anderson County Courthouse on November 15, 2007.

Appearances are of record.

Applicant's allegations appear to be bundled under S.C. Code Ann. § 17-27-20(a)(1). That is, Applicant claims his conviction was in violation of the Constitution of the United States or the Constitution or Laws of the State of South Carolina. As stated by Applicant's post conviction relief counsel. Applicant claims his plea was not a voluntary plea.



Applicant alleges that he was not aware of the consequences of his plea, particularly that he could be sentenced to consecutive terms of imprisonment. Applicant claims that he thought his sentence would be ten (10) to twelve (12) years. Applicant's claims regarding the consequences of his plea and his understanding of the sentence he would receive are in essence claims of ineffective assistance of counsel.

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, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Butler, 334 S.E.2d at 814.

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. at 688. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of pleas counsel. First, 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, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced 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, 386 S.E.2d at 625. With respect to guilty plea counsel, 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, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

As to Applicant’s understanding that he would receive a ten to twelve year sentence, there is a conflict in the evidence. Applicant testified that Plea Counsel told him he would receive a sentence of ten to twelve years. Plea counsel denied making any such assurance, except in the context of a negotiated plea. From the record, no such offer was ever extended by the State. Plea Counsel had no recollection of conveying the aforementioned sentence range to Applicant. Additionally, Plea Counsel testified he told Applicant that he could receive up to fifty (50) years plus on the two felony DUI charges and the other charges. Plea Counsel testified he could not be sure that his advice as to the maximum or minimum sentence was “adequate.”

To the extent Applicant alleges ineffective assistance of counsel regarding Applicant’s understanding of the sentence he faced, he has failed to carry his burden of proof. The evidence produced at the post conviction relief hearing coupled with the transcript of Applicant’s plea of guilt and his General Sessions record as to those charges indicate he was advised that he was facing fifty years imprisonment. While the Plea Judge’s statement as to the potential sentences could have been more clearly conveyed, the Plea Judge told Applicant that the sentence range on each of the two felony DUI charges was twenty-five (25) years. (Plea Transcript, p. 6, ll. 5-8). Also, Applicant signed separate sentencing sheets for the felony DUI charges. Each states

thereon "max 1-25 years and \$10,000-\$25,000 fine" (the Court does not have the originals, but does have copies indicated to be "true copies").

The Court finds it telling that in his application for post conviction relief, Applicant never alleges he did not know he could receive consecutive sentences on the two felony DUI charges. His claim was that he thought he would get ten to twelve years, and in his application he states:

I was sentenced to 40 years imprisonment when I thought I was being sentenced to twelve years at the most. I would have only received ten additional years had I went to trial, been convicted and sentenced to the maximum. I would never have agreed to plead knowing the judge could sentence me (sic) maximum time.

This under oath averment reflects not that Applicant did not know the maximum time he was facing, but reflects his misapprehension as to what sentence he felt he would receive. Also, it reflects that he knew that his minimum sentence was fifty (50) years.²

Accordingly, I find Applicant has failed to carry his burden of proof and failed to convince the Court by a preponderance of the evidence that he was not adequately made aware he could be sentenced to up to fifty years on the two felony DUI charges.

In addition to Applicant's claims of ineffective assistance of counsel, Applicant alleges he is entitled to withdraw his plea because the record fails to show that Applicant affirmed the facts presented by the State at the plea. Essentially, Applicant contends he did not knowingly and voluntarily enter a plea of guilt.

A trial judge should not accept a guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). To knowingly and voluntarily enter a plea of guilt, the defendant must understand the following: (1) the nature and crucial elements of the charges; (2) the

²Reference to the sentencing sheets is appropriate, although it is clear that a signed sentencing sheet rises to the level of a contract. See State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct. App. 2006). At the least, a signed document should be construed as rising to the level of notice, even if the document is not a contract. Actually, fifty plus, because of the companion drug charge.

consequences of the plea; and (3) the constitutional rights he is waiving. State v. Rikard, 371 S.C. 295, 300-301, 638 S.E.2d 72, 75 (Ct. App. 2006) (citing Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001)). Moreover, the record in a guilty plea proceeding must establish a factual basis for the plea. Rikard, 638 S.E.2d at 75 (citing LoPiano v. State, 270 S.C. 563, 569, 243 S.E.2d 448, 451 (1978); State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975)). In accepting a guilty plea, "the trial judge is free to use any appropriate procedure for determining the accuracy of the guilty plea." Armstrong, 211 S.E.2d at 891.

In Rikard, the South Carolina Court of Appeals held that a post conviction relief applicant was not entitled to withdraw a guilty plea because of the trial judge's failure to make a finding on the record that the applicant accepted the facts presented by the State at the plea. See Rikard, 638 S.E.2d at 75-76. Although the applicant did not specifically acknowledge the accuracy of the State's recitation of the facts, he did not object at the hearing. Id. at 76. The plea record and the applicant's testimony indicated he was aware of the charges to which he pled and the potential sentences he faced as a result. Id. Further, the State presented a sufficient factual basis for those charges. Id.

Here, as in Rikard, the State put on the record the factual basis for the charges to which Applicant pled guilty. Here, as in Rikard, Applicant did not object to or challenge the State's factual presentation. Here, as in Rikard, the evidence indicates that Applicant was aware of the charges³ against him and the sentence he faced for those charges, and he pled guilty. Here, as in Rikard, the facts presented provided sufficient support for all of the charges to which Applicant pled guilty. The Plea Judge was not, as Applicant contends, required to make a finding of record at the hearing that Applicant accepted the facts presented at his plea. Id.

³ The "elements" issue is different and is addressed below.

Finally, Applicant contends he was not informed of the elements of the felony DUI charges. As to this claim, Applicant has carried his burden of proof. The record is void of any statement by the Plea Judge as to the elements of the two felony DUI charges. It is true that Applicant's Plea Counsel testified he told Applicant of the elements of the charges pending against him "in layman's terms." However, case law required the Plea Judge to clearly convey this information to Applicant, or to confirm through colloquy with Plea Counsel that Applicant understood the elements of the crimes to which he pled. State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993).

Plea Counsel told the trial judge that he discussed Applicant's rights and the facts of the case with Applicant, but this quantum of information is insufficient to support the requirement that one entering a plea know the elements of the crime to which he or she is pleading. (Plea Transcript, p. 8, ll. 3-51).

As to the companion drug charges to which Applicant pled guilty, it would appear that the Plea Judge informed Applicant of the elements of the diazepam charge, but did not inform Applicant as to the elements of the methadone charge. (Plea Transcript p. 8, ll. 18-20). Therefore, the diazepam charge is constitutionally and otherwise properly founded. The sentence for the diazepam charge was six months concurrent and has thus been fulfilled by Applicant. However, this does not moot the issue, but as to this indictment Applicant's claim for relief is denied and this claim is dismissed with prejudice.

The Applicant's plea as to the methadone charge must fail for the same reasons as do his pleas to the felony DUI charges.

In the scheme of things, it does seem somewhat incongruous that Applicant should get a new trial based on what appears to be a thread. However, our Courts have fashioned this thread

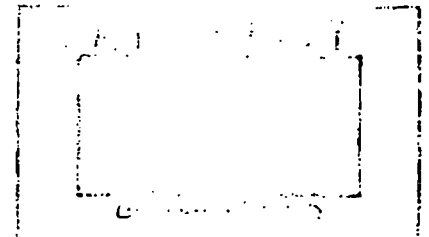
as a necessary component of a tapestry of a knowing and intelligent plea of guilt. Without this thread, the whole tapestry unravels and is ruined.

Wherefore, Applicant's application for post conviction relief is Granted as to charges on indictments 2003-GS-04-0263, 0264, and 0265. Applicant's pleas thereto are hereby set aside and the sentences thereunder are void. The indictments are reinstated, and Applicant is entitled to a new trial as to said indictments.

IT IS SO ORDERED

John C. Hayes, III
John C. Hayes, III
Presiding Judge #7

November 29th, 2007
York, South Carolina.



2007 DEC -3 A 11:40
CLERK OF COURT
COURT HOUSE
YORK, SOUTH CAROLINA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2004-CP-04-0767
COUNTY OF ANDERSON	)	
	)	
Thomas Chad Heaton, # 291537.	)	
	)	
Applicant,	)	MOTION TO ALTER OR AMEND
	)	JUDGMENT PURSUANT TO SCRCP
v.	)	59(e)
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, State of South Carolina, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, moves the Court to amend the judgment on the grounds that the Court erred in finding that Applicant's plea to the possession of methadone charge and the two felony DUI charges "must fail" because there is no indication on the record that Applicant was fully informed of the elements of these charges. As a threshold matter, the Order Granting Post-Conviction Relief was filed on December 3, 2007 (the "Order"), and received by Respondent on December 6, 2007. In support of the motion, Respondent shows the following to the Court:

First and foremost, Respondent asserts that the Order must be altered or otherwise amended because a guilty plea must rise and fall together. The individual parts of a plea cannot be dissected from one another, as it appears this Court is attempting to do. The Order states that Applicant's PCR application is granted with regard to the felony DUI charges and the possession of methadone charge, but not as to the possession of diazepam charge. When a plea agreement is reached as part of a negotiated "package deal", which allows Applicant to receive the benefit of a bargain, the plea must stand or fall together.

Secondly, Respondent submits that Applicant did not, in fact, carry his burden of proving that he was not fully informed of the elements of the felony DUI charges and the methadone charge. This Court seems to base its ruling entirely upon the fact that the record is devoid of any statements by the plea judge directly to Applicant or through colloquy with plea counsel that confirms Applicant's understanding of the elements of each crime to which he pled. However, Respondent respectfully submits that this Court failed to consider the record as a whole. When addressing PCR matters, the PCR court is to take, not only the plea transcript, but also the evidence and testimony presented at the PCR hearing. Respondent submits that a review of the record in its totality clearly establishes that Applicant's plea was knowingly, voluntarily, and freely given.

Respondent submits that this Court erroneously relies on State v. Ray, 310 S.C. 431, 437, 427 S.E. 2d 171 (1993) in finding that Applicant is entitled to a new trial. Ray more accurately stands for the proposition that the death penalty may be imposed when a defendant pleads guilty without expressly admitting guilt where the plea was knowingly and voluntarily entered. The Supreme Court, in Ray, is focused on the notion that the "paramount concern" for a reviewing court, when determining the validity of a guilty plea, is whether the plea was entered freely and voluntarily. Ray, 310 S.C. 431 at 435, 427 S.E.2d 171 at 173. The Court, in Ray, is concerned with ensuring that the plea was freely and voluntarily entered; not that the plea transcript was totally mistake free.

In fact, it is necessary only that the record reveals an affirmative awareness of the consequences of the guilty plea. LoPiano v. State, 270 S.C. 563, 243 S.E2d 448 (1978). No specific inquiry by the plea judge is mandated, and the judge is not required to direct the defendant's attention to each and every right and obtain a separate waiver as to each

as long as the record indicates the defendant was fully aware of the consequences of the plea. In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998); Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); see also Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999). Likewise, Respondent submits that there is no specific mandate that each element of a crime be discussed on the record if it is clear, as in this case, that Applicant understood the charges against him, the consequences of his plea, and that Applicant intended to plead guilty.

The United States Supreme Court has stated that “[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction: nothing remains but to give judgment and determine punishment.” Boykin v. Alabama, 395 U.S. 238, 242 (1969); see also In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998). “All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001), citing Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

Contrary to this Court’s findings, a full review of the record, including the testimony presented at the PCR hearing, clearly indicates Applicant’s desire to plead guilty. Applicant informed the plea court that he understood the charges against him; that he understood his constitutional rights and chose to waive them; and that he had not been threatened or coerced into pleading guilty. Furthermore, Applicant stated that he was pleading guilty because he was, in fact, guilty of all charges. (Tr. p. 6-8).

Furthermore, Respondent submits that this Court incorrectly found that the record was void of confirmation that Applicant understood the elements of each charge against him. A complete review of the plea transcript and the testimony of plea counsel at the PCR hearing indicate that Applicant was fully advised of, and understood, the elements of each crime with which he was charged. The plea court asked plea counsel if he felt that Applicant understood his waiver of constitutional rights. Plea counsel responded by explaining to the court that he and Applicant had reviewed "completely the facts of this case and his rights". (Tr. p. 8). Plea counsel further informed the court that he went over the facts of the case against Applicant with Applicant's family; and that everyone, including Applicant, understood. (Tr. p. 8). Clearly, colloquy between the plea court and plea counsel existed that, while perhaps not as thorough as this Court would have liked, suggests that Applicant was advised of the elements of each charge.

In conjunction with the transcript, this Court must consider plea counsel's testimony at the PCR hearing. Counsel testified that he went over "in layman's terms" the elements of each charge with Applicant. Counsel's testimony is further evidence that Applicant's plea was knowingly and voluntarily entered. This Court made no finding that Applicant's testimony was more credible than that of plea counsel. Respondent submits that Applicant has failed to carry his burden of proof.

Additionally, Applicant provided no evidence that counsel did not go over the elements with him. In fact, Applicant did not even raise this issue in his application. Respondent submits that post-conviction relief should not be granted on a ground not raised by Applicant. Furthermore, the record in this matter suggests that Applicant had access to the true-billed indictments against him prior to his plea.

The record before this Court further shows that Applicant acknowledged his guilt. Applicant admitted his guilt at the plea. (Tr. p. 8). Applicant also testified at the PCR hearing that he knowingly took drugs and drank a large quantity of alcohol; and that he got behind the wheel of his truck and drove; which directly resulted in him being charged with two felony DUI- death resulting and two possession of controlled substance charges. Where there is such overwhelming evidence of guilt, as in this case, no prejudice exists. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State 305 S.C. 365, 409 S.E.2d 344 (S.C., 1991). In Ford, the Court found that Applicant had failed to meet the second prong of Strickland, and his PCR, therefore, should be dismissed. The overwhelming evidence in this case, requires a similar finding as the one in Ford.

The State, therefore, submits that the post-conviction relief court misapprehended the facts of this case and erred in granting post-conviction relief.

(intentionally left blank)

WHEREFORE, Respondent respectfully requests the Court to amend the Final
Order.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DANIEL E. GRIGG
Assistant Attorney General

BY: 
ATTORNEYS FOR RESPONDENT

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

Columbia, South Carolina
December 12, 2007.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
C.A. No. 2004-CP-04-0767

Thomas Chad Heaton, #291537

Applicant

v.

State of South Carolina,

Respondent.

ORDER

The Court issued an Order herein filed December 3, 2007. The State has filed a Rule 59(e) South Carolina Rules of Civil Procedure Motion to Alter or Amend. This order disposes of the State's motion.

The Court granted, partially, Applicant's application for post-conviction relief. The State asserts error in the Court's rationale and conclusions upon which its Order is based.

Initially, the State posits that a plea "must stand or fall together" when a plea is entered as a "package deal." No authority is cited for this proposition, and the Court's research has provided no guidance on this issue. The Court also questions how this rule would benefit the State. Under the State's position any error would vitiate the plea. One cannot intellectually argue that a partial properly entered plea somehow clothes an error with respectability and warrants a defective plea to stand on the proper plea. This is akin to arguing that a three legged stool with two legs missing can stand on its one leg.

In Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (Sup. Ct. 2000) our Supreme Court stated:

Before a court can accept a guilty plea, a

defendant must be advised of the constitutional rights he or she is waiving. In addition to the requirements of Boykin,¹ a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense . . . (emphasis the Court's), 535 S.E.2d at 651).

As to the elements of the offense to which one is entering a plea, the Court states the defendant "must" be aware of the "crucial elements" of the offense. The Anderson Court found that the trial judge's failure to include the elements of "heat of passion" and "provocation" did not induce Anderson's guilty plea.

The Anderson case appears to be the bedrock upon which State v. Rikard, 371 S.C. 295, 638 S.E.2d 72 (Ct.App. 2006) and Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (Sup.Ct. 2001) stand. This line of cases,² the Court believes, require that the trial court must be certain that a pleading defendant understands the charge to which he or she is pleading. The Court may establish this through a colloquy with the defendant or counsel. (See Rikard) This requirement falls under the Due Process Clause³ rather than the sixth amendment right to counsel.⁴ Therefore, the issue on this front is not one of ineffective assistance of counsel but is whether or not a defendant has voluntarily, knowingly, and intelligently entered his plea. Boykin, *supra*.

State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (Sup.Ct. 1976) requires the record to reflect that the trial court "has assured itself that the plea [is] voluntary and intelligently entered with full knowledge of the nature of the offense". (emphasis

¹ Boykin v. Alabama, 395 U.S. 238 (1969).

² At least two cases precede Anderson, but it is in Anderson that the Court highlights the requirement for that the "crucial elements" be understood by the defendant. See State v. Hazel, 275 S.C. 292, 271 S.E.2d 602 (Sup.Ct. 1980) and State v. Dover, 304 S.C. 433, 405 S.E.2d 391 (Sup.Ct. 1991).

³ Fifth Amendment to the Constitution of the United States; Article I, Section 3, to the Constitution of the State of South Carolina.

⁴ Sixth Amendment to the Constitution of the United States; Article I, Section 3, to the Constitution of the State of South Carolina through the Fourteenth Amendment to the Constitution of the United States.

supplied). Lambert does not require the trial court to express the defendant's rights with "precise language." However, it is clear that the nature of the offense must be conveyed to the defendant by the court or that trial counsel must establish that he or she has conveyed to the defendant information as to the nature of the offense to which he is pleading to the extent that the defendant has "full knowledge of the nature of the offense". Lambert, *supra*.

The Court has again scoured the record and the plea transcript for evidence that Applicant knew at the time of his plea the crucial elements of Felony Driving Under the Influence and drug possession. As charged, the elements of the offense are that Applicant, while under the influence of intoxicants, drove a vehicle and while driving did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused a death. *See* Indictments and Section 56-05-2945(A)(2), S.C. Code of Laws, 1976, as amended.

The State argues that the record "suggests" that Applicant had access to the true-billed indictments against him prior to his plea. The Court suggests that the State should have in its brief pointed to evidence supporting its supposition. The Court must acknowledge that Applicant "had access" to his indictments. The Court suggests he also had access to the South Carolina Code of Laws and both the United States and South Carolina Constitutions. The Court suggests not even the State would argue such "access" would void an obligation established by Boykin. However, this general "access" is, according to the State, sufficient to establish full knowledge of the elements of the charges Applicant was facing. If this is the case, then all of the cases cited above relating to the "full knowledge" requirement are a waste of ink. The Court suggests that the

defendants Hazel, Anderson, Rikard and Rollison, suggests had the same "access" to their indictments as did Applicant.

Next, the State "suggests" the record establishes that Applicant "was advised of the elements of each charge." The court suggests it has considered all the legs which the State uses for support of its suggestions and found them not to comply with our state's requirement that a defendant entering a plea do so knowing the elements of the charge to which he is pleading.

As stated above, the Court has re-read the record. The trial judge has still not explained to Applicant the element of the charges to which he was entering pleas. The statement by trial counsel at page 8, lines 5-8 still does not give the Court comfort that prior to his plea anyone, trial counsel included, explained to Applicant, not his rights, not the facts, but the elements of the charges he was facing.

The State asserts the Court did not consider the record as a whole. Contrariwise, the Court here affirmatively states it did consider the record as a whole and found the record (tapestry) to be threadbare.

As to the credibility of trial counsel's testimony, the Court finds it entirely credible, just lacking in essential evidence. The Court believes trial counsel did exactly what he stated on the record. The Court found, and here again finds, this evidence, though credible, does not establish that anyone at any time informed Applicant of the crucial elements of the charges to which he pled.

Here, as the State argues, Applicant admitted his guilt to a set of facts. The problem is the record does not establish that he knew those facts to which he admitted

and pled constituted a crime. In fact. Applicant never acknowledged the truth of the facts presented by the State and pled guilty only to this:

The Court: All right. Mr. Heaton. on 2003-GS-04-265,
which is a felony D.U.I. death, and 2003-GS-04-264,
which is also a felony D.U.I. death, do you want to
plead guilty?

The witness: Yes, sir.

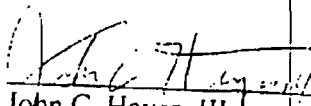
The Court: And, are you guilty?

The witness: Yes. (Plea TR, p. 811, LL 12-17)

The Court needs to make it clear the granting of Applicant's application is not based on ineffective assistance of counsel, but on the basis that his plea did not comport with and was thus in violation of the Constitution of the United States or the Constitution or laws of the State of South Carolina pursuant to Section 17-27-20(A)(1), South Carolina Code of Laws, 1976, as amended.

Wherefore, the State's motion to alter or amend this Court's Order granting partial relief to Applicant is DENIED.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

December 27, 2007
York, South Carolina

ARREST WARRANT

I-137117

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

THE STATE

against

HEATON, THOMAS C

Address:

TOWNVILLE, SC 29689-0000

 Date: _____ SSN: _____
 Sex: M Race: W Height: 5 9 Weight: 170

DL State: _____ DL#: _____

DOB: 4/14/1974 Agency ORI#: HP03Prosecuting Agency: HWY PATROL DEPTProsecuting Officer: HANKS, BRAD
 Offense: DUI/FELONY DRIVING UNDER
THE INFLUENCE, Offense Code: 0395
Code/Ordinance Sec. 56052945A2This 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 HEATON, THOMAS C

in _____

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

AFFIDAVIT

 Form Approved
 S.C. Attorney G.
 July 26, 1999
 SC11A 518
Personally appeared before me the affiant T.B. HANKS/SCHPbeing duly sworn deposes and says that defendant HEATON, THOMAS Cdid within this county and state on 9/09/2002

violate the criminal laws

State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____)

in the following particulars:

**DESCRIPTION OF OFFENSE: DUI/FELONY DRIVING UNDER THE INFLUENCE,
 DEATH RESULTS.**

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

 THAT THE DEFENDANT, THOMAS CHAD HEATON, WHILE DRIVING A VEHICLE
 WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS CAUSED THE
 DEATH OR ANOTHER PERSON OTHER THAN HIMSELF. THIS OFFENSE
 OCCURRED ON SECONDARY 23, OLD DOBBINS BRIDGE RD. IN ANDERSON
 COUNTY.

 Sworn to and subscribed before me)
 on 9/12/2002)

Signature of Affiant

_____ (L.S.)

Affiant's Address 331 US 29 N And SC 29689

Signature of Issuing Judge

Affiant's telephone _____

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

CASE NUMBER

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
 on 9/09/2002 defendant HEATON, THOMAS C

did violate the criminal laws of the State of South Carolina (or ordinance of _____)

☐ County/ ☐ Municipality of _____) as set forth below:

**DESCRIPTION OF OFFENSE: DUI/FELONY DRIVING UNDER THE INFLUENCE,
 DEATH RESULTS.**

 Now, therefore, you are empowered and directed to arrest the said defendant and bring him or
 before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
 defendant at the time of its execution, or as soon thereafter as is practicable.

 Signature of Issuing Judge
 Judge Code: 733

 Judge's Address POB 8002, 107 S. MAIN ST.
 (L.S.) ANDERSON SC 29622
Judge's Telephone 260-4156
 Issuing Court: ☒ Magistrate ☐ Municipal ☐ C

ORIGINAL

BAIL set by

nd Amount:

of Surety:

PRELIMINARY HEARING held at

e Attorney:

n:

DISPOSITION before

ile jury trial, bench trial, plea, nol.pros., etc.)

ion:

e:

JURORS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

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Name:

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Telephone:

Name:

Address:

Telephone:

CODEFENDANTS

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

STATE v THOMAS C HEATON

AKA: _____

Race/Sex: W M Age: 27

DOB: 04/14/74 SSN: _____

DL# 4077367

SID: _____

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT/CASE #

) 2003-GS-04-2005

) A/W#: 1137117

) Date of Offense: 09/09/02

) S.C. Code: 56-05-2945 CDR Code #: 0395

) CASE RESTORED ☐

) SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

FELONY DWI - Death Rank 1-25 years

in violation of 56-05-2945 of the S.C. Code of Laws, bearing CDR Code #: 0395

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Kathy M. Phillips
Solicitor

Thomas Chad Heaton
Defendant

Robert H. Hinkle
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 20 days/month/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 182 days/months/jail time.

☒ CONCURRENT or ☒ CONSECUTIVE to sentences on: 264

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine.....	\$	
14-1-206 - Assessments (107.5%)	\$	
14-1-211 (A)(1) Surcharge	\$	100.
14-1-211 (A)(2) Surcharge	\$	
56-5-2995 (DUI)	\$	12.
3% County(if Paid in Installments)	\$	
Public Defender Fund.....	\$	
TOTAL	\$	112.

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

Cathy M. Phillips

Clerk of Court/Deputy Clerk

JUDGE Paul Hinkle Code #: 113

Sentence Date 2/10/03

WITNESSES
T HANKS - SCHP

DOCKET NO. 2003-GS-04-265

The State of South Carolina,
ANDERSON

County of _____

COURT OF GENERAL SESSIONS

JAN 2 8 2003

TERM _____

KJH

THE STATE

vs.

THOMAS CHAD HEATON

3-10-03

A TRUE COPY

MAR 11 2004

Clerk of Court

ACTION OF GRAND JURY

George Reed
Foreman of Grand Jury
1/29/03

VERDICT

Foreman of Petit Jury

Date:

Indictment for
FELONY DUI - DEATH RESULTING

56-05-2945 (A) (2) [0395]

BRUANNE WHITE, SOLICITOR

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

INDICTMENT FOR

FELONY DUI - DEATH
 56-5-2945 (A)(2)[0395]

At a Court of General Sessions, convened on JAN 28 2003,
 the Grand Jurors of ANDERSON County present upon their oath:

FELONY DUI - DEATH

That Thomas Chad Heaton, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, did in Anderson County on or about September 9, 2002, drive a vehicle and while driving did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused death to Venissa Rehfeldt. All in violation of Section 56-05-2945 (A) (2) [0395], 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.

 SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

STATE v THOMAS CHAD HEATON

AKA: _____

Race/Sex: W M Age: 28

DOB: 01/14/74 SSN: _____

DL# 4077367 SID: SC00961467

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

20 03 -GS-04- 3122

AW#: Detect. [unclear]

Date of Offense: 09/09/02

S.C. Code: 44-53-0370 CDR Code #: 0179

CASE RESTORED ☐

SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Possession of Controlled Substance, Degree 1, Sch. II

in violation of 44-53-370(1)(i) of the S.C. Code of Laws, bearing CDR Code #: 011717

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

Kathleen Hodges
Solicitor

Thomas Chad Heaton
Defendant

Robert J. Fable
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 6 days/months/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 363, 364, 365
☒ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied
by the State Department of Corrections

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine.....	\$ _____
14-1-206 - Assessments (107.5%)	\$ _____
14-1-211 (A)(1) Surcharge	\$ <u>100</u>
14-1-211 (A)(2) Surcharge	\$ _____
56-5-2995 (DUI)	\$ _____
3% County (if Paid in Installments)	\$ _____
Public Defender Fund.....	\$ _____
TOTAL	\$ _____

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Report: Deborah Schmidt

Code # _____

PTUP _____ time served pursuant to S.C. Code 24-13-40 to
_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing MARK 10 2007

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

\$ _____ paid to Public Defender Fund

Other: _____

JUDGE Paula Hall Code #: 1631

Sentence Date 3/10/03

WITNESSES
T HANKS S CHP

DIRECT
ARREST WARRANT NO. INDICTMENT

ACTION OF GRAND JURY

George Reed
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

DOCKET NO. 2003-GS-04-262

The State of South Carolina,
ANDERSON

County of _____

COURT OF GENERAL SESSIONS

JAN 28 2003

TERM _____

KJH

THE STATE

THOMAS CHAD HEATON

Indictment for
POSSESSION OF CONTROLLED SUBSTANCES

44-53-0370(D)(1)[0179]

DRUANNE WHITE, SOLICITOR

3-10-03

A TRUE COPY

MADE 11 11 2003

CERTIFIED TRUE COPY

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR
POSSESSION OF COCAINE
44-53-0370(D)(1)[0179]

At a Court of General Sessions, convened on JAN 28 2003
the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CONTROLLED SUBSTANCES

SCHEDULE I - IV

That Thomas Chad Heaton, did in Anderson County on or about September 9, 2002, knowingly and intentionally possess a quantity of Diazepam, a Schedule IV narcotic under provisions of 44-53-110, *et, seq. Code of Laws of South Carolina* (1976), as amended, such possession not having been authorized by law.

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

SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

STATE v THOMAS CHAD HEATON

AKA: _____

Race/Sex: W M Age: 28

DOB: 01/14/74 SSN: _____

DL# 4077367

SID: SC00961467

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

20-03-GS-04-1163

AW#: Durham

Date of Offense: 09/09/02

S.C. Code: 44-53-0370 CDR Code #: 0179

CASE RESTORED ☐

SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Possession of Controlled Substance, Schedule II

in violation of 44-53-370(C) of the S.C. Code of Laws, bearing CDR Code #: 0179

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Kathy J. Hodges
Solicitor

Thomas Chad Heaton
Defendant

Robert A. Gable
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,

☐ County Detention Center, for a determinate term of 2 days/month/years or

☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.

Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 202 - 205

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

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine	\$
14-1-206 - Assessments (107.5%)	\$
14-1-211 (A)(1) Surcharge	\$100.
14-1-211 (A)(2) Surcharge	\$
56-5-2995 (DUI)	\$
3% County(if Paid in Installments)	\$
Public Defender Fund	\$
TOTAL	\$

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter Debra L. Schmidt

PTUP _____ time served pursuant to S.C. Code 24-13-40 to _____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

JUDGE Paul H. Gable Code #: 1131

Sentence Date 3/10/03

WITNESSES
T HANKS - SCHP

DOCKET NO. 2003-ES-04-263

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

JAN 28 2003

TERM

A TRUE COPY
MAY 10 2003

ARREST WARRANT NO. DIRECT
INDICTMENT

KJH

THE STATE

THOMAS CHAD HEATON

ACTION OF GRAND JURY

Gary R. L. TRUE BILL
DATE 1/23/03
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

Date:

Indictment for

POSSESSION OF CONTROLLED SUBSTANCES

44-53-0370(D)(1)(017) 10-21-03

DRUANNE WHITE. SOLICITOR

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

INDICTMENT FOR
 POSSESSION OF COCAINE

44-53-0370(D)(1)(017) 174 4-31-03/1/03

At a Court of General Sessions, convened on JAN 28 2003,
 the Grand Jurors of ANDERSON County present upon their oath:

POSSESSION OF CONTROLLED SUBSTANCES

SCHEDULE I - IV

That Thomas Chad Heaton, did in Anderson County on or about September 9, 2002, knowingly and intentionally possess a quantity of Methadone, a Schedule II narcotic under provisions of 44-53-110, et, seq. *Code of Laws of South Carolina* (1976), as amended, such possession not having been authorized by law.

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

Thomas Chad Heaton
 SOLICITOR

WITNESSES
T HANKS - SCHP

DOCKET NO. 2003-1-04-264

The State of South Carolina,
ANDERSON

County of _____

COURT OF GENERAL SESSIONS

JAN 28 2003

TERM _____

A TRUE COPY 144

MAR 11 2003

C. H. H. H. H.

3-10-03

I-137102

ARREST WARRANT NO. _____

KJH

THE STATE

vs.

THOMAS CHAD HEATON

ACTION OF GRAND JURY

TRUE BILL
DATE

1/28/03

Foreman of Grand Jury

VERDICT

Indictment for
FELONY DUI - DEATH RESULTING

56-05-2945 (A) (2) [0395]

Foreman of Petit Jury

Date: _____

BRUANNE WHITE, SOLICITOR

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

INDICTMENT FOR
 FELONY DUI - DEATH
 56-5-2945 (A)(2)[0395]

At a Court of General Sessions, convened on JAN 28 2003
 the Grand Jurors of ANDERSON County present upon their oath:

FELONY DUI - DEATH

That Thomas Chad Heaton, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, did in Anderson County on or about September 9, 2002, drive a vehicle and while driving did an act forbidden by law and/or neglected a duty imposed by law in the driving of the vehicle, which act or neglect proximately caused death to Angela Carter. All in violation of Section 56-05-2945 (A) (2) [0395], 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.

 SOLICITOR

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
STATE v THOMAS CHEATON

AKA: _____

Race/Sex: W M Age: 27

DOB: 04/14/74 SSN: _____

DL# 4077367 SID: _____

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT/CASE #

) 20 03 -GS-04-264

) A/W#: I137102

) Date of Offense: 09/09/02

) S.C Code: 56-05-2945 CDR Code #: 0395

) CASE RESTORED ☐

) SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Felony DUI - Drunk

Max. 1-35 years

in violation of 56-05-2945 of the S.C. Code of Laws, bearing CDR Code #: 0395

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

Kathleen Hodges
Solicitor

Thomas Cheaton
Defendant

Robert H. Hamble
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 20 days/months/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 182 days/months jail time.

☒ CONCURRENT or ☒ CONSECUTIVE to sentences on: 265

SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine..... \$ _____
14-1-206 - Assessments (107.5%) \$ _____
14-1-211 (A)(1) Surcharge \$ 100.
14-1-211 (A)(2) Surcharge \$ _____
56-5-2995 (DUI) \$ 12.
3% County (if Paid in Installments) \$ _____
Public Defender Fund..... \$ _____
TOTAL \$ 112.

Cathy M. Phillips

Clerk of Court/Deputy Clerk

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

JUDGE Cathy M. Phillips Code #: 134

ARREST WARRANT

I-137102

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

 THE STATE
against

HEATON THOMAS C

 Address: TOWNVILLE, SC 29689-0000

 Phone: SSN:
☒ M Race: W Height: 5 9 Weight: 170
DL State: SC DL#: 004077367DOB: 4/14/1974 Agency ORI#: HP03Prosecuting Agency: HWY PATROL DEPTProsecuting Officer: HANKS, BRADOffense: DUI/FELONY DRIVING UNDERTHE INFLUENCE, Offense Code: 0395Code/Ordinance Sec. 56052945A2This 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.)

RETURN

 A copy of this arrest warrant was delivered to
defendant HEATON, THOMAS C
on
T.B. Hanks SCHP
Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

AFFIDAVIT

 Form Approved
S.C. Attorney C
July 26, 1992
SCCA 518

 Personally appeared before me the affiant T.B. HANKS/SCHP
being duly sworn deposes and says that defendant HEATON, THOMAS C
did within this county and state on 9/09/2002 violate the criminal laws

 State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of
in the following particulars:

 DESCRIPTION OF OFFENSE: DUI/FELONY DRIVING UNDER THE INFLUENCE,
DEATH RESULTS.

 I further state that there is probable cause to believe that the defendant named above did commit the
set forth and that probable cause is based on the following facts:
THAT THE DEFENDANT, THOMAS CHAD HEATON, WHILE DRIVING A VEHICLE
WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS CAUSED THE
DEATH OF ANOTHER PERSON OTHER THAN HIMSELF. THIS OFFENSE
OCCURRED ON SECONDARY 23, OLD DOBBINS BRIDGE RD. IN ANDERSON
COUNTY.

A TRUE COPY

Sworn to and subscribed before me)

on 9/10/2002)

Signature of Affiant)

Affiant's Address 331 US 27 N ANDERSON SC)

Signature of Issuing Judge (L.S.))

Affiant's telephone (864) 260-2200

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ANDERSON

** CASE NUMBER

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
on 9/09/2002 defendant HEATON, THOMAS C
did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☐ Municipality of) as set forth below:

 DESCRIPTION OF OFFENSE: DUI/FELONY DRIVING UNDER THE INFLUENCE,
DEATH RESULTS.

 Now, therefore, you are empowered and directed to arrest the said defendant and bring him
before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered
defendant at the time of its execution, or as soon thereafter as is practicable.

James Busby
Signature of Issuing Judge
Judge Code: 733

 Judge's Address POB 8002, 107 S. MAIN ST.
(L.S.) ANDERSON SC 2962
Judge's Telephone 260-4156
 Issuing Court: ☒ Magistrate ☐ Municipal ☐

ORIGINAL

BAIL set by

James A. Carr

Officer

nd Amount:

Demo

if Surety:

PRELIMINARY HEARING held at

Attorney:

1:

DISPOSITION before

e jury trial, bench trial, plea, nol.pros., etc.)

on:

JURORS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

CODEFENDANTS

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 04/27/04
 OMCOMITA RELEASE DATE SCREEN SUMMELI
 SCDC# > 291537 LOC: MCCORMICK
 HEATON, THOMAS CHAD SCDC CLASSIFICATION... NON-VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL PREDATOR...: NOT APP
 DNA STATUS...: N/A
 TOTAL SENTENCE...: 040-00-000 CONSECUTIVE SENTENCE ...: N
 CURRENT SENTENCE: 040-00-000 CURRENT SENT START DATE: 09/09/2002
 PROJECTED COMPLETION DATES
 MAXOUT DATE: 08/31/2036 CURRENT EWC ..: 3 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

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
 TOTAL EARNED WORK CREDITS ...: 000140 LABOR CREW DISQ REASON:
 TOTAL EDUCATION CREDITS: 000000
 TOTAL EXTRA EARNED CREDITS ..: 000
 TOTAL SERVICE TIME EARNED ...: 000588

PFKEYS: 5: HISTORY OF DATE CHANGES

4-9 1 Sess-1 167.7.50.33 TNET0713 3/11

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

STATE v THOMAS CHAD HEATON

AKA: _____

Race/Sex: W M Age: 28

DOB: 01/14/74 SSN: _____

DL# 4077367

SID: SC00961467

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

20 03 -GS-04-262

AW#: Direct Indictment

Date of Offense: 09/09/02

S.C. Code: 44-53-0370 CDR Code #: 0179

CASE RESTORED ☐

SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Possession of Controlled Substance, Dinepan Sch. IV

in violation of 44-53-370 (D)(1) of the S.C. Code of Laws, bearing CDR Code #: 011719

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

Cathy M. Phillips
Solicitor

Thomas Chad Heaton
Defendant

Robert J. Suble
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 6 days/months/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 263, 264, 265
☒ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied
by the State Department of Corrections

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine.....	\$
14-1-206 - Assessments (107.5%)	\$
14-1-211 (A)(1) Surcharge	\$ 100.
14-1-211 (A)(2) Surcharge	\$
56-5-2995 (DUI)	\$
3% County(if Paid in Installments)	\$
Public Defender Fund.....	\$
TOTAL	\$

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Report: Reborah Schmidt

Code #: _____

PTUP _____ time served pursuant to S.C. Code 24-13-40 to
_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

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

\$ _____ paid to Public Defender Fund

Other: _____

MAR 11 2003

CLERK OF COURT

JUDGE Robert J. Suble

Code #: 113A

Sentence Date 3/10/03

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

STATE v THOMAS CHAD HEATON

AKA:

Race/Sex: W M Age: 28

DOB: 01/14/74 SSN:

DL# 4077367

SID: SC00961467

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

20 03-GS-04- 263

AW#: Direct Indictment

Date of Offense: 09/09/02

S.C Code: 44-53-0370

CDR Code #: 0179

CASE RESTORED ☐

SENTENCE:

☒ PLEA

☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Possession of Controlled Substance Methadone, Sch. II

in violation of 44-53-370 (C) of the S.C. Code of Laws, bearing CDR Code #: 011719

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

Kathy M. Phillips
Kathy M. Phillips
Solicitor

Thomas Chad Heaton
Defendant

Robert A. Gunkle
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,

☐ County Detention Center, for a determinate term of 2 days/month/years or

☐ under the Youthful Offender Act not to exceed years and/or 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 of South Carolina Department of Probation.

Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 263, 264, 265

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

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ plus 20% fee \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine.....	\$
14-1-206 - Assessments (107.5%)	\$
14-1-211 (A)(1) Surcharge	\$100.
14-1-211 (A)(2) Surcharge	\$
56-5-2995 (DUI)	\$
3% County(if Paid in Installments)	\$
Public Defender Fund.....	\$
TOTAL	\$

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter *Deborah Schmidt* Code #: 11

PTUP time served pursuant to S.C. Code 24-13-40 to

days/hours Public Service Employment

Obtain GED

Attend Voc Rehab, or Job Corps

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be paid in equal consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other:

MAR 11 2003

Cathy M. Phillips
CLERK OF COURT

JUDGE *Paul Hall* Code #: 113/1

Sentence Date 3/10/03

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
STATE v THOMAS C HEATON

AKA: _____

Race/Sex: W M Age: 27

DOB: 04/14/74 SSN: _____

DL# 4077367

SID: _____

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT/CASE #

20 03 -GS-04-264

) A/W#: 1137102

) Date of Offense: 09/09/02

) S.C Code: 56-05-2945

CDR Code #: 0395

) CASE RESTORED ☐) SENTENCE: ☒ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Felony DUI - Death

Max: 1-25 years

in violation of 56-05-2945 of the S.C. Code of Laws, bearing CDR Code #: 0395
And \$10,000 to \$25,000 fine

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.Plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Kathleen J. Hodges
Solicitor

Thomas C. Heaton
Defendant

Robert H. Gable
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 20 days/month/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 182 days/months jail time.

☒ CONCURRENT or ☒ CONSECUTIVE to sentences on: 265

SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine.....	\$	_____
14-1-206 - Assessments (107.5%)	\$	_____
14-1-211 (A)(1) Surcharge	\$	100.
14-1-211 (A)(2) Surcharge	\$	_____
56-5-2995 (DUI)	\$	12.
3% County(if Paid in Installments)	\$	_____
Public Defender Fund.....	\$	_____
TOTAL	\$	112.

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter: *Deborah Schmidt*

PTUP _____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Cathy M. Phillips
CLERK OF COURT

JUDGE *Paul Waller* Code #: 1131Sentence Date 3/10/03

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
STATE v THOMAS C HEATON

AKA: _____

Race/Sex: W M Age: 27

DOB: 04/14/74 SSN: _____

DL# 4077367

SID: _____

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT/CASE #

) 2003-GS-04-265

) A/W#: 1137117

) Date of Offense: 09/09/02

) S.C Code: 56-05-2945 CDR Code #: 0395

) CASE RESTORED ☐

) SENTENCE: ☒ PLEA ☐ TRIAL



In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO:

Felony DUIS - Death

Max: 1-25 years

in violation of 56-05-2945 of the S.C. Code of Laws, bearing CDR Code #: 0395 And \$10,000 - \$25,000 fine

☐ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Kathy J. Hodges
Solicitor

Thomas Chad Heaton
Defendant

Robert A. Phillips
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,
☐ County Detention Center, for a determinate term of 20 days/month/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ The Defendant is to be given credit for 182 days/months/jail time.

☒ CONCURRENT or ☒ CONSECUTIVE to sentences on: 264

SPECIAL CONDITIONS:

☐ RESTITUTION ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine..... \$ _____
14-1-206 - Assessments (107.5%) \$ _____
14-1-211 (A)(1) Surcharge \$100.
14-1-211 (A)(2) Surcharge \$ _____
56-5-2995 (DUI) \$12.
3% County(if Paid in Installments) \$ _____
Public Defender Fund..... \$ _____
TOTAL \$112.

Cathy M. Phillips

Clerk of Court/Deputy Clerk

Court Reporter: Deborah L. Schmidt

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

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

\$ _____ paid to Public Defender Fund.

Other: _____

MAR 11 2003

Cathy M. Phillips
CLERK OF COURT

JUDGE: Paul Walker Code #: 1131

Sentence Date 3/10/02

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-CP-04-00767

Thomas Chad Heaton,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

DANIEL E. GRIGG
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

- I. Did the PCR court err in finding that Respondent's Constitutional rights had been violated because plea counsel and the plea court failed to explain the elements of each charge against Respondent and the possible sentences that he was facing, which resulted in a plea that was not knowingly and voluntarily entered into?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Respondent was indicted at the January 2003 term of the Anderson County Grand Jury for possession of controlled substance (03-GS-40-0262), possession of narcotic in schedule 1(B) (03-GS-04-0263), and two counts of felony DUI (03-GS-40-0264, 0265). He was represented by Robert Gamble, Esquire. On March 11, 2003, Respondent pled guilty as indicted. He was sentenced by the Honorable J. Cordell Maddox to six (6) months to run concurrent, two (2) years to run concurrent, and two twenty (20) year sentences to run consecutively. Respondent did not appeal his conviction or sentence.

Respondent filed an application for post conviction relief on March 5, 2004. In his application, Respondent alleged that he was being held in custody unlawfully for the following reasons:

I. Ineffective assistance of counsel.

Petitioner made its Return on June 25, 2004. A hearing was convened at the Anderson County Courthouse, on November 15, 2007, before the Honorable John C. Hayes, III. By Order dated November 29, 2007, Judge Hayes granted Respondent's post-conviction relief request. Petitioner made a Motion to Alter or Amend Judgment Pursuant to SCRCP 59(e) on December 12, 2007. By Order dated December 27, 2007, Judge Hayes denied Petitioner's motion.

Petitioner timely filed a Notice of Appeal and this appeal follows.

ARGUMENT

- I. **The PCR court erred in finding that Respondent's Constitutional rights had been violated because plea counsel and the plea court failed to explain the elements of each charge against Respondent and the possible sentences that he was facing, which resulted in a plea that was not knowingly and voluntarily entered.**

The proper standard for review in this matter is whether there is "any evidence of probative value" to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992). Petitioner submits that a review of the complete record, including the testimony presented at the PCR hearing, will clearly show that zero evidence of probative value exists upon which this Court could uphold the PCR court's findings. First, Respondent's plea must rise and fall as a whole. Second, Respondent's plea was voluntarily, knowingly, and intelligently entered. Third, plea counsel's representation was not ineffective; and even if this Court should find that counsel was ineffective, Respondent suffered no prejudice due to the overwhelming evidence of guilt that exists in this case. Finally, Petitioner submits that if counsel was not ineffective; if Respondent was fully aware of the nature of his plea, including the elements of each charge and the possible sentences; and if the plea court satisfied itself that Respondent's plea was freely, knowingly, and voluntarily entered; then Respondent's constitutional rights could not have been violated.

a. Respondent's plea must rise and fall as a whole.

First and foremost, Respondent asserts that a guilty plea must rise and fall together. Plea agreements are contractual in nature, and courts use traditional principles of contract law to interpret and enforce them. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 347 (1994); State v. Compton, 366 S.C. 671, 623 S.E.2d 661, 665 (Cl. App. 2005). Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. State v. Gates, 299 S.C. 92, 382 S.E.2d

886, 887 (1989). When a plea is predicated in any significant degree on a promise or agreement with the state, such promise must be fulfilled to maintain the integrity of the plea. Id. Appellate courts cannot read terms or conditions into the contract that the parties did not intend, and must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Compton, 623 S.E.2d at 665. Therefore, the individual parts of a plea cannot be dissected from one another, as it appears the PCR court attempted to do, because the whole plea is predicated on each parties' understanding of the agreed upon resolution of each part of the plea.

In the present case, the Order states that Respondent's PCR application is granted with regard to the felony DUI charges and the possession of methadone charge, but not as to the possession of diazepam charge. App. p. 120. As stated above, when a plea agreement is reached as part of a negotiated "package deal", which allows Respondent to receive the benefit of a bargain, the plea must stand or fall together. The PCR court was incorrect in upholding a portion of the plea and reversing other portions.

b. Plea counsel correctly advised Respondent of the elements of the charges against him and the possible punishment he could receive, thus making Respondent's plea freely, voluntarily, and knowingly entered.

Secondly, Petitioner submits that Respondent did not, in fact, carry his burden of proving that he was not fully informed of the elements of the felony DUI charges and the methadone charge. The PCR court seemingly based its ruling entirely upon the fact that the record is devoid of any statements by the plea judge directly to Respondent or through colloquy with plea counsel that confirms Respondent's understanding of the elements of each crime to which he pled. However, when addressing PCR matters, the PCR court is to take, not only the plea transcript, but also the evidence and testimony presented at the PCR hearing. A review of the record in its totality clearly establishes that Respondent's plea was

knowingly, voluntarily, and freely given.

The PCR court erroneously relied on State v. Ray, 310 S.C. 431, 437, 427 S.E. 2d 171 (1993) in finding that Respondent is entitled to a new trial. App. p. 119. Ray more accurately stands for the proposition that the death penalty may be imposed when a defendant pleads guilty without expressly admitting guilt where the plea was knowingly and voluntarily entered. This Court, in Ray, focused on the notion that the “paramount concern” for a reviewing court, when determining the validity of a guilty plea, is whether the plea was entered freely and voluntarily. Ray, 310 S.C. 431 at 435, 427 S.E.2d 171 at 173. This Court, in Ray, was concerned with ensuring that the plea was freely and voluntarily entered; not that the plea transcript was totally mistake free.

In fact, it is necessary only that the record reveals an affirmative awareness of the consequences of the guilty plea. LoPiano v. State, 270 S.C. 563, 243 S.E.2d 448 (1978). No specific inquiry by the plea judge is mandated, and the judge is not required to direct the defendant’s attention to each and every right and obtain a separate waiver as to each as long as the record indicates the defendant was fully aware of the consequences of the plea. In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998); Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); see also Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999). Likewise, there is no specific mandate that each element of a crime be discussed on the record if it is clear, as in this case, that Respondent understood the charges against him, the consequences of his plea, and that Respondent intended to plead guilty.

c. Plea counsel’s representation was not ineffective; and even if this Court should find that plea counsel was ineffective, Respondent suffered no prejudice due to the overwhelming evidence of guilt that exists in this case.

The United States Supreme Court has stated that “[a] plea of guilty is more than a

confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Boykin v. Alabama, 395 U.S. 238, 242 (1969); see also In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998). “All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001), citing Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

Contrary to this Court’s findings, a full review of the record, including the testimony presented at the PCR hearing, clearly indicates Respondent’s desire to plead guilty. Respondent informed the plea court that he understood the charges against him; that he understood his constitutional rights and chose to waive them; and that he had not been threatened or coerced into pleading guilty. App. p. 6, l. 2- p. 7, l. 22. Furthermore, Respondent stated that he was pleading guilty because he was, in fact, guilty of all charges. App. p. 8, ll. 12- 23.

Furthermore, a complete review of the plea transcript and the testimony of plea counsel at the PCR hearing indicate that Respondent was fully advised of, and understood, the elements of each crime with which he was charged. The plea court asked plea counsel if he felt that Respondent understood his waiver of constitutional rights. Plea counsel responded by explaining to the court that he and Respondent had reviewed “completely the facts of this case and his rights”. App. p. 8, ll. 3- 5. Plea counsel further informed the court that he went over the facts of the case against Respondent with Respondent’s family; and that everyone, including Respondent, understood. App. p. 8, ll. 5-8. Clearly, colloquy between the plea court and plea counsel existed that, while perhaps not as thorough as the lower court would have liked, unequivocally shows that Respondent was advised of the elements of each charge.

Additionally, plea counsel testified that he went over "in layman's terms" the elements of each charge with Respondent. App. p. 91, l. 8- p. 92, l. 4. Plea counsel also testified that he discussed the possible sentences for each charge with his client. App. p. 80, l. 20- p. 81, l. 9; p. 84, ll. 7- 9. Furthermore, he testified about his strategy in this case. App. p. 81, l. 12- p. 82, l. 18. Counsel's testimony is further evidence that Respondent's plea was knowingly and voluntarily entered. The PCR court made no finding that Respondent's testimony was more credible than that of plea counsel.

Moreover, Respondent provided no evidence that counsel did not go over the elements with him. In fact, Respondent did not even raise this issue in his application. App. p. 34- 43. Petitioner submits that post- conviction relief should not be granted on a ground not raised by Respondent. Furthermore, the record in this matter suggests that Respondent had access to the true- billed indictments against him prior to his plea.

The record before this Court further shows that Respondent acknowledged his guilt. Respondent admitted his guilt at the plea. App. p. 8, ll. 12- 23. He also testified at the PCR hearing that he knowingly took drugs and drank a large quantity of alcohol; and that he got behind the wheel of his truck and drove; which directly resulted in the crash that led to these charges being brought against him. App. p. 73, ll. 7- 22. Where there is such overwhelming evidence of guilt, as in this case, no prejudice exists. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State 305 S.C. 365, 409 S.E.2d 344 (S.C., 1991). In Ford, the Court found that the applicant had failed to meet the second prong of Strickland, and his PCR, therefore, should be dismissed. The overwhelming evidence in this case, requires a similar finding.

d. If counsel was not ineffective; if Respondent was fully aware of the nature of his plea, including the elements of each charge and the possible sentences; and if the plea court satisfied itself that Respondent's plea was freely, knowingly, and voluntarily entered; then Respondent's constitutional rights could not have been

violated.

Finally, Petitioner submits that based on all of the foregoing, it is impossible for the lower court to rule, as it did in its Order denying Petitioner's 59(e) motion, that counsel was not ineffective, yet Respondent's constitutional rights were violated because he was not fully aware of the elements of each charge against him. Counsel testified that he informed Respondent of the elements of each charge against him. He testified that he discussed the possible sentences Respondent was facing with him. Furthermore, the plea court obviously conducted sufficient inquiry to satisfy itself that Respondent was making a free, knowing, and voluntary decision to plead guilty. And, as if that were not enough, Respondent admitted at the plea hearing, and the PCR hearing, that he was guilty of these crimes.

Based on these facts, and the lower court's acknowledgment of these facts in its Order denying Petitioner's 59(e) motion, Petitioner is left dumbfounded as to how the lower court could have possibly concluded that Respondent's constitutional rights were violated. The case law cited throughout this Petition requires that Respondent's convictions, all of Respondent's convictions, be upheld.

CONCLUSION

For the reasons stated above, this Court should grant Petitioner's Petition for Certiorari; and reverse the lower court's decision to grant Respondent's application for post-conviction relief.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOT
Assistant Deputy Attorney General

DANIEL E. GRIGG
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By:



ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
June 9, 2008.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2004-CP-04-00767

Thomas Chad Heaton, ...Respondent.

-v-

State of South Carolina, ...Petitioner.

RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

Ricky Harris
145 N. Church Street, #34
Spartanburg, South Carolina 29306
(864) 591-4250

Attorney for Respondent
S.C. Bar # 2750

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QUESTION PRESENTED

Did the PCR Court correctly decide that the Respondent's guilty plea was taken in violation of the Respondent's Due Process Rights under the Constitution of the United States and/or the Constitution or Laws of the State of South Carolina pursuant to S.C.Code Ann. § 17-27-20 (a) (1) because the Respondent was not aware of the nature and crucial elements of the offenses to which he pled or of the maximum penalties which could result from the plea?

STATEMENT OF THE CASE

Respondent (hereinafter "Heaton") is presently confined by the South Carolina Department of Corrections pursuant to Orders of Commitment of the Anderson County Clerk of Court. Heaton was indicted at the January 2003 term of the Anderson County Grand Jury for Felony DUI-Death Resulting(03-GS-04-0264); Felony DUI-Death Resulting (03-GS-04-0265); Possession of Controlled Substances (03-GS-04-0262); and Possession of Controlled Substances (03-GS-04-0263). He was represented by Robert Gamble, Esquire (hereinafter "Plea Counsel").

On March 10, 2003, Heaton entered a plea of guilty as indicted. Heaton's plea was without negotiation, recommendation, or agreement of any kind. (App. pp. 1-33) Heaton was sentenced by the Honorable J. Cordell Maddox on Indictment 2003-GS-04-0262, an Indictment for Possession of a Controlled Substance (Diazepam), to the maximum sentence of six months concurrent with a maximum sentence of two years on Indictment 2003-GS-04-0263 for Possession of Controlled Substances (Methadone). These sentences were concurrent to sentences under 2003-GS-04-0264 and 0265 for Felony DUI-Death. Heaton was sentenced to 20 years on each of the Felony DUI-Death indictments to run consecutively.

Heaton did not appeal his conviction or sentence. Heaton filed a Pro Se application for Post Conviction Relief on March 5, 2004. (App. p. 34) Petitioner made its Return on June 25, 2004. A hearing was convened at the Anderson County Courthouse, on November 15, 2007, before the Honorable John C. Hayes, III. At the PCR hearing, Heaton's PCR counsel stated Heaton's contentions prior to the taking of testimony and evidence. (App. p. 52. l. 17- p. 58 l. 18) Heaton raised issues challenging his guilty plea on the basis that it was not knowingly and voluntarily entered into with the required appreciation of the consequences of the plea. By Order dated November 29, 2007, the PCR Judge granted Heaton's Post Conviction Relief request.

Petitioner made a Motion to Alter or amend Judgment Pursuant to Rule 59 (e), SCRPC on December 12, 2007. By Order Dated December 27, 2007, the PCR Judge denied Petitioner's Motion.

Petitioner timely filed a Notice of Appeal and this Appeal follows.

ARGUMENT

THE PCR COURT CORRECTLY DECIDED THAT THE RESPONDENT'S GUILTY PLEA WAS ACCEPTED IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OR LAWS OF THE STATE OF SOUTH CAROLINA PURSUANT TO S.C. CODE ANN. § 17-27-20 (a)(1).

Heaton alleges that his guilty plea was involuntary and not knowingly and intelligently entered. The PCR transcript (App. pp. 49-113) confirms that this issue was fully litigated by both parties and without objection by the Petitioner.

The Supreme Court of South Carolina has established the test by which to judge the voluntariness of a guilty plea.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by Defendants. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a Court can accept a guilty plea, a Defendant must be advised of the Constitutional rights he or she is waiving. *Id.* Specifically, a Defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a Defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.* Pittman v. State of South Carolina, 337 S.C. 597 524 S.E.2d 623 (1999) at p. 599.

The transcript of a guilty plea may on its face provide enough evidence to hold that a plea was not voluntary or knowing. Pittman, *Id.* at p. 599.

At the PCR hearing, Heaton attacked the voluntariness of his guilty plea as to two of the three prongs of the voluntariness test. First, Heaton attacked the voluntariness of his plea

on the ground that he was not advised and therefore unaware of the possibility of consecutive sentences. Therefore, Heaton's argument is and was that he was unaware of the maximum penalties for the offenses to which he pled. Second, Heaton attacked the voluntariness of his guilty plea on the basis that he was unaware of the nature and crucial elements of the offenses to which he pled. Heaton was therefore ignorant of the consequences of his plea on both accounts. In the Order granting Post Conviction Relief (App. p. 114), the PCR judge denied relief on the penalties ground but granted relief on what the PCR judge referred to as the "elements" issue. (App. p. 118)

I. THE PCR JUDGE CORRECTLY GRANTED RELIEF BY FINDING THAT HEATON WAS NOT ADVISED AND WAS UNAWARE OF THE NATURE AND CRUCIAL ELEMENTS OF FELONY DUI AND POSSESSION OF METHADONE.

Petitioner made a Motion to Alter or Amend Judgment Pursuant to Rule 59 (c). SCRCF seeking reconsideration of the PCR Judge's order of November 29, 2007 granting relief. In its Motion Petitioner made virtually the identical arguments as are set forth in the present Petition for Writ of Certiorari. The PCR Court addressed and forcefully and persuasively rejected each of the Petitioner's arguments in its Order dated December 27, 2007. (App. p. 127)

Petitioner, in its present challenge to the PCR Court's final ruling, seems to concede that the guilty plea record is devoid of any statements by the plea judge directly to Heaton or through colloquy with plea counsel that confirms Heaton's understanding of the elements of each crime to which he pled. (Petition for Writ of Certiorari p. 5) Indeed, the guilty plea record is completely lacking as to any explanation and/or affirmation of Heaton's awareness or understanding of the nature and crucial elements of the offenses to which he pled or that Heaton had any true understanding of the same. The indictments were not published as part of the plea.

The indictments were not read to the Defendant or described in any manner. There was no attempt to have Heaton affirm that he understood the charges against him or that he understood the charges which were contained in the indictments or that he understood what the State had to prove in order to convict him of the several offenses. There was no colloquy with plea counsel as to the same.

While it may be true that no particular method or formula is dictated in establishing a pleading Defendant's knowledge or understanding, there must be some on the record attempt at doing so. Otherwise, the record is a silent one as respects fundamental compliance with this due process requirement. An example of a typical plea colloquy in the courts of this state may be found in the case of Stalk v. South Carolina, 375 S.C. 289, 652 S.E.2d 402 (S.C App. 2007) November 16, 2007 (Rehearing denied) May 30, 2008 (Certiorari granted).

The PCR Court's Order denying the Petitioner's Motion to Alter/Amend cogently states, "The problem is the record does not establish that he knew those facts to which he admitted and pled constituted a crime." (App. p. 130-131) A concise expression of this principle is found in the Boykin case. In an explanatory footnote the United States Supreme Court, in citing McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed.2d 418 stated in pertinent part, "Moreover, because a guilty plea is an admission of a formal criminal charge, it cannot be truly voluntary unless the Defendant possesses an understanding of the law in relation to the facts." Boykin, 395 U.S. at p. 243.

Petitioner argues that adequate evidence of Heaton's knowledge of the crucial elements of the offense of Felony DUI may be found in the testimony of plea counsel the PCR Judge disagreed. Plea counsel was asked whether he believed that he informed Heaton of the essential elements of Felony DUI. Plea counsel's response was:

Q. I mean, I know we all say it differently but did you believe you said that to Mr. Heaton?

A. Not in those terms. I would have put it in layman's terms as to what they would have to prove. (App. p. 92 l.1 - l.4)

However, this answer alone is not an affirmation that any explanation of the essential elements of Felony DUI were given to Heaton but rather that, if that was done, it would have been done in so called "layman's terms". Whether laymen's terms would be adequate to allow Heaton to, in the words used in the Bovkin footnote, "Possess an understanding of the law in relation to the facts" is questionable. This response, particularly when taken in context of the whole of plea counsel's testimony provides no substantive evidence beyond speculation that any meaningful information was ever given to Heaton by plea counsel about the nature and essential elements of the offense of Felony DUI. (App. p. 43 l. 5, p. 53 l.15.)

Plea counsel had no independent recollection of any of the discussions that he had with Heaton and his testimony as to anything specific was predicated on a generalized notion of what plea counsel would normally do in similar circumstances. Indicative of the type of testimony which was given is as follows:

Q. Okay. Now, you answered a lot of questions on direct examination about some of the facts of the case and I want to go into that briefly with you, sir. Do you have any recollection of specific discussions you may have had with Mr. Heaton to explain the essential elements of the offense of Felony DUI?

A. I don't have an independent recollection of it but it's an easy offense to put forward. You're just drunk or under the influence of pills or liquor, your driving and somebody is killed. (App. p. 91 l. 2- l.11)

Q. Would you agree that a fair summarization of your testimony has been though that there are a lot of things you could have discussed with Mr. Heaton that were significant to evaluating the case that you didn't discuss? As you've said, you had these things in your mind. You didn't necessarily share them in any way with your

client so that he could make up his own mind about it, and sort of out of all of that process you were convinced that he ought to plead guilty. You told him that he ought to plead guilty, this was a good Judge. Never expected the result you got. And he trusted you, relied on you and went in there and did it.

A. That's a pretty fair assessment." (Appendix p. 101 1.3 - 1.15)

In the Order denying the Motion to Amend or Alter the PCR Court stated, "As to the creditability of trial counsel's testimony, the Court finds it entirely credible, just lacking in essential evidence. The Court believes trial counsel did exactly what he stated on the record. The Court found, and here again finds, this evidence, though credible, does not establish that anyone at any time informed Applicant of the crucial elements of the charges to which he pled." (App. p. 130)

Petitioner stated in his petition that "Respondent informed the plea Court that he understood the charges against him ..." (Petition p. 7) However, a reading of the plea transcript reveals no such statement. To reemphasize, the plea Court never explained the allegations contained in the indictments; never explained what the State had to prove; and, never sought any affirmation by Heaton that he understood the charges against him.

II. HEATON'S GUILTY PLEA WAS ACCEPTED IN VIOLATION OF HIS DUE PROCESS RIGHTS BECAUSE HEATON WAS NOT AWARE OF THE MAXIMUM CONSECUTIVE PENALTIES WHICH COULD BE IMPOSED FOR THE OFFENSES TO WHICH HE PLED.

Heaton also challenged the validity of his guilty plea on the ground that his plea was involuntary because he was unaware of the maximum penalty which could be imposed for the offenses to which he pled because he was unaware that he could receive consecutive sentences. The PCR Court denied relief on this ground. However, Heaton raises this issue in his

Return to the Petition for Writ of Certiorari as an additional sustaining ground for finding his guilty plea was involuntary.

Heaton testified at the PCR hearing that it was his understanding that the maximum sentence that he could receive was 25 years; that he did not know that there was a possibility of receiving consecutive sentences, and that his understanding of the plea judge's statement as to the maximum sentence for Felony DUI was that he could receive a sentence of 25 years total. (App. p.60 l. 15 – p. 61 l. 7)

The guilty plea transcript contains the following colloquy :

THE COURT: All right. You understand that on the two felonies D.U.I. cases, the sentence range under the statute is one year – one year to twenty-five years?

THE WITNESS: Yes, sir.” (App. p. 6 l.5 – l.8)

Plea counsel testified that he had no independent recollection of the advice that he gave Heaton concerning the maximum possible punishment and that he could only rely on what would have been his standard practice. Plea counsel conceded that he did not know exactly what he told Heaton about consecutive sentences or if Heaton understood that possibility. (App. p.87 l. 12 – p. 88 l.21)

III. PETITIONER'S ARGUMENT THAT “RESPONDENT'S PLEA MUST RISE AND FALL AS A WHOLE” IS INAPPOSITE.

Petitioner argues in part I.a. of the Petition that the PCR Court erred in invalidating only part of Heaton's plea. This argument, if efficacious at all, is appropriate only in circumstances involving a written plea agreement or other plea by agreement. Heaton's plea was without negotiation, recommendation, or agreement of any kind.

IV. A GUILTY PLEA TAKEN IN VIOLATION OF A PLEADING DEFENDANT'S DUE PROCESS RIGHTS CANNOT BE UPHOLD ON THE BASIS OF OVERWHELMING EVIDENCE WHEN NO SUCH EVIDENCE EXISTS AND/OR ON AN INCOMPLETE RECORD.

Petitioner argues that there is overwhelming evidence of Heaton's guilt and therefore he can suffer no prejudice from the violation of his Constitutional rights. (Petition p.8) The cases cited for this proposition all involve convictions obtained after full trials on the facts. In those cases, presumably, the factual record establishes the circumstances of the commission of the alleged crimes through the full trial process. In the guilty plea setting, no full factual record is established whereby it could be determined that overwhelming evidence of guilt is established.

Even if this were not so, there is no overwhelming evidence of guilt in this case. Rather, as can be seen through the cross-examination of plea counsel at the PCR hearing, there were many factual issues which could have been tried including but not limited to the fact that Heaton's alleged blood alcohol level was less than the inference level for impairment; the fact that extrapolation evidence would have had to been used by the State's toxicologist; the fact that the decedent's car failed to yield the right of way to Heaton's vehicle; the fact that the State had lost a key piece of evidence and the possibility of the submission of lesser included offenses.

CONCLUSION

Heaton's guilty plea was accepted in violation of his due process rights because it was not voluntarily, knowingly, and intelligently entered. Heaton's guilty plea was accepted without his knowing awareness of the nature and crucial elements of the offenses to which he pled guilty. Heaton's guilty plea was accepted without his knowing awareness of the maximum consecutive penalties which he could face. The PCR Court's Order granting relief and the PCR Court's Order denying the Motion to Alter or Amend should be affirmed under the appropriate standard of Appellate review. The additional sustaining ground submitted in this Return further supports the relief granted by the PCR Court. Heaton's guilty pleas thereto should be set aside and sentences thereunder be voided.

Respectfully Submitted,



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September 9, 2008

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2004-CP-04-00767

Thomas Chad Heaton, ...Respondent.

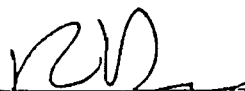
-v-

State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Respondent's Return to the Petition for Writ of Certiorari on the Petitioner by depositing a copy of the same in the United States Mail, postage prepaid on September 9, 2008, addressed to: Daniel E. Grigg, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211-1549.

September 9, 2008



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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2004-CP-04-00767

Thomas Chad Heaton,.....Respondent,

v.

State of South Carolina,.....Petitioner.

BRIEF OF PETITIONER

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QUESTION PRESENTED

- I. Did the PCR court err in finding that Respondent's Constitutional rights had been violated because plea counsel and the plea court failed to explain the elements of each charge against Respondent and the possible sentences that he was facing, which resulted in a plea that was not knowingly and voluntarily entered into?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Respondent was indicted at the January 2003 term of the Anderson County Grand Jury for possession of controlled substance (03-GS-40-0262), possession of narcotic in schedule I(B) (03-GS-04-0263), and two counts of felony DUI (03-GS-40-0264, 0265). He was represented by Robert Gamble, Esquire. On March 11, 2003, Respondent pled guilty as indicted. He was sentenced by the Honorable J. Cordell Maddox to six (6) months to run concurrent, two (2) years to run concurrent, and two twenty (20) year sentences to run consecutively. Respondent did not appeal his conviction or sentence.

Respondent filed an application for post conviction relief on March 5, 2004. In his application, Respondent alleged that he was being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of counsel.

Petitioner made its Return on June 25, 2004. A hearing was convened at the Anderson County Courthouse, on November 15, 2007, before the Honorable John C. Hayes, III. By Order dated November 29, 2007, Judge Hayes granted Respondent's post-conviction relief request. Petitioner made a Motion to Alter or Amend Judgment Pursuant to SCRPC 59(e) on December 12, 2007. By Order dated December 27, 2007, Judge Hayes denied Petitioner's motion.

Petitioner timely filed a Notice of Appeal and this appeal follows.

STANDARD OF REVIEW

The proper standard for review in this matter is whether there is "any evidence of probative value" to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); Wicker v. State, 310 S.C. 8, 425 S.E.2d 25 (1992).

If any probative evidence supports the findings of the judge ruling on an application for post-conviction relief, those findings must be upheld. Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

ARGUMENT

- I. **The PCR court erred in finding that Respondent's Constitutional rights had been violated because plea counsel and the plea court failed to explain the elements of each charge against Respondent and the possible sentences that he was facing, which resulted in a plea that was not knowingly and voluntarily entered.**

Petitioner submits that a review of the complete record, including the testimony presented at the PCR hearing, will clearly show that zero evidence of probative value exists upon which this Court could uphold the PCR court's findings. First, Respondent's plea must rise and fall as a whole. Second, Respondent's plea was voluntarily, knowingly, and intelligently entered. Third, plea counsel's representation was not ineffective; and even if this Court should find that counsel was ineffective, Respondent suffered no prejudice due to the overwhelming evidence of guilt that exists in this case. Finally, Petitioner submits that if counsel was not ineffective; if Respondent was fully aware of the nature of his plea, including the elements of each charge and the possible sentences; and if the plea court satisfied itself that Respondent's plea was freely, knowingly, and voluntarily entered; then Respondent's constitutional rights could not have been violated.

a. Respondent's plea must rise and fall as a whole.

First and foremost, Respondent asserts that a guilty plea must rise and fall together. Plea agreements are contractual in nature, and courts use traditional principles of contract law to interpret and enforce them. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341, 347 (1994); State v. Compton, 366 S.C. 671, 623 S.E.2d 661, 665 (Ct. App. 2005). Where language used in an instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. State v. Gates, 299 S.C. 92, 382 S.E.2d 886, 887 (1989). When a plea is predicated in any significant degree on a promise or agreement with the state, such promise must be fulfilled to maintain the integrity of the plea. Id. Appellate courts cannot read terms or conditions into the contract that the parties did not

intend, and must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Compton, 623 S.E.2d at 665. Therefore, the individual parts of a plea cannot be dissected from one another, as it appears the PCR court attempted to do, because the whole plea is predicated on each parties' understanding of the agreed upon resolution of each part of the plea.

In the present case, the Order states that Respondent's PCR application is granted with regard to the felony DUI charges and the possession of methadone charge, but not as to the possession of diazepam charge. App. p. 120. As stated above, when a plea agreement is reached as part of a negotiated "package deal", which allows Respondent to receive the benefit of a bargain, the plea must stand or fall together. The PCR court was incorrect in upholding a portion of the plea and reversing other portions.

b. Plea counsel correctly advised Respondent of the elements of the charges against him and the possible punishment he could receive, thus making Respondent's plea freely, voluntarily, and knowingly entered.

Secondly, Petitioner submits that Respondent did not, in fact, carry his burden of proving that he was not fully informed of the elements of the felony DUI charges and the methadone charge. The PCR court seemingly based its ruling entirely upon the fact that the record is devoid of any statements by the plea judge directly to Respondent or through colloquy with plea counsel that confirms Respondent's understanding of the elements of each crime to which he pled. However, when addressing PCR matters, the PCR court is to take, not only the plea transcript, but also the evidence and testimony presented at the PCR hearing. A review of the record in its totality clearly establishes that Respondent's plea was knowingly, voluntarily, and freely given.

The PCR court erroneously relied on State v. Ray, 310 S.C. 431, 437, 427 S.E. 2d 171 (1993) in finding that Respondent is entitled to a new trial. App. p. 119. Ray more

accurately stands for the proposition that the death penalty may be imposed when a defendant pleads guilty without expressly admitting guilt where the plea was knowingly and voluntarily entered. This Court, in Ray, focused on the notion that the “paramount concern” for a reviewing court, when determining the validity of a guilty plea, is whether the plea was entered freely and voluntarily. Ray, 310 S.C. 431 at 435, 427 S.E.2d 171 at 173. This Court, in Ray, was concerned with ensuring that the plea was freely and voluntarily entered; not that the plea transcript was totally mistake free.

In fact, it is necessary only that the record reveals an affirmative awareness of the consequences of the guilty plea. LoPiano v. State, 270 S.C. 563, 243 S.E.2d 448 (1978). No specific inquiry by the plea judge is mandated, and the judge is not required to direct the defendant’s attention to each and every right and obtain a separate waiver as to each as long as the record indicates the defendant was fully aware of the consequences of the plea. In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998); Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000); State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); *see also* Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999). Likewise, there is no specific mandate that each element of a crime be discussed on the record if it is clear, as in this case, that Respondent understood the charges against him, the consequences of his plea, and that Respondent intended to plead guilty.

c. Plea counsel's representation was not ineffective; and even if this Court should find that plea counsel was ineffective, Respondent suffered no prejudice due to the overwhelming evidence of guilt that exists in this case.

The United States Supreme Court has stated that “[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Boykin v. Alabama, 395 U.S. 238, 242 (1969); *see also* In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998).

“All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, the constitutional rights he is waiving, and that the record reflect a factual basis for the plea.” Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001), citing Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000).

Contrary to this Court’s findings, a full review of the record, including the testimony presented at the PCR hearing, clearly indicates Respondent’s desire to plead guilty. Respondent informed the plea court that he understood the charges against him; that he understood his constitutional rights and chose to waive them; and that he had not been threatened or coerced into pleading guilty. App. p. 6, l. 2- p. 7, l. 22. Furthermore, Respondent stated that he was pleading guilty because he was, in fact, guilty of all charges. App. p. 8, ll. 12- 23.

Furthermore, a complete review of the plea transcript and the testimony of plea counsel at the PCR hearing indicate that Respondent was fully advised of, and understood, the elements of each crime with which he was charged. The plea court asked plea counsel if he felt that Respondent understood his waiver of constitutional rights. Plea counsel responded by explaining to the court that he and Respondent had reviewed “completely the facts of this case and his rights”. App. p. 8, ll. 3- 5. Plea counsel further informed the court that he went over the facts of the case against Respondent with Respondent’s family; and that everyone, including Respondent, understood. App. p. 8, ll. 5-8. Clearly, colloquy between the plea court and plea counsel existed that, while perhaps not as thorough as the lower court would have liked, unequivocally shows that Respondent was advised of the elements of each charge.

Additionally, plea counsel testified that he went over “in layman’s terms” the elements of each charge with Respondent. App. p. 91, l. 8- p. 92, l. 4. Plea counsel also testified that he discussed the possible sentences for each charge with his client. App. p. 80,

l. 20- p. 81, l. 9; p. 84, ll. 7- 9. Furthermore, he testified about his strategy in this case. App. p. 81, l. 12- p. 82, l. 18. Counsel's testimony is further evidence that Respondent's plea was knowingly and voluntarily entered. The PCR court made no finding that Respondent's testimony was more credible than that of plea counsel.

Moreover, Respondent provided no evidence that counsel did not go over the elements with him. In fact, Respondent did not even raise this issue in his application. App. p. 34- 43. Petitioner submits that post- conviction relief should not be granted on a ground not raised by Respondent. Furthermore, the record in this matter suggests that Respondent had access to the true- billed indictments against him prior to his plea.

The record before this Court further shows that Respondent acknowledged his guilt. Respondent admitted his guilt at the plea. App. p. 8, ll. 12- 23. He also testified at the PCR hearing that he knowingly took drugs and drank a large quantity of alcohol; and that he got behind the wheel of his truck and drove; which directly resulted in the crash that led to these charges being brought against him. App. p. 73, ll. 7- 22. Where there is such overwhelming evidence of guilt, as in this case, no prejudice exists. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); *See also* Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State 305 S.C. 365, 409 S.E.2d 344 (S.C., 1991). In Ford, the Court found that the applicant had failed to meet the second prong of Strickland, and his PCR, therefore, should be dismissed. The overwhelming evidence in this case, requires a similar finding.

d. If counsel was not ineffective; if Respondent was fully aware of the nature of his plea, including the elements of each charge and the possible sentences; and if the plea court satisfied itself that Respondent's plea was freely, knowingly, and voluntarily entered; then Respondent's constitutional rights could not have been violated.

Finally, Petitioner submits that based on all of the foregoing, it is impossible for the lower court to rule, as it did in its Order denying Petitioner's 59(e) motion, that counsel was

not ineffective, yet Respondent's constitutional rights were violated because he was not fully aware of the elements of each charge against him. Counsel testified that he informed Respondent of the elements of each charge against him. He testified that he discussed the possible sentences Respondent was facing with him. Furthermore, the plea court obviously conducted sufficient inquiry to satisfy itself that Respondent was making a free, knowing, and voluntary decision to plead guilty. And, as if that were not enough, Respondent admitted at the plea hearing, and the PCR hearing, that he was guilty of these crimes.

Based on these facts, and the lower court's acknowledgment of these facts in its Order denying Petitioner's 59(e) motion, Petitioner is left dumbfounded as to how the lower court could have possibly concluded that Respondent's constitutional rights were violated. The case law cited throughout this Petition requires that Respondent's convictions, all of Respondent's convictions, be upheld.

CONCLUSION

For the reasons stated above, this Court should grant Petitioner's Petition for Certiorari; and reverse the lower court's decision to grant Respondent's application for post-conviction relief.

Respectfully submitted,

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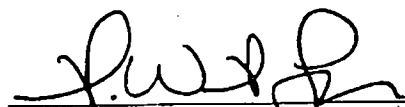
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Columbia, South Carolina
April 2, 2010.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No: 2004-CP-04-00767

Thomas Chad Heaton, ... Respondent

State of South Carolina, ... Petitioner

BRIEF OF RESPONDENT

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Case No.: 2004-CP-04-00767

Thomas Chad Heaton, ...Respondent,

-v-

State of South Carolina, ...Petitioner.

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QUESTION PRESENTED

Did the PCR Court correctly decide that the Respondent's guilty plea was taken in violation of the Respondent's Due Process Rights under the Constitution of the United States and/or the Constitution or Laws of the State of South Carolina pursuant to S.C.Code Ann. § 17-27-20 (a) (1) because the Respondent was not aware of the nature and crucial elements of the offenses to which he pled or of the maximum penalties which could result from the plea?

STATEMENT OF THE CASE

Respondent (hereinafter "Heaton") is presently confined by the South Carolina Department of Corrections pursuant to Orders of Commitment of the Anderson County Clerk of Court. Heaton was indicted at the January 2003 term of the Anderson County Grand Jury for Felony DUI-Death Resulting(03-GS-04-0264); Felony DUI-Death Resulting (03-GS-04-0265); Possession of Controlled Substances (03-GS-04-0262); and Possession of Controlled Substances (03-GS-04-0263). He was represented by Robert Gamble, Esquire (hereinafter "Plea Counsel").

On March 10, 2003, Heaton entered a plea of guilty as indicted. Heaton's plea was without negotiation, recommendation, or agreement of any kind. (App. pp. 1-33) Heaton was sentenced by the Honorable J. Cordell Maddox on Indictment 2003-GS-04-0262, an Indictment for Possession of a Controlled Substance (Diazepam), to the maximum sentence of six months concurrent with a maximum sentence of two years on Indictment 2003-GS-04-0263 for Possession of Controlled Substances (Methadone). These sentences were concurrent to sentences under 2003-GS-04-0264 and 0265 for Felony DUI-Death. Heaton was sentenced to 20 years on each of the Felony DUI-Death indictments to run consecutively.

Heaton did not appeal his conviction or sentence. Heaton filed a Pro Se application for Post Conviction Relief on March 5, 2004. (App. p. 34) Petitioner made its Return on June 25, 2004. A hearing was convened at the Anderson County Courthouse, on November 15, 2007, before the Honorable John C. Hayes, III. At the PCR hearing, Heaton's PCR counsel stated Heaton's contentions prior to the taking of testimony and evidence. (App. p. 52, l. 17- p. 58 l. 18) Heaton raised issues challenging his guilty plea

on the basis that it was not knowingly and voluntarily entered into with the required appreciation of the consequences of the plea. By Order dated November 29, 2007, the PCR Judge granted Heaton's Post Conviction Relief request. Petitioner made a Motion to Alter or amend Judgment Pursuant to Rule 59 (e), SCRCP on December 12, 2007. By Order Dated December 27, 2007, the PCR Judge denied Petitioner's Motion.

Petitioner timely filed a Notice of Appeal and this Appeal follows.

ARGUMENT

I. THE PCR COURT CORRECTLY DECIDED THAT THE RESPONDENT'S GUILTY PLEA WAS ACCEPTED IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OR LAWS OF THE STATE OF SOUTH CAROLINA PURSUANT TO S.C. CODE ANN. § 17-27-20 (a)(1).

Heaton alleges that his guilty plea was involuntary and not knowingly and intelligently entered. The PCR transcript (App. pp. 49-113) confirms that this issue was fully litigated by both parties and without objection by the Petitioner.

The Supreme Court of South Carolina has established the test by which to judge the voluntariness of a guilty plea.

Entering a guilty plea results in a waiver of several constitutional rights, therefore the Due Process Clause requires that guilty pleas are entered into voluntarily, knowingly, and intelligently by Defendants. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). The United States Supreme Court has held that before a Court can accept a guilty plea, a Defendant must be advised of the Constitutional rights he or she is waiving. *Id.* Specifically, a Defendant must be aware of the privilege against self incrimination, the right to a jury trial, and the right to confront one's accusers. This Court considered the requirements of a voluntary and knowing guilty plea in State v. Hazel, 275 S.C. 392, 271 S.E.2d 602 (1980) and Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In addition to the requirements of Boykin, a Defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.* Pittman v. State of South Carolina, 337 S.C. 597 524S.E.2d 623 (1999) at p. 599.

The transcript of a guilty plea may on its face provide enough evidence to hold that a plea was not voluntary or knowing. Pittman, *Id.*, at p. 599.

At the PCR hearing, Heaton attacked the voluntariness of his guilty plea as to two of the three prongs of the voluntariness test. First, Heaton attacked the voluntariness of his plea on the ground that he was not advised and therefore unaware of the possibility of consecutive sentences. Therefore, Heaton's argument is and was that he was unaware of the maximum penalties for the offenses to which he pled. Second, Heaton attacked the voluntariness of his guilty plea on the basis that he was unaware of the nature and crucial elements of the offenses to which he pled. Heaton was therefore ignorant of the consequences of his plea on both accounts. In the Order granting Post Conviction Relief (App. p.114), the PCR judge denied relief on the penalties ground but granted relief on what the PCR judge referred to as the "elements" issue. (App. p. 118)

a. THE PCR JUDGE CORRECTLY GRANTED RELIEF BY FINDING THAT HEATON WAS NOT ADVISED AND WAS UNAWARE OF THE NATURE AND CRUCIAL ELEMENTS OF FELONY DUI AND POSSESSION OF METHADONE.

Petitioner made a Motion to Alter or Amend Judgment Pursuant to Rule 59 (e), SCRCP seeking reconsideration of the PCR Judge's order of November 29, 2007 granting relief. In its Motion Petitioner made virtually the identical arguments as are set forth in the present Petition for Writ of Certiorari. The PCR Court addressed and forcefully and persuasively rejected each of the Petitioner's arguments in its Order dated December 27, 2007. (App. p. 127)

Petitioner, in its present challenge to the PCR Court's final ruling, seems to concede that the guilty plea record is devoid of any statements by the plea judge directly to Heaton or through colloquy with plea counsel that confirms Heaton's understanding of the elements of each crime to which he pled. (Petition for Writ of Certiorari p. 5)

Indeed, the guilty plea record is completely lacking as to any explanation and/or affirmation of Heaton's awareness or understanding of the nature and crucial elements of the offenses to which he pled or that Heaton had any true understanding of the same. The indictments were not published as part of the plea. The indictments were not read to the Defendant or described in any manner. There was no attempt to have Heaton affirm that he understood the charges against him or that he understood the charges which were contained in the indictments or that he understood what the State had to prove in order to convict him of the several offenses. There was no colloquy with plea counsel as to the same.

While it may be true that no particular method or formula is dictated in establishing a pleading Defendant's knowledge or understanding, there must be some on the record attempt at doing so. Otherwise, the record is a silent one as respects fundamental compliance with this due process requirement. An example of a typical plea colloquy in the courts of this state may be found in the case of Stalk v. South Carolina, 375 S.C. 289, 652 S.E.2d 402 (S.C App. 2007) November 16, 2007 (Rehearing denied) May 30, 2008 (Certiorari granted).

The PCR Court's Order denying the Petitioner's Motion to Alter/Amend cogently states, "The problem is the record does not establish that he knew those facts to which he admitted and pled constituted a crime." (App. p. 130-131) A concise expression of this principle is found in the Boykin case. In an explanatory footnote the United States Supreme Court, in citing McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed.2d 418 stated in pertinent part, "Moreover, because a guilty plea is an admission of a formal criminal charge, it cannot be truly voluntary unless the Defendant

possesses an understanding of the law in relation to the facts." Boykin, 395 U.S. at p. 243.

Petitioner argues that adequate evidence of Heaton's knowledge of the crucial elements of the offense of Felony DUI may be found in the testimony of plea counsel the PCR Judge disagreed. Plea counsel was asked whether he believed that he informed Heaton of the essential elements of Felony DUI. Plea counsel's response was:

Q. I mean, I know we all say it differently but did you believe you said that to Mr. Heaton?

A. Not in those terms. I would have put it in layman's terms as to what they would have to prove. (App. p. 92 l.1 - l.4)

However, this answer alone is not an affirmation that any explanation of the essential elements of Felony DUI were given to Heaton but rather that, if that was done, it would have been done in so called "layman's terms". Whether laymen's terms would be adequate to allow Heaton to, in the words used in the Boykin footnote, "Possess an understanding of the law in relation to the facts" is questionable. This response, particularly when taken in context of the whole of plea counsel's testimony provides no substantive evidence beyond speculation that any meaningful information was ever given to Heaton by plea counsel about the nature and essential elements of the offense of Felony DUI. (App. p. 43 l. 5, p. 53 l.15.)

Plea counsel had no independent recollection of any of the discussions that he had with Heaton and his testimony as to anything specific was predicated on a generalized notion of what plea counsel would normally do in similar circumstances. Indicative of the type of testimony which was given is as follows:

Q. Okay. Now, you answered a lot of questions on direct examination about some of the facts of the case and I want to go into that briefly with you, sir. Do you have any recollection of specific discussions you may have had with Mr. Heaton to explain the essential elements of the offense of Felony DUI?

A. I don't have an independent recollection of it but it's an easy offense to put forward. You're just drunk or under the influence of pills or liquor, your driving and somebody is killed. (App. p. 91 l. 2- l.11)

Q. Would you agree that a fair summarization of your testimony has been though that there are a lot of things you could have discussed with Mr. Heaton that were significant to evaluating the case that you didn't discuss? As you've said, you had these things in your mind, You didn't necessarily share them in any way with your client so that he could make up his own mind about it, and sort of out of all of that process you were convinced that he ought to plead guilty. You told him that he ought to plead guilty, this was a good Judge. Never expected the result you got. And he trusted you, relied on you and went in there and did it.

A. That's a pretty fair assessment." (Appendix p. 101 l.3 - l.15)

In the Order denying the Motion to Amend or Alter the PCR Court stated, "As to the creditability of trial counsel's testimony, the Court finds it entirely credible, just lacking in essential evidence. The Court believes trial counsel did exactly what he stated on the record. The Court found, and here again finds, this evidence, though credible, does not establish that anyone at any time informed Applicant of the crucial elements of the charges to which he pled." (App. p. 130)

Petitioner stated in his petition that "Respondent informed the plea Court that he understood the charges against him ..." (Petition p. 7) However, a reading of the plea transcript reveals no such statement. To reemphasize, the plea Court never

explained the allegations contained in the indictments; never explained what the State had to prove; and, never sought any affirmation by Heaton that he understood the charges against him.

b. HEATON'S GUILTY PLEA WAS ACCEPTED IN VIOLATION OF HIS DUE PROCESS RIGHTS BECAUSE HEATON WAS NOT AWARE OF THE MAXIMUM CONSECUTIVE PENALTIES WHICH COULD BE IMPOSED FOR THE OFFENSES TO WHICH HE PLED.

Heaton also challenged the validity of his guilty plea on the ground that his plea was involuntary because he was unaware of the maximum penalty which could be imposed for the offenses to which he pled because he was unaware that he could receive consecutive sentences. The PCR Court denied relief on this ground. However, Heaton raises this issue in his Return to the Petition for Writ of Certiorari as an additional sustaining ground for finding his guilty plea was involuntary.

Heaton testified at the PCR hearing that it was his understanding that the maximum sentence that he could receive was 25 years; that he did not know that there was a possibility of receiving consecutive sentences, and that his understanding of the plea judge's statement as to the maximum sentence for Felony DUI was that he could receive a sentence of 25 years total. (App. p.60 l. 15 – p. 61 l. 7)

The guilty plea transcript contains the following colloquy:

THE COURT: All right. You understand that on the two felonies D.U.I. cases, the sentence range under the statute is one year – one year to twenty-five years?

THE WITNESS: Yes, sir.” (App. p. 6 l.5 – l.8)

Plea counsel testified that he had no independent recollection of the advice that he gave Heaton concerning the maximum possible punishment and that he could

only rely on what would have been his standard practice. Plea counsel conceded that he did not know exactly what he told Heaton about consecutive sentences or if Heaton understood that possibility. (App. p.87 l. 12 – p. 88 l.21)

c. PETITIONER'S ARGUMENT THAT "RESPONDENT'S PLEA MUST RISE AND FALL AS A WHOLE" IS INAPPOSITE.

Petitioner argues in part I.a. of the Petition that the PCR Court erred in invalidating only part of Heaton's plea. This argument, if efficacious at all, is appropriate only in circumstances involving a written plea agreement or other plea by agreement. Heaton's plea was without negotiation, recommendation, or agreement of any kind.

d. A GUILTY PLEA TAKEN IN VIOLATION OF A PLEADING DEFENDANT'S DUE PROCESS RIGHTS CANNOT BE UPHELD ON THE BASIS OF OVERWHELMING EVIDENCE WHEN NO SUCH EVIDENCE EXISTS AND/OR ON AN INCOMPLETE RECORD.

Petitioner argues that there is overwhelming evidence of Heaton's guilt and therefore he can suffer no prejudice from the violation of his Constitutional rights. (Petition p.8) The cases cited for this proposition all involve convictions obtained after full trials on the facts. In those cases, presumably, the factual record establishes the circumstances of the commission of the alleged crimes through the full trial process. In the guilty plea setting, no full factual record is established whereby it could be determined that overwhelming evidence of guilt is established.

Even if this were not so, there is no overwhelming evidence of guilt in this case. Rather, as can be seen through the cross-examination of plea counsel at the PCR hearing, there were many factual issues which could have been tried including but not limited to the fact that Heaton's alleged blood alcohol level was less than the inference level for impairment; the fact that extrapolation evidence would have had to been used by

the State's toxicologist; the fact that the decedent's car failed to yield the right of way to Heaton's vehicle; the fact that the State had lost a key piece of evidence and the possibility of the submission of lesser included offenses.

CONCLUSION

Heaton's guilty plea was accepted in violation of his due process rights because it was not voluntarily, knowingly, and intelligently entered. Heaton's guilty plea was accepted without his knowing awareness of the nature and crucial elements of the offenses to which he pled guilty. Heaton's guilty plea was accepted without his knowing awareness of the maximum consecutive penalties which he could face. The PCR Court's Order granting relief and the PCR Court's Order denying the Motion to Alter or Amend should be affirmed under the appropriate standard of Appellate review. The additional sustaining ground submitted in this Return further supports the relief granted by the PCR Court. Heaton's guilty pleas thereto should be set aside and sentences thereunder be voided.

Respectfully Submitted,



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April 27, 2010
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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Chad Heaton,

Respondent,

v.

State of South Carolina,

Petitioner.

Appeal From Anderson County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2011-UP-456
Heard October 4, 2011 – Filed October 13, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy John W. McIntosh, and Assistant Deputy Attorney General Salley W. Elliott, of Columbia, for Petitioner.

Ricky Keith Harris, of Spartanburg, for Respondent.

PER CURIAM: The State appeals the trial court's order granting post-conviction relief (PCR) to Thomas Heaton. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to the standard of review: Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (declaring that on appeal, this court should uphold the PCR court's ruling if it is supported by any evidence of probative value in the record); Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (providing if matters of credibility are involved, this court gives deference to the PCR judge's findings because this court lacks the opportunity to directly observe the witnesses); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (stating this court gives great deference to the PCR court's findings of fact and conclusions of law).

2. As to the guilty plea: Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (noting that generally, a guilty plea must be entered voluntarily, knowingly, and intelligently); State v. Lambert, 266 S.C. 574, 580, 225 S.E.2d 340, 342 (1976) (holding the record should reflect that the trial court has assured itself that the plea was voluntary and intelligently entered with full knowledge of the nature of the offense); State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) ("A defendant's knowing and voluntary waiver of a statutory or constitutional right must be established by a complete record; and may be accomplished by colloquy between the court and the defendant, between the court and defendant's counsel, or both."); Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624-25 (1999) ("When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing."); Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (stating the defendant must be aware of (1) the nature and crucial elements of the offense; (2) the maximum and any mandatory minimum penalty; and (3) the constitutional rights being waived); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him."); State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006) (quoting State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) and instructing

that in accepting a guilty plea the trial court may "use any appropriate procedure for determining the accuracy of the guilty plea;" however, the trial court must ensure the defendant "understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea").

3. As to the other issues: Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Anderson County
John C. Hayes, III, Circuit Court Judge

THOMAS CHAD HEATON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR REHEARING
WITH
SUPPORTING CITATIONS OF AUTHORITY

On October 13, 2011, this Court affirmed the post-conviction relief court's grant of relief in Thomas Chad Heaton v. State, Up. Op. No. 2011-UP-456 (filed October 13, 2011). Pursuant to Rule 221(a), SCACR, the State respectfully petitions for rehearing on the following points the State believes were possibly overlooked or misapprehended:

I.

Thomas Chad Heaton asserted at the post-conviction relief hearing that his guilty plea must be vacated when the record of his plea failed to comport with legal requirements for accepting a guilty plea because it did not include a colloquy between the plea court and Heaton or his attorney as to Heaton's understanding of the elements of the charges against him. (App. p.

55, lines 3 - 7; pp. 56, line 25 - 57, line 4). At the post-conviction relief hearing, Heaton acknowledged that plea counsel explained the evidence against him but denied that counsel explained what the State would have to present to prove his guilt. He stated that counsel did not explain matters that actually constitute defenses to the charges and not elements of the offense. (App. p. 64, lines 6 - p. 65, line 17). Despite finding that plea counsel testified at the post-conviction relief hearing that counsel told Heaton of the elements of the offense in laymen's terms and finding that counsel was credible in his testimony, the post-conviction relief court vacated the convictions because the guilty plea record failed to include an on-the-record colloquy between the plea court and Heaton or his attorney as to the Heaton's understanding of the elements of the charges against him. (App. pp. 119, 130). The post-conviction relief court found that "caselaw required the Pea Judge to clearly convey this information to Applicant, or to confirm through colloquy with Pea Counsel that Applicant understood the elements of the crimes to which he pled." (App. p. 119). The State submits that the post-conviction relief court committed errors of law when it concluded the guilty plea must be vacated because an on-the-record inquiry did not occur at the guilty plea and when it limited its consideration of the knowing nature of the guilty plea to the guilty plea record only when ruling on the issue. The State also respectfully submits that this Court overlooked or misapprehended the post-conviction relief court's errors of law and failed to apply the proper standard of review to the legal and factual issues presented.

II.

The appellate court must give deference to the post-conviction relief court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). The

appellate court will uphold the findings of the post-conviction relief judge when there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007). However, when a post-conviction relief judge's ruling is controlled by an error of law, the appellate court must reverse the ruling. Rivera v. State, 382 S.C. 606, 677 S.E.2d 596 (2009); Counsel v. Catog, 380 S.C. 159, 670 S.E.2d 356 (2008); Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); Simpson v. State, 317 S.C. 506, 455 S.E.2d 176 (1995).

III.

Long-standing precedent in this State controls the analysis of the issue presented. The State submits that this Court may have overlooked or misapprehended the governing decisions when affirming the post-conviction relief court's order. The controlling decisions in this State indicate that no specific inquiry by the plea judge is mandated for a guilty plea, and the plea judge is not required to direct the defendant's attention to each and every right and obtain a separate waiver as to each as long as the record indicates the defendant was aware of the consequences of the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975); State v. Lambert, 266 S.C. 574, 225 S.E.2d 340 (1976); LoPiano v. State, 270 S.C. 563, 243 S.E.2d 448 (1978); In re Arisha K.S., 331 S.C. 288, 501 S.E.2d 128 (Ct. App. 1998); Gaines v. State, 335 S.C. 376, 517 S.E.2d 439 (1999); Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000); see also Brown v. State, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000)(stating that "an on-the-record waiver of a constitutional right is but one method of determining whether the defendant knowingly and intelligently waived that right."). When a guilty plea is challenged in a post-conviction relief action, the voluntary and knowing nature of a guilty plea is not determined by an examination of the specific inquiry made by the plea judge alone but is determined from both the record made at the time of the entry of the guilty plea and from the evidence

presented at the post-conviction relief hearing. See Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)(stating the PCR judge erroneously considered that he was bound by the extent of the inquiries made by the plea judge and erroneously disregarded testimony from the PCR hearing); see also Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972); LoPiano v. State, 270 S.C. 563, 243 S.E.2d 448 (1978); Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000); Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000); Rollison v. State, 346 S.C. 506, 552 S.E.2d 290 (2001); Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005); Bennett v. State, 371 S.C. 198, 638 S.E.2d 673 (2006); Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007); Suber v. State, 371 S.C. 554, 640 S.E.2d 884 (2007); Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (Ct. App. 2007); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008); James v. State, 377 S.C. 81, 659 S.E.2d 148 (2008); Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009); Holden v. State, 713 S.E.2d 611 (2011).

Clearly, the post-conviction relief court's decisions that a colloquy respecting the elements of the offenses must appear on the record of the guilty plea and that it was limited to the record of guilty plea when analyzing the issue constituted errors of law and must be reversed by this Court. Respondent respectfully submits that this Court might have misapprehended the basis for the post-conviction relief court's order and the errors of law controlling the findings and conclusions. Respondent requests this Court to reconsider the order, the controlling authority, and its decision affirming the post-conviction relief court's order.

IV.

Respondent also respectfully submits that this Court overlooked the fact that, even though the post-conviction relief court ultimately concluded it was confined to the plea transcript when ruling on the issue before it, the post-conviction relief court made findings of fact that are

supported by probative evidence, are binding on this Court and require reversal of the post-conviction relief order. Specifically, Respondent submits that this Court might have overlooked the post-conviction relief court's findings that plea counsel advised Heaton of the elements of the offense and that the testimony was credible. (App. pp. 119, 130). As set forth below, these findings are supported by probative evidence and must be accorded deference by this Court. See Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989); Soloman v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356, (2006). Unfortunately, the post-conviction relief court incorrectly believed it was limited to the plea record and erroneously declined to consider these factual findings when ruling on the issue before it. This was clearly error. When the entire record before the court below is properly considered, these findings of the post-conviction relief court require reversal of the order vacating the conviction. As set forth below, probative and credible evidence exists in the record to support the post-conviction relief court's finding that Heaton was advised of the elements of the offenses by plea counsel before Heaton entered the guilty plea.

The record before this Court shows that plea counsel and Heaton discussed the four pending indictments, the MAIT team report and the findings of excessive speed, the drugs and alcohol in Heaton's system and the extrapolation that would be presented as evidence at trial. (App. p. 77, lines 5 - 23; p. 78, line 5 - 80, line 24). In addition to discussing the MAIT report, plea counsel advised Heaton that the State would prove that he had alcohol and drugs in his system, that he was drunk, that he was driving, and that he was driving fast, resulting in two dead victims. (App. p. 82, lines 3 - 7). Plea counsel testified that he explained the offense of felony driving under the influence in laymen's terms to Heaton. (App. p. 91, line 12 - p. 92, line 4; p.

100, lines 18 - 20). Counsel testified that he explained the elements of the offense by using the specific evidence Heaton would face at trial rather than merely reciting the legal terms. (App. p. 100, lines 22- 25). Counsel testified that he would not have allowed Heaton to enter a guilty plea if he thought Heaton did not understand the plea. (App. p. 103, lines 17 - 24).

The record also includes the presentation of facts by the State at the guilty plea. The prosecutor stated at the plea that the incident occurred when Heaton traveled at a speed of eighty-one miles per hour on a two-lane road with a speed limit of fifty-five miles per hour, that Heaton tested positive for drugs and alcohol, and that the proximate cause of the incident was Heaton's excessive speed. (App. p. 9 - 12). Heaton, through plea counsel, acknowledged the excessive rate of speed at the guilty plea. (App. p. 14). At the post-conviction relief hearing Heaton admitted that he had drugs and alcohol in his system and was driving at eighty-one (81) miles per hour at the time of the incident. He also admitted that he did what the prosecutor stated during the guilty plea. (App. p. 73, lines 10 - 22).

Because the circuit court determined that plea counsel advised Heaton of the elements of the offenses and found the testimony credible and because probative evidence exists to support these findings as set forth above, this Court is bound by the findings of the post-conviction relief court and must reverse the order granting relief. It was error for the post-conviction relief court to disregard this post-conviction relief testimony and its findings respecting the testimony. Stalk v. State, 375 S.C. 289, 652 S.E.2d 402 (Ct. App. 2007). This Court should reconsider the findings and reverse the post-conviction relief order because the post-conviction relief court found that plea counsel explained the elements of the offenses to Heaton before the guilty plea but erroneously believed it could not consider the evidence when ruling on the issue.

WHEREFORE, Petitioner asks this Court to reconsider and rehear this matter and reverse the order of the post-conviction relief court.

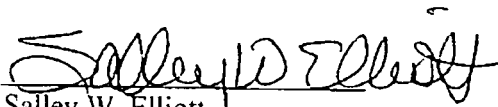
Respectfully submitted,

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October 28, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
John C. Hayes, III, Circuit Court Judge

THOMAS CHAD HEATON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petition for Rehearing with Supporting Citations of Authority by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Ricky Keith Harris, Esquire, 145 N. Church Street, #34, Suite 501, Spartanburg, South Carolina 29306.

I further certify that all parties required by Rule to be served have been served.

This 28th day of October, 2011.


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Thomas Chad Heaton, ... Respondent,

-v-

State of South Carolina, ... Petitioner.

RESPONDENT'S RETURN TO THE PETITION FOR REHEARING

Petitioner ("The State") asserts in its Petition for Rehearing that the Court overlooked or misapprehended certain points in its opinion in Thomas Chad Heaton v. The State, Up. Op. No. 2011-UP-456 (filed October 13, 2011). Respondent ("Heaton") opposes the Petition for Rehearing.

Responding to Part I of the Petition for Rehearing it is clear that the Court's Opinion in paragraph one accurately states the standard of review and that that standard was applied.

The balance of the Petition for Rehearing argues that the Court should reconsider its Opinion on the ground that the PCR Court allegedly confined its review of the record to the guilty plea transcript and the deficiencies therein as the sole basis for granting post conviction relief to Heaton and that this constituted reversible error which the Court of Appeals Opinion overlooked. A review of the PCR Court's Order denying the State's Motion to Alter or Amend

the judgment clearly shows that the PCR Court did not confine its review of the record to the guilty plea transcript but rather reviewed the entire record and made specific reference to plea counsel's PCR Hearing testimony. Therefore, it is inaccurate for the State to assert in its Petition for Rehearing and otherwise that the PCR Judge confined his review to the guilty plea transcript. Heaton points out, as he did in his brief and in oral argument, that even if this assertion were true, that it would not provide a basis for reversal of the PCR Court's granting of Post Conviction Relief. One of the leading decisions in the field, Pittman v. State, 337 S.C. 597, 524 S.E. 2d 623 (1999) states that the transcript of a guilty plea may on its face provide enough evidence to hold that a plea was not voluntary or knowing. Pittman, *Id*, at p. 599.

The Order denying the State's Motion under Rule 59 (c) of the S.C. Rules of Civil Procedure to Alter or Amend specifically states that the PCR Judge did not confine its review to the guilty plea transcript only. (Order, App. pp. 127-131) The PCR Court's Order states:

"The Court has again scoured the record and the plea transcript for evidence that Applicant knew at the time of his plea the crucial elements of Felony Driving Under the Influence and drug possession." (Order, App. p 129)

"The State asserts the Court did not consider the record as a whole. Contrariwise, the Court here affirmatively states that it did consider the record as a whole and found the record (tapestry) to be threadbare." (Order, App. p 130)

Part III of the Petition for Rehearing alleges that the Court may have overlooked or misapprehended the governing decisions when affirming the PCR Court's Order. A review of many of the decisions cited in support of that proposition in the the Petition for Rehearing are also cited in Part II of the Court's Opinion. The decisions cited in Part II of the Court's Opinion are the leading decisions in the field, including Pittman v. State, 337 S.C. 597, 599, 524 S.E. 2d 623, 624-25 (1999).

The State alleges in Part IV of the Petition for Rehearing, if understood, that because the PCR Court found that plea counsel's testimony was credible that the Court should reverse the PCR Court's findings. However, The State fails to appreciate the precise finding of the PCR Court as contained in its Order to deny the Motion to Alter or Amend. The PCR Court stated:

"As to the credibility of trial counsel's testimony, the Court finds it entirely credible, just lacking in essential evidence. The Court believes trial counsel did exactly what he stated on the record. The Court found, and here again finds, this evidence, though credible, does not establish that anyone at any time informed Applicant of the crucial elements of the charges to which he pled." (Order, App. p. 130)

The Court, having fully considered the record, the briefs, and the argument of counsel has issued its Opinion affirming the PCR Court's grant of Post Conviction Relief. Nothing in the State's Petition for Rehearing requires reconsideration of the Court's Opinion.

Respectfully Submitted,



Ricky Harris
145 N. Church Street, #34
Spartanburg, South Carolina 29306
(864) 591-4250

Attorney for Respondent
S.C. Bar # 2750

November 2, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
The Honorable John C. Hayes, III, Circuit Court Judge

Thomas Chad Heaton, ...Respondent,

-v-

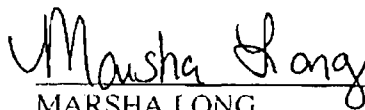
State of South Carolina, ...Petitioner.

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Return to the Petition for Rehearing on the Petitioner by depositing two copies of the same in the United States Mail, postage prepaid on November 3, 2011, addressed to: Salley W. Elliott, Deputy Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211-1549.

I further certify that all parties required by Rule to be served have been served.

November 3, 2011



MARSHA LONG
Paralegal to
Ricky Harris
145 N. Church Street, #34
Spartanburg, South Carolina 29306
(864) 591-4250

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
John C. Hayes, III. Circuit Court Judge

THOMAS CHAD HEATON.

Respondent.

vs.

STATE OF SOUTH CAROLINA.

Petitioner.

REPLY TO RESPONDENT'S RETURN TO PETITION FOR REHEARING

On October 13, 2011, this Court affirmed the post-conviction relief court's grant of relief in Thomas Chad Heaton v. State, Up. Op. No. 2011-UP-456 (filed October 13, 2011). The State submitted a Petition for Rehearing, and Respondent made Return to the Petition. The State herein submits its Rely to the Return and would respectfully show unto this Court as follows:

I.

The issue and argument presented by Respondent Heaton to the post-conviction relief court and upon which that court ruled was whether the failure of the **guilty plea record** to include a colloquy between the plea court and Heaton or his attorney as to Heaton's understanding of the elements of the charges against him required the plea to be vacated because the plea record failed to comport with legal requirements for accepting the plea. (App. p. 55.

lines 3 - 7: p. 55, lines 25 - p. 57, line 4). In its order granting relief, the post-conviction relief court noted that plea counsel testified at the post-conviction relief hearing that counsel told Heaton of the elements of the offense in laymen's terms. The post-conviction relief court also determined that counsel was credible in his testimony but vacated the convictions because the guilty plea record failed to include an on-the-record colloquy between the plea court and Heaton or his attorney as to the Heaton's understanding of the elements of the charges against him.

(App. pp. 119, 130). Specifically, the post-conviction relief court ruled:

Finally, Applicant contends to he was not informed of the elements of the felony DUI charges. As to this claim, Applicant has carried his burden of proof. The record is void of any statement by the Plea Judge as to the elements of the two felony DUI charges. It is true that Applicant's Plea Counsel testified he told Applicant of the elements of the charges pending against him "in laymen terms." However, case law required the Plea Judge to clearly convey this information to Applicant, or to confirm through colloquy with Plea Counsel that Applicant understood the elements of the crimes to which he pled.

(App. p. 119). While the post-conviction relief court might have later stated in its order denying the State's motion to alter or amend that it scoured the entire record, it clearly did not do so in light of the specific allegation before it as presented by Respondent Heaton and the findings in its order granting relief as set forth above.

II.

The State also notes for this Court the attached unpublished decision recently issued by another panel of this Court in the Post-Conviction Relief appeal of Marcus Martin v. State Up.Op. No. 2011-UP-489 (Filed November 2, 2011), which addressed issues similar to those considered by the Court in this appeal. The State understands that the decision is without

precedential value but offers it to this panel for information purposes only.

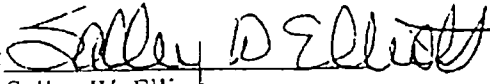
WHEREFORE, Petitioner asks this Court to reconsider and rehear this matter and reverse the order of the post-conviction relief court.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BY: 
Salley W. Elliott

Office of the Attorney General
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(803) 734-3727

ATTORNEYS FOR PETITIONER

November 9, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Anderson County
Honorable John C. Hayes, III, Circuit Court Judge

THOMAS CHAD HEATON,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

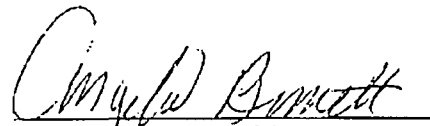
Petitioner.

PROOF OF SERVICE

I, Angela S. Bennett certify that I have served the Reply to Respondent's Return to Petition for Rehearing on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Ricky Harris, Esquire, 145 N. Church Street, #34, Suite 501, Spartanburg, South Carolina 29306.

I further certify that all parties required by Rule to be served have been served.

This 9th day of November, 2011.



ANGELA S. BENNETT
Administrative Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

Thomas Chad Heaton,

Respondent,

v.

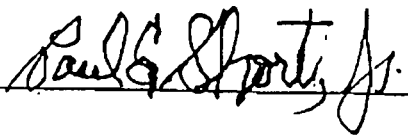
State of South Carolina,

Petitioner.

The Honorable John C. Hayes, III
Anderson County
Trial Court Case No. 2004-CP-04-00767

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 Short, J.

 Williams, J.

 Geathers, J.

Columbia, South Carolina

Nov. 17, 2011

cc: Attorney General Alan Wilson
Chief Deputy Attorney General John McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Ricky Keith Harris, Esquire

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Martin, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Anderson County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2011-UP-489
Heard October 19, 2011 – Filed November 2, 2011

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H.
Carter, of Columbia, for Respondent.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Salley W. Elliott,
Assistant Attorney General A. West Lee, and
Assistant Attorney General Kaelon E. May, all
of Columbia, for Appellant.

PER CURIAM: In this post-conviction relief (PCR) case, the State appeals the PCR court's grant of PCR to Marcus Martin regarding his guilty plea to a number of crimes. We reverse and remand for an additional finding by the PCR court.

Martin was indicted for one count of murder, two counts of armed robbery, one count of assault and battery with intent to kill, one count of possession of a firearm during the commission of a violent crime, and one count of criminal conspiracy. After jury voir dire, his counsel notified the plea court that he agreed to plead guilty to all of the charges. The plea court proceeded with its colloquy, and it eventually accepted the plea as made knowingly and voluntarily. During the plea hearing, however, the plea court did not define or explain the elements of the charges to Martin, and Martin's counsel did not confirm to the plea court that he had done so.

Martin subsequently applied for PCR, alleging his plea counsel was ineffective because his

plea was not knowing and voluntary. At the PCR hearing, Martin testified (1) he did not understand the elements of the crimes he plead to and (2) his plea counsel did not explain those elements to him. Despite this allegation, plea counsel testified he explained the elements to Martin, and in its order addressing Martin's application, the PCR court found plea counsel's testimony credible. However, the PCR court explicitly stated that it must disregard that testimony because "[t]he record at the time of the plea must comport with due process requirements. The record cannot be propped up at a later time." The PCR court then found that during the plea hearing the plea court did not explain the charges to Martin and Martin's counsel did not confirm that he had done so. Consequently, the PCR court held the plea was not knowing and voluntary, and it granted PCR. This appeal followed.

The State argues the PCR court erred in granting PCR because the PCR court explicitly disregarded plea counsel's testimony that he explained the elements of the crime to Martin even though the PCR court also found that testimony credible. We agree.

On appeal from PCR proceedings, this court must affirm the findings and holdings of the PCR court unless the findings are not supported by "any evidence of probative value" or the holdings are "controlled by an error of law." Bailey v. State, 392 S.C. 422, 432, 709 S.E.2d 671, 676 (2011). "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that" he was prejudiced by counsel's errors. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). In determining whether plea counsel was ineffective for permitting the defendant to plead guilty, the ultimate test is not the plea court's explanations or questions or the plea counsel's answers; rather, the test is the extent of the defendant's understanding revealed by the entire record, including evidence admitted at the PCR hearing. See Holden v. State, 393 S.C. 565, 572-74, 713 S.E.2d 611, 615-16 (2011); Rolen, 384 S.C. at 413, 683 S.E.2d 474.

Here, the PCR court failed to consider the entire record. It explicitly found credible plea counsel's testimony that he explained the elements of the crimes to Martin. Yet the PCR court ignored that testimony simply because it was not presented at the time of the plea. Therefore, the PCR court's decision is affected by an error of law.

Despite plea counsel's testimony, Martin testified he did not understand the elements of the charges against him, and the order granting PCR did not make a finding as to whether Martin understood those elements. Therefore, we reverse and remand for a finding of whether Martin in fact understood the elements of the crimes he plead to. In making this finding, the PCR court must consider the entire record. If Martin did not understand the elements, the PCR court must find whether this lack of understanding prejudiced him. If Martin did understand the elements, his plea was knowing and voluntary and plea counsel was not ineffective for permitting the plea.[1]

REVERSED AND REMANDED.

FEW, C.J., and THOMAS and KONDUROS, JJ., concur.

{1} During oral argument, Martin conceded that the record reflected a sufficient factual basis for the plea, description of sentencing maximums and minimums, and explanation of the constitutional rights waived.