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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Pickens County

Eugene C. Griffith, Jr., Circuit Court Judge

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RICKY LEE SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000584

---

APPENDIX

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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA  
COUNTY OF PICKENS

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA, )  
 )  
 PLAINTIFF, )  
 )  
 -VS- )  
 )  
 RICKY LEE SMITH, )  
 )  
 DEFENDANT. )  
 )  
 \_\_\_\_\_ )

2013-GS-39-0297  
2012-GS-39-1655  
2012-GS-39-1580-1584

APRIL 22, 2013

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE EDWARD W. MILLER, JUDGE

APPEARANCES:

BRANDI BATSON, ESQUIRE  
ATTORNEY FOR THE STATE

MICHAEL JOHNSON, ESQUIRE  
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS  
CIRCUIT COURT REPORTER

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**EXHIBITS**

(NONE)



1           THE COURT: You're up here on a number of  
2 indictments, some of which have not been presented to the  
3 grand jury. You have an absolute right to require that  
4 those cases be presented to the grand jury where they  
5 would have to prove more probably than not that a crime  
6 was committed and you did it. Do you want to give that  
7 right up, which will allow you to go forward today?

8           THE DEFENDANT: Yes, sir.

9           THE COURT: The first indictment, 2012-1584,  
10 alleges you did in Pickens County, between May 21 and May  
11 23, 2012, unlawfully enter the dwelling of Brent Iverson  
12 in Pickens, burglary first, fifteen years to life in  
13 prison. This is a violent offense, which means no parole.  
14 It's a most serious offense. And convictions for two or  
15 more most serious offenses entitles you to life in prison  
16 without parole. Do you understand that?

17          THE DEFENDANT: Yes, sir.

18          THE COURT: All right. You're also here on  
19 2012-1583, alleges you did, Pickens County, between May 21  
20 and 23 of 2012, feloniously carry away the personal  
21 property of Brent Iverson, a TV, laptop, boat keys.  
22 That's a five year grand larceny. You understand that?

23          THE DEFENDANT: Yes, sir.

24          THE COURT: You're also here on 2012-1582, it  
25 alleges you did, Pickens County, between April 29 and May

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*Guilty Plea*

5

1 6, 2012, feloniously carry away the personal property of  
2 Joshua Clark, TVs, an ATV and other items, firearms.  
3 That's a five year offense. You understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You're here on 2012-1581, it alleges  
6 you did, Pickens County, between April 29, 2012 and May 6,  
7 2012, unlawfully enter an outbuilding belonging to Joshua  
8 Clark in Sunset, South Carolina. That's second degree  
9 violent. That carries fifteen years and it's a serious  
10 offense. You get convictions for three or more serious  
11 offenses, you're eligible for life in prison without  
12 parole. You understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You're also here on 2012-1580, and  
15 it alleges that you did, in Pickens County, between April  
16 29 and May 6, 2012, unlawfully enter the dwelling of  
17 Joshua Clark in Sunset, South Carolina. That's a burglary  
18 first degree and fifteen years to life in prison, a most  
19 serious offense and a violent offense. You understand all  
20 that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You're also here on 2012-1655, it  
23 alleges you did, Pickens County, between May 27 and 29 of  
24 2012, unlawfully enter the outbuilding belonging to Marvin  
25 Holliday, Norris, South Carolina. That's a burglary

1 second violent. Fifteen years. And it is a serious  
2 offense. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: You're also here on 2013-297, and it  
5 alleges you did, Pickens County, November 20, 2012,  
6 unlawfully escape from the Pickens County Detention  
7 Center. That carries a mandatory minimum of one year to  
8 fifteen years consecutive to any other charges. You  
9 understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. Understanding the nature  
12 of the charges against you and the maximum possible  
13 punishment, how do you want to plead?

14 THE DEFENDANT: Guilty.

15 THE COURT: Is that your free and voluntary  
16 decision?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You understand you have an absolute  
19 right to a trial by a jury where you would be presumed  
20 innocent unless and until the state can prove you guilty  
21 beyond any reasonable doubt of each and every element of  
22 each offense you're charged with. You'd have a right to  
23 confront and cross examine the witnesses and the evidence  
24 put up against you by the state. You'd have a right to  
25 compel in court all relevant and competent evidence in

1 your own defense. Or you can remain silent. Your silence  
2 cannot be held against you. And you could never be  
3 compelled to incriminate yourself. Do you understand all  
4 those rights?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: You want to give all those rights up  
7 to enter this plea?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Are you guilty?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you totally satisfied with your  
12 lawyer?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Have you had enough time to review  
15 the evidence the state has against you?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Okay. Listen. They're going to  
18 tell us about it.

19 MS. HINTON: Thank you, Your Honor. For the  
20 record he has been in jail three hundred and twenty-seven  
21 days.

22 Your Honor, between March 9th, 2012 and May 31st of  
23 2012, the defendant broke into seven residences within  
24 Pickens County. While inside he took various items,  
25 including jewelry, electronics, guns, ATVs, et cetera.

1 Twice victims were home when he broke in. One female, Ms.  
2 Penley, who is present today, was in the shower at the  
3 time. Twice he burglarized the same residence.

4 On several incidences, Jack Kuykendall assisted this  
5 defendant in the burglaries and was an active participant.  
6 Heather Hamilton was also present when they broke into a  
7 residence and proceeded to shower while inside. Tiffany  
8 Landers was also present when a moped was stolen from a  
9 residence and assisted in selling that moped to Kevin  
10 Nicholson. Caitlin Brewer also assisted Jack Kuykendall  
11 and Ricky Lee Smith in breaking into a residence. Brewer  
12 was aware of what Kuykendall and Smith were doing at the  
13 time of the break-ins and was an active participant.

14 On November 20th of 2012, the defendant and co-  
15 defendant, Jonathan Moody, escaped from the Pickens County  
16 LEC. Smith and Moody were assisted by several inmates,  
17 but Shawn Rock and Brandi Cunningham were the two inmates  
18 that assisted Smith and Moody in scaling the fence at the  
19 rec yard.

20 On November the 24th of 2012, Smith called Pickens  
21 County Sheriff's Office to come get him.

22 Your Honor, his prior history is a 2006 petit  
23 larceny, burg second violent and malicious injury to  
24 personal property, for which he received a YOA.

25 In 2011, two counts of burg second violent. He

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*Guilty Plea*

9

1 received eight years, suspended on four years and five  
2 years probation. That probation began on September the  
3 30th of 2011.

4 Your Honor, this is a negotiated sentence of twenty-  
5 two years on the property offenses and one year  
6 consecutive on the escape. The state is dismissing four  
7 burglaries first, three petit larcenies, a grand larceny  
8 and a simple possession of marijuana. And we are also  
9 asking for restitution, Your Honor.

10 And Your Honor, at the appropriate time, the victim  
11 advocate would like to speak on behalf of Ms. Penley.

12 THE COURT: All right. Is all that true?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. Yes, ma'am.

15 BRITTANY ROPER: Yes, Your Honor, Ms. Penley had  
16 ask me to address the court on her behalf. She wanted you  
17 to know that that morning she was in the shower getting  
18 ready for work, the lights were on, the TV was on, the  
19 dryer was on, the dog was barking, and she felt that this  
20 defendant made a decision to come into her house knowing  
21 that someone was obviously there. This has completely  
22 demolished every bit of security that she's had in her  
23 home. She is really upset about this incident, but she is  
24 very much in agreement with the state's recommendation and  
25 she would like for Your Honor to go along with that.

1 I also have spoken to the other victim, Ms. Thomas,  
2 who was unable to be here today due to a work conflict,  
3 but she also is in agreement with the recommendation and  
4 would like for you to go along with it, as well.

5 THE COURT: All right. Thank you.

6 All right. Well, let's hear about he's on probation.

7 MS. FORD: Your Honor, he was sentenced before  
8 Judge Williams, March 22, 2010, to the two counts of  
9 burglary second where he received an active four year  
10 sentence and five years probation. We did speak to one of  
11 the victims, the only one that wanted something said on  
12 her behalf today, Ms. McCall. She is related to Ricky and  
13 she just feels like he needs some type of counseling while  
14 he's incarcerated. She knew he was going to get a  
15 substantial sentence when he did go to court.

16 THE COURT: All right. What do you want to tell  
17 me?

18 THE DEFENDANT: I'm sorry for everything I did.  
19 I wasn't myself. I need help.

20 THE COURT: What kind of help?

21 THE DEFENDANT: Drugs. I've been on  
22 methamphetamine since I was thirteen years old. Drug  
23 help.

24 THE COURT: Well, y'all aren't hanging anything  
25 over him?

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*Guilty Plea*

11

1 MS. HINTON: No, Your Honor.

2 THE COURT: It's kind of hard to make him pay  
3 restitution.

4 MS. HINTON: The victims are aware of that, Your  
5 Honor.

6 THE COURT: Okay. One consecutive?

7 MS. HINTON: Yes, Your Honor.

8 MR. JOHNSON: Yes, Your Honor.

9 THE COURT: All right. The lead indictment,  
10 2012-1584, twenty-two years. Recommend ATU. Restitution  
11 pursuant to the order.

12 Next one is 2013-297, escape, one year consecutive to  
13 2000 -- to that burglary first.

14 Then on grand larcenies, five years apiece. Burglary  
15 seconds fifteen years apiece. And they're all concurrent.  
16 And the other -- excuse me, burglary first, twenty-two.  
17 And those are all concurrent with what you got.

18 THE DEFENDANT: Yes, sir.

19 MS. FORD: Terminate his probation?

20 THE COURT: Terminate the probation.

21 MS. FORD: Civil judgment for restitution?

22 THE COURT: Civil judgment.

23 MS. FORD: Thank you.

24 THE COURT: All right. Good luck to you.

25 MR. JOHNSON: Thank you, Your Honor.

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*Guilty Plea*

1 MS. HINTON: Thank you, Your Honor.

2

3 END OF REQUESTED TRANSCRIPT OF RECORD

1 CERTIFICATE OF REPORTER

2

3 I, the undersigned Danette P. Hanks, Official Court  
4 Reporter for the Thirteenth Judicial Circuit of the State  
5 of South Carolina, do hereby certify that the foregoing is  
6 a true, accurate, and complete transcript of record of all  
7 the proceedings had and evidence introduced in the  
8 trial/hearing of the captioned case, relative to appeal,  
9 in the Circuit Court for Pickens County, South Carolina,  
10 on the 22nd day of April, 2013.

11 This transcript may contain quoted material. Such  
12 material is reproduced as read by the speaker.

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

15 January 20, 2014

16

17

18

19

20



Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA PM 1 54 )  
 2013 OCT 8 )  
 COUNTY OF )  
 Clerk of Court )  
 PICKENS COUNTY )  
 SOUTH CAROLINA )  
 Full name and prison number (if any) of Applicant )

IN THE COURT OF COMMON PLEAS

2013-CP-39-1262

State of South Carolina

APPLICATION FOR  
POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (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 LCI 990 WISACKY HWY, BISHOPVILLE, SC. 29010
2. Name and location of Court which imposed sentence Pickens County Court house.
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: \_\_\_\_\_  
 (a) 2012 GS-39-01580-01584 = 22 YEARS  
 (b) 2012 GS-39-01655  
 (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:  
 (a) 4/22/2013  
 (b) \_\_\_\_\_

- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty  \_\_\_\_\_
- (b) after a plea of not guilty \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
N/A
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) Plea Counsel failed to inform me of my Constitutional Right to an Appeal / Not knowingly, and intelligently waived
- (b) Plea Counsel was ineffective for failing to file a direct appeal, when post-trial requested one
- (c) Plea Counsel's declaration is the cause to "avoid the prejudice" and if these issues are procedurally barred
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Plea: *Involuntary and unintelligently Made*
- (b)        *Not In compliance With due process mandates of United States Constitution*
- (c)        *Counsel failed to comply with the mandates of Sixth Amend of U.S. Constitution*

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

- (a) Applicant, *was not given adequate information by Trial Counsel (, in order to make an intelligent decision*
- (b) Trial Counsel *failed to properly inform Applicant of the negotiation from the plea*  
*due process violations*
- (c) Trial Counsel's *incompetence, caused Applicant to plead involuntarily and unintelligently*  
*Constitutional violation*

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

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

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?

*N/A*

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?
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? \_\_\_\_\_
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

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. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

Re-plea / Belated direct appeal

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

N/A

STATE OF SOUTH CAROLINA

VERIFICATION

County of

2013 OCT ) 8 PM 1 54

I, 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 said action and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Ricky Smith*

SWORN to and subscribed before me this day of Oct, 2012

3

*John Sures*

(L.S.)

Notary Public

My Commission Expires: 11-4-2015

2013 OCT 8 PM 1 54

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

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

I, \_\_\_\_\_, 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.

Ricky Smith  
Applicant

SWORN or affirmed to and subscribed before me this

3 day of Oct, 2013.

Debra Jones  
Notary Public

My Commission Expires: 11-4-2015

2013 OCT 8 PM 1 55

CLERK OF COURT  
PICKENS COUNTY  
SOUTH CAROLINA

*Take Minutes Assistance of Counsel*

The adversarial process is provided by the Sixth Amendment, and requires that the accused have "competent" counsel acting in the role of an advocate. Both the plain reading and the reading of *Godwin* would support the guarantee of counsel in "M" criminal prosecutions. Furthermore, in case where the defendant has pled guilty and alleges his plea was due to counsel's ineffective assistance of counsel, and said plea was involuntary and unintelligent, still enjoys the Sixth Amendment protections and is entitled to the full process which lead up to said plea. *Hill v. Lockhart*, supra. This right requires the prosecution's case to survive the crucible of meaningful adversarial testing. A criminal defendant is also protected from unfairness in criminal process by due clause, and an accused can not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Sprenger v. Marshall*, 357 U.S. 513, 826, 78 S.Ct. 1392, 1398, 2 L.Ed.2d 1400 (1958).

Notice of Constitutional Rights not only must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences. *ED Hardson v. State* SC 277 S.E.2d 692 (1981) which follows: Standard 14-3.3 Pleas of Guilty, Responsibilities of the Trial Judge. 14-1.7, Record of the proceedings, 14-1.4, Courts advice to the defendant, 14-1.5, inquiry into the voluntariness of the plea, and 14-1.6, Partial basis of the plea. Further, if the Supreme Court have no record of the plea, any attempt by the state to argue that the trial court considered said factual basis from the plea, would be a due process deprivation violation based on there being no reasonable record for appeal.

*Petitioner Requested Action To this PR: from PR Counsel.*

- 1) Amend M PR issues
- 2) Request discovery and use of subpoena, all transcripts
- 3) Prepare a order Granting PR Relief, with findings of facts and conclusions of law
- 4) File a SCRCR 59 (w/j) motion if all issues are not asked or properly

Clearly what I am requesting from you is legal and ethical and in compliance with SC. § 17-29-15D. I am requesting these document along with a detailed report, so that all issues, and cases can be presented, preserved and adjudicated in the PR courts. Further, because this is my initial initial report, and comes on your behalf would be the "case" and "prejudice" to over come any procedural? *hous. Martinez v. Ryan* (2012) Wt. 912 950.

*Please include in the record for appointed counsel  
Stamp date and Return a copy to me.*

## Ineffective Assistance of Counsel

### 1) Involuntary and Unintelligent Plea

Applicant alleges that his trial counsel did not properly inform him of the factual basis for acceptance of the guilty plea, failed to properly determine from all procedures, statements and inquiries, that said guilty plea was not voluntarily and knowingly entered. Further, the trial court's failure to make certain that the record expressly reflects full compliance with Boykin Rule before trial court accepts said guilty plea. The test established by *Boykin v. Alabama*, 395 U.S. 238 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), is whether the record establishes that a guilty plea was voluntarily and understandingly made.

If the record shows that the plea was so entered, then it is not silent as to the waiver of his constitutional rights. Defendant entering a guilty plea must be aware of the privilege against self-incrimination, the right to a jury trial, the right to confront one's accusers, the nature and "crucial" elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived.

Applicant asserts that the "nature" and "crucial" elements was not properly explained to him, and this failure of counsel and trial court made said plea incompatible with the rules of Boykin, and therefore involuntary and unintelligent.

Conduct of counsel prior to the entry of a guilty plea may be examined in evaluating the extent to which the prior representations influenced the voluntary and intelligent character of the guilty plea entered. The history of counsel's representation should be explored to determine if counsel's assistance was so ineffective as to render the plea involuntary. A guilty plea does not bar collateral review of allegations of ineffective assistance of counsel in so far as the alleged ineffectiveness bears on the voluntariness of the guilty plea. *Hill v. Lockhart*, supra; *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010); *Massouri v. Frye*, 132 S.Ct. 1399 (2012); and *U.S. v. Patterson*, 739 F.2d 191.

Where allegations of ineffective assistance of counsel are made, the question becomes, whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial and/or plea can not be relied on as having produced a just result. As such courts evaluate allegations using a two pronged test. See *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625. First the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. "Under this view the proper measure of an attorney's performance remains simply reasonableness under prevailing professional norms. Secondly, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that but for counsel's errors there is a reasonable probability that the results of the proceedings would have been different. A reasonable probability is sufficient to undermine confidence in the outcome. *Hill v. Lockhart* supra. This is a Special Request for the plea transcript.

x Backlog Journals

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2013-CP-39-1262
COUNTY OF PICKENS	)	
	)	
Ricky Lee Smith,	)	
S.C.D.C. No. 321505,	)	
	)	
Applicant,	)	
	)	<b>RETURN</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed October 8, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the August 2012 term of General Sessions for two counts each of: first-degree burglary (2012-GS-39-1580, -1584), second-degree burglary (2012-GS-39-1581, -1655), grand larceny (2012-GS-39-1582, -1583). Michael Johnson, Esquire represented the Applicant.

On April 22, 2013, the Applicant pled guilty as indicted.<sup>1</sup> The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of twenty-two years for each count of first-degree burglary, fifteen years for each count of second-degree burglary, and five years for each count of grand larceny (\$2000-\$10,000). The Applicant did not appeal.

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<sup>1</sup> The State not prossed the following charges the next day: first-degree burglary (2012-GS-39-1575, -1577, -1579, -1587), petit larceny (2012-GS-39-1576, -1586, -1588), grand larceny (2012-GS-39-1578), possession of marijuana (2012-GS-39-1585).

Attached herewith and incorporated herein by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

## II.

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

1. Ineffective assistance of counsel:
  - a. "Applicant was not given adequate information by trial counsel in order to make an intelligent decision."
  - b. "Trial counsel failed to properly inform Applicant of the negotiations from the plea."
  - c. "Trial counsel's ineffectiveness caused Applicant to plead involuntarily and unintelligently."
2. Involuntary guilty plea.

## III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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

professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

#### IV.

The Applicant’s assertion that his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d

742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)). An Applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the Applicant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal 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." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State,

339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

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 post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for Respondent

March 26, 2014

STATE OF SOUTH CAROLINA )  
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 COUNTY OF PICKENS )  
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 RICKY LEE SMITH, 321505 )  
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 Applicant, )  
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 vs )  
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 STATE OF SOUTH CAROLINA, )  
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 Respondent. )  
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IN THE COURT OF COMMON PLEAS

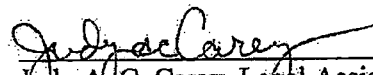
2013-CP-39-1262

AFFIDAVIT OF SERVICE BY MAIL

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

**Ricky Lee Smith, 321505  
 Lee Correctional Institution  
 990 Wisacky Highway  
 Bishopville SC 29010**

DATED this 26th day of March, 2014.

  
 \_\_\_\_\_  
 Judy A.C. Carey, Legal Assistant  
 For Respondent



I N D E X

(AW) - Denotes Applicant's Witness  
(RW) - Denotes Respondent's Witness

Page No.

(AW) RICKY LEE SMITH:

Direct Examination by Mr. Ariail.....4  
Cross-Examination by Ms. Ratigan.....12

(RW) MICHAEL JOHNSON:

Direct Examination by Ms. Ratigan.....15  
Cross-Examination by Mr. Ariail.....20

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

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THE COURT: Yes, ma'am.

MS. RATIGAN: Thank you, Your Honor.

May it please the Court.

This is the case of Ricky Smith v. the State of South Carolina. The docket number is 2013-CP-39-1262.

Mr. Smith was indicted for two counts each of first degree burglary, second degree burglary, and grand larceny. He, also, had an escape charge. He was represented on these charges by Mr. Johnson.

On April 22nd, 2013, he pled guilty pursuant to a negotiated plea before Judge Miller. Judge Miller accepted the negotiated plea and sentenced Mr. Smith to concurrent terms of 22 years for each count of burglary first, 15 years for each count of second degree burglary, five years for each count of grand larceny, and a consecutive one year for escape.

He did not file an appeal. And as his application was timely filed, the State is ready to proceed.

THE COURT: All right. Mr. Ariail.

MR. ARIAIL: Thank you, Your Honor.

We're ready to proceed. I call my client to the stand, Mr. Ricky Lee Smith.

THE COURT: All right. Come around, Mr. Smith, and be sworn.

1 THE CLERK: Place your left hand on the Bible and  
2 raise your right hand, please.

3 WHEREUPON,

4 RICKY LEE SMITH,  
5 after first having been duly sworn, testified as follows:

6 THE CLERK: State your full name for the record.

7 THE WITNESS: Ricky Lee Smith.

8 THE CLERK: Please be seated.

9 DIRECT EXAMINATION

10 BY MR. ARIAIL:

11 Q Mr. Smith, how are you doing today?

12 A I'm doing good, sir.

13 How are you?

14 Q Good. Doing fine.

15 I want to go through and summarize a little bit. You  
16 were represented by Mr. Johnson in regards to these  
17 charges; is that right?

18 A Yes, sir.

19 Q Okay. And you pled guilty to them?

20 A Yes, sir.

21 Q Okay. And I want to go through and -- what I'd like  
22 to do is kind of get the bullet points of what you want to  
23 talk about today. Tell me the issues that you want to  
24 raise for the Court to evaluate as to why you think  
25 Mr. Johnson was ineffective in your case.

1       A     I feel like he didn't take the time to go over my  
2       case with me properly. I feel like he was -- I was  
3       coerced in a lot of things he said to me. Like I say, he  
4       didn't take the time. He didn't take the effort. I'd  
5       tell him to come see me. He wouldn't come see me.

6                When he brought me my motion of discovery, I come and  
7       went to court like two days later. He never talked to me  
8       until I got up here. I feel like he didn't take the time  
9       to go over my indictments, and all that.

10              And I asked him to have my family up here. He did  
11       not notify my family to come up here. So he let me down  
12       on a lot of different things.

13       Q     Okay. And this is what I want to go back to a little  
14       bit about your discussion with him about the case. Did he  
15       go over the discovery with you about these items?

16       A     Man, we sat down for five minutes and went over it.  
17       That's it.

18       Q     When you say you went down and talked about it for  
19       five minutes, what did y'all discuss?

20       A     He was talking about this right here. He said,  
21       You're going to get a life sentence on this, this, and  
22       this, and this consecutive if you don't take this plea  
23       right here.

24                I said, My family is not here.

25                He said, All right. You're going to sign this plea

1 and you're going to come back up the next morning on the  
2 next docket.

3 And I signed the plea. I come back up. And when I  
4 come back up, there was no plea no more. It was a whole  
5 other plea for some other reason.

6 Q Okay. So when you signed the -- are you saying you  
7 signed the plea agreement at one time?

8 A Yes, sir.

9 Q So what was that for?

10 A It was 18 years and one granted for the escape. It  
11 would have been 19 altogether.

12 Q Well, why didn't y'all go forward with that at that  
13 time?

14 A He said the Solicitor changed their mind. But I  
15 signed on it.

16 Q Okay. So you signed it. And when you say you signed  
17 it, you signed the sentencing sheet?

18 A No. I signed the -- it was supposed to have been  
19 like the agreement. You know what I'm saying?

20 Q Okay. So you signed something acknowledging you were  
21 taking 18 years?

22 A And a year consecutive.

23 Q Okay. Did you give him any -- first, I guess, did he  
24 go over the elements of each of these crimes with you?

25 A Yes.

1 Q Okay. Did he -- did y'all talk about any defenses  
2 you had?

3 A No, sir. He told me I didn't have no defenses. He  
4 told me I was going to get a life sentence if I kept  
5 playing with it. So that's why I pleaded to what I did.

6 Q Well, my question is, did you have any defenses that  
7 you put him on notice of?

8 A No, sir.

9 Q Okay. So I'm trying to figure --

10 A Appeal -- I asked him about my appeal. He said he  
11 was going to file it, but he never filed my appeal, or  
12 nothing, sir.

13 Q Let's go back to your defenses and not having any.  
14 What was your theory -- you weren't going to trial on  
15 these cases; right?

16 A No, sir.

17 Q So you were trying to get the best deal you could to  
18 plead?

19 A Yes, sir.

20 Q Okay. So what did he do in regards to not getting  
21 you the best deal, or doing what he -- what are the things  
22 that caused an issue with that?

23 A Like did -- why didn't he give me the best deal?

24 Q Well, I mean, and that's up to -- I mean, I'm trying  
25 to figure -- you're saying now you're pleading guilty --

1 A Yes, sir.

2 Q -- you got more time than the 18 years?

3 A Yes, sir.

4 Q So then what happened between you getting the plea  
5 offer of 18 years to what you got now?

6 A What happened?

7 Q Yeah.

8 A He said the Solicitor wasn't going for it.

9 Q Do you know why the Solicitor wasn't going for it?

10 A No, sir.

11 Q He never told you that?

12 A No, sir.

13 Q Okay. So you raised the issue of the indictments  
14 with me. And I think one of your issues was you're saying  
15 the Grand Jury was not convened, or was not there the date  
16 you were indicted; is that correct?

17 A Yes, sir.

18 Q So what evidence do you have about that and an issue  
19 about?

20 A It's in my paperwork that -- I guess Rule 415 -- I  
21 can't remember it all, but it's all right there. You have  
22 the paperwork, I think. They wouldn't let me bring none  
23 of my legal work with me.

24 Q Okay. You're talking about the -- hold on. I've got  
25 it right here.

1 I think it's a letter you sent to me. It's entitled  
2 "Prosecutorial Misconduct."

3 A Yes, sir.

4 Q And I filed this for you on -- it looks like  
5 November 26th here in Pickens. And it's part of the file;  
6 is that right?

7 A Yes, sir.

8 Q Okay. So this is some of the issues that you want  
9 the Judge to review. Tell me a little bit about it, if  
10 you can summarize it.

11 A Prosecutorial misconduct. It's like the Fifteenth  
12 Amendment if the general sessions was not in session at  
13 the time the indictments were convened on, it's supposed  
14 to be void. And if I would have known about that, I would  
15 have never pled to that.

16 Q Okay. And you've claimed it's prosecutorial  
17 misconduct. What you're doing -- I mean, I think what you  
18 meant to say was that he should have objected to it --

19 A Yes, sir.

20 Q -- based upon you saying the Grand Jury was not there  
21 and didn't --

22 A Yes, sir.

23 Q -- indict you on that day?

24 A Yes, sir.

25 Q Did he ever go over with you, hey, here's your true

1 bill of indictment --

2 A No, sir.

3 Q -- showing you were indicted?

4 A He just gave me this and said, This is your  
5 indictments. And that's it. He said, This is what -- the  
6 evidence they've got you on. And that's it. And I went  
7 to court.

8 Q Okay. My -- I've dealt with this on a couple other  
9 ones. Do you have anything showing -- you've got a true  
10 bill of indictment by the Grand Jury; correct?

11 A Yes, sir.

12 Q Okay. Is there anything showing you that they have  
13 not done something, or that's a fraudulent Grand Jury  
14 indictment?

15 A It's in the law book. It's in the South Carolina  
16 state rule book. It says -- it's like 415. It says that  
17 Pickens County Thirteenth Judicial System is convened on  
18 every Monday of such and such of this month, this month,  
19 and this month. I don't have it in my law work. They  
20 wouldn't let me bring none of that.

21 Q But what I'm saying is, do you have -- I mean, you've  
22 got the true bill of indictment?

23 A Yes, sir.

24 Q Okay. Do you have something showing, hey, look,  
25 well, they didn't meet on the same day as they're saying

1 they convened -- they indicted me on?

2 A No, sir.

3 Q Okay. Tell me some other -- any other issues you  
4 want the Court to be aware of in regards to your  
5 representation.

6 A I asked him to file for my appeal. He did not file  
7 for my appeal.

8 Q Okay. Did y'all discuss that?

9 A Yeah. He said -- at the end, I said, Would you file  
10 for an appeal? And he said he got me, and he never did.

11 Q But, in this case, what was the ground for appeal?  
12 You got more years than --

13 A Yeah, than what I was supposed to at the 18. Plus, I  
14 was supposed to have 19 altogether.

15 Q Okay. So my question is, was that the only ground  
16 that you wanted to appeal?

17 A Yes, sir.

18 Q Did the Judge ever explain to you that, hey, you  
19 can --

20 A No, sir.

21 Q -- appeal this?

22 A He didn't tell me I could appeal this. He said I had  
23 10 days to appeal this.

24 Q The Judge?

25 A I think so.

1 Q Okay. So did you have a discussion with Mr. Johnson  
2 about, hey, I need you to file the appeal for me?

3 A Yes, sir. When I was signing off on the papers after  
4 they done sentenced me, I said that.

5 MR. ARIAIL: I have no further questions, Your Honor.

6 THE COURT: Ms. Ratigan.

7 MS. RATIGAN: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. RATIGAN:

10 Q When you met with Mr. Johnson, did you tell him kind  
11 of your version of what happened with all these different  
12 charges?

13 A Yes, ma'am.

14 Q Okay. And did he tell you that you were facing a  
15 possible sentence of life without parole?

16 A Not in that way. He told me in another way.

17 Q Okay. What other way did he tell you?

18 A He said, If you don't take this sentence right here,  
19 you're going to get life on this, and this, and this, and  
20 this ran consecutive.

21 Q Okay. And your testimony is there was a prior offer  
22 for a 19-year sentence?

23 A Yes, ma'am.

24 Q And that, eventually, that offer went away because  
25 the State changed their mind?

1 A I have no idea, ma'am.

2 Q Well, didn't you say that's what he told you?

3 A He didn't say nothing about that. He said that just  
4 she changed her mind.

5 Q That's what I mean. The State changed their mind.  
6 That's why the 19 years was no longer an option?

7 A Yeah.

8 Q So you knew when you went to the courthouse that day  
9 you weren't going to get that 19-year offer?

10 A I didn't know that until I got in there behind the  
11 bench.

12 Q So when you walked into the courthouse that day, you  
13 thought you were getting that 19 years?

14 A Yes, ma'am.

15 Q When did you find out that the negotiated agreement  
16 was for 23?

17 A When I got in there.

18 Q Were you unhappy about finding this out the day of  
19 the plea?

20 A Yes, ma'am.

21 Q Why didn't you tell the Judge that you were not  
22 satisfied, that you were unhappy with Mr. Johnson?

23 A Because I was going with what he said. Because it  
24 scared me when -- how would you feel when somebody tells  
25 you you're about to get life on this, this, this, and this

1 and it's all ran concurrent and you're going to get life  
2 without parole?

3 Q So when did Mr. Johnson explain this 23-year plea  
4 offer to you?

5 A Right before we went into the courtroom.

6 Q Okay. So you were, actually, in the courtroom when  
7 he told you?

8 A Well, we were standing outside the door.

9 Q Did he, also, tell you the State was going to dismiss  
10 several other charges?

11 A Yes, ma'am.

12 Q So even though you were unhappy with Mr. Johnson that  
13 day, you just decided to go along with him because you  
14 were scared of getting a life sentence?

15 A Yes, ma'am.

16 Q Okay. And the issue that you would have wanted to  
17 appeal is that you thought you should have gotten the  
18 19 years?

19 A Yes, ma'am. I signed for it.

20 Q But did you ever mention the 19-year offer during the  
21 plea?

22 A No, ma'am.

23 Q So how would an appellate court -- how would they be  
24 able to judge whether or not you should have gotten  
25 19 years if you never brought it up at the plea?

1 A You're right.

2 MS. RATIGAN: That's all I have, Your Honor.

3 THE COURT: Mr. Ariail?

4 MR. ARIAIL: Nothing further, Your Honor.

5 THE COURT: All right. You can step down.

6 MR. ARIAIL: Your Honor, that is our case.

7 THE COURT: All right.

8 MS. RATIGAN: Your Honor, the State would call  
9 Mr. Johnson.

10 THE CLERK: Place your left hand on the Bible and  
11 raise your right hand, please.

12 WHEREUPON,

13 MICHAEL JOHNSON,  
14 after first having been duly sworn, testified as follows:

15 THE CLERK: State your full name for the record.

16 THE WITNESS: Michael Johnson.

17 DIRECT EXAMINATION

18 BY MS. RATIGAN:

19 Q Mr. Johnson, do you recall representing Mr. Smith on  
20 these charges?

21 A I do.

22 Q And were you appointed, or were you retained?

23 A I was retained.

24 Q Okay. And did you file Brady and Rule 5 discovery  
25 motions?

1 A Yes.

2 Q To the best of your knowledge, did you receive full  
3 discovery from the State?

4 A Yes.

5 Q Did Mr. Smith ever make bond, or was he always at the  
6 detention center? Do you recall?

7 A He was always at the detention center when I was  
8 representing him.

9 Q Did you go visit him while he was at the detention  
10 center?

11 A Yes.

12 Q Did you review the discovery materials with him?

13 A Yes, ma'am. We kind of got the discovery in, I  
14 guess, segments, or piecemeal. The first couple of times  
15 we went over what we had up to that point.

16 And then what I did receive here at the courthouse  
17 and what he was referring to, we reviewed outside of the  
18 holding cell and went over again some of the elements of  
19 each of the crimes. A lot of them were the same type of  
20 offenses that we had previously been over the elements on,  
21 just different incidents.

22 Q Did Mr. Smith tell you his version of events for all  
23 these different occurrences?

24 A Yes.

25 Q Okay. And was Mr. Smith eligible for life without

1 parole --

2 A Yes.

3 Q -- being served?

4 A Yes.

5 Q Was an LWOP notice ever served?

6 A Yeah -- I cannot say for sure. I do not remember for  
7 sure, but I am fairly certain.

8 Q And did you explain to him that if that notice was  
9 served, that would be an automatic sentence if he was  
10 found guilty?

11 A Yes.

12 Q Prior to the plea we're talking about, the plea in  
13 question, were there any other plea offers that were made  
14 in this case that you recall?

15 A Prior to the plea that was eventually --

16 Q Yes, sir.

17 A Yes. There was. He was, actually, appointed  
18 representation with David Cantrell. And, at that time,  
19 when I got the case, I was under the impression that that  
20 plea offer -- although it was not given to me of 18 years,  
21 I believe, prior to the escape charge that -- he was  
22 speaking with the State. They relayed -- or advised me  
23 that he had either declined the offer or had taken up a  
24 certain amount of time to where they were going to go  
25 forward.

1           And then I was brought in, retained. And then, at  
2 the time, the State decided they were not going to go with  
3 the 18, along with the escape charge being added to it.

4           Q     So by the time you were retained on the case, that  
5 prior offer was already gone?

6           A     Yes.

7           Q     Okay. At that point, did you engage in plea  
8 negotiations with the State?

9           A     Yes.

10          Q     And y'all, ultimately, decided on and negotiated 23;  
11 is that correct?

12          A     Yes.

13          Q     Did you explain to Mr. Smith the nature of a  
14 negotiated plea, what that would mean?

15          A     Yes.

16          Q     Did he, at that point, ask you if you could get back  
17 that 19 years, or did he ask you about that prior offer?

18          A     We tried on several different occasions. And,  
19 actually, I sat down for an additional meeting with the  
20 Solicitor handling the case in her office to go over  
21 certain evidence from each of the charges, and still to no  
22 say avail. The best that I could negotiate with the State  
23 was the 23.

24          Q     Okay. When did you tell Mr. Smith that was the  
25 negotiated plea? Was it prior to him coming to court, or

1 was he brought to court and you told him, you're going to  
2 plead to a negotiated 23?

3 A It was, actually, over a two year -- or a two-time  
4 appearance to court. So he came up. I, actually, met  
5 with him. I had several other clients I was meeting with.  
6 And I met with him. We went over that. And at that time  
7 is what I believe he's referring to is when he signed the  
8 sentencing sheet. And then he was, actually, brought back  
9 up a second time.

10 Q Okay. Both of these times, y'all discussed the  
11 23-year negotiated --

12 A Yes.

13 Q Okay. Did he ask you to file a notice of appeal?

14 A I do not recall, to be honest. I do know that,  
15 typically, with my clients, I was always very up-front in  
16 that they would have 10 days to file an appeal. I know I  
17 was not retained to file an appeal. But as far as our  
18 discussion, I cannot remember for sure if he asked me to  
19 do that or not.

20 Q If he had asked you to file a notice of appeal, would  
21 you have done so?

22 A Sure.

23 MS. RATIGAN: That's all I have, Your Honor.

24 THE COURT: Mr. Ariail.

25 MR. ARIAIL: Thank you, Your Honor.

CROSS-EXAMINATION

1

2

BY MR. ARIAIL:

3

Q Mr. Johnson, in regards to the appeal, were there any grounds that you saw that were -- should be appealed?

5

A No, sir.

6

Q So he -- I want to understand. A negotiated plea for 23. You're saying now that you talked to him on two different occasions about that 23; is that right?

9

A It was, at least, two, but, yes.

10

Q Okay. And during those times, did he ever express to you, hey, I don't want that, I want the 19, or I'm not going to plead, or anything like that?

12

13

A He expressed to me that he did want to go back to the 18, plus a year for the escape. And, on several occasions, I talked to the Solicitor. And they were not willing to do that.

14

15

16

17

Q Despite that and wanting to go back clearly to an offer you couldn't get, was he willing to go forward? Did he express any concerns, anything like that?

18

19

20

A Other than not being happy with the figure going up by four years total, we went over the possible outcomes -- or the possible penalty if he were to go to trial and be found guilty.

21

22

23

24

Q Okay.

25

A And other than being unhappy with the amount of time,

1 no.

2 Q Okay. What about this Grand Jury indictment issue?  
3 Was this ever raised? Did y'all discuss it beforehand?

4 A No.

5 Q Have you ever heard of any issue from him in regards  
6 to I wasn't indicted on the day the Grand Jury was here?

7 A No. I do not recall any conversation regarding that  
8 between he and I. Granted, most of those charges were, I  
9 believe, indicted prior to me being retained when  
10 Mr. Cantrell was representing him.

11 MR. ARIAIL: I have no further questions, Your Honor.

12 THE COURT: Anything else?

13 MS. RATIGAN: No further questions, Your Honor.

14 And the State would rest.

15 THE COURT: The LWOP notice -- two burglary firsts  
16 and he's on LWOP notice for both of those if he got --

17 THE WITNESS: Yes, Your Honor, with the prior record.

18 THE COURT: You can step down.

19 All right. Anything else?

20 MR. ARIAIL: No, Your Honor.

21 MS. RATIGAN: No, Your Honor.

22 THE COURT: I'll study the submissions and the  
23 testimony taken. And I'll let you know.

24 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*

25

CERTIFICATE OF REPORTER

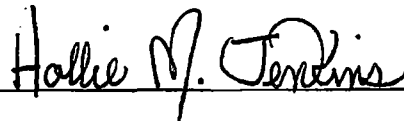
STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Pickens County, South Carolina, on the 15th day of December, 2014.

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

May 11, 2015



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF PICKENS )  
 )  
 Ricky Lee Smith, )  
 S.C.D.C. No. 321505, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2013-CP-39-1262  
 CLERK OF COURT  
 PICKENS COUNTY  
 SOUTH CAROLINA

2015 FEB -2 A 10: 30

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 8, 2013. The Respondent made its return on March 26, 2014. An evidentiary hearing into the matter was held on December 15, 2014 at the Pickens County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Michael Johnson, Esquire. The Court had before it the transcript of the guilty plea hearing, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, and the return.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Pickens County Grand Jury indicted the Applicant at the August 2012 term of General Sessions for two counts each of: first-degree burglary (2012-GS-39-1580, -1584), second-degree burglary (2012-GS-39-1581, -1655),

<sup>1</sup> SCM

grand larceny (2012-GS-39-1582, -1583). The Applicant also waived presentment on the charge of escape (2013-GS-39-0297). He was represented by Michael Johnson, Esquire.

On April 22, 2013, the Applicant pled guilty pursuant to a negotiated plea.<sup>1</sup> The Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 22 years for each count of first-degree burglary, 15 years for each count of second-degree burglary, and 5 years for each count of grand larceny (\$2000-\$10,000). Judge Miller levied a consecutive sentence of 1 year for escape. The Applicant did not appeal.

### ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:<sup>2</sup>

1. Ineffective assistance of counsel:
  - a. "Applicant was not given adequate information by trial counsel in order to make an intelligent decision."
  - b. "Trial counsel failed to properly inform Applicant of the negotiations from the plea."
  - c. "Trial counsel's ineffectiveness caused Applicant to plead involuntarily and unintelligently."
2. Involuntary guilty plea.

At the PCR hearing, the Applicant proceeded solely upon issues of ineffective assistance of counsel.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the

<sup>1</sup> The State not prossed the following charges the next day: first-degree burglary (2012-GS-39-1575, -1577, -1579, -1587), petit larceny (2012-GS-39-1576, -1586, -1588), grand larceny (2012-GS-39-1578), possession of marijuana (2012-GS-39-1585). (Plea transcript, p.9).

<sup>2</sup> This Court will not consider the pro se amendments filed by PCR counsel on November 26, 2014, as there is a prohibition against hybrid representation. See Rule 11(a), SCRCP; Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) (counsel cannot serve as a mere conduit for pro se documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client).

<sup>2</sup> SED

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

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated that, while he told plea counsel his version of the facts, they only reviewed discovery materials for five minutes. The Applicant stated plea counsel told him there were no defenses in this case and that he would receive consecutive life sentences if he did not plead guilty. The Applicant stated he signed up to plead guilty to a 19-year sentence, but that plea counsel said the assistant solicitor changed her mind. The Applicant admitted plea counsel

3 SCDA

explained to him before the plea hearing that he was pleading guilty to a negotiated sentence of 23 years and that the State was dismissing several charges. The Applicant stated he asked plea counsel to file an appeal, but that one was not filed. The Applicant stated he wanted to appeal his sentence because he should have received 19 years.

Plea counsel testified he was retained in this case. Plea counsel testified he filed discovery motions and received the discovery material over time. Plea counsel testified he reviewed the discovery materials with the Applicant, as well as the elements of the charges and the sentencing ranges. Plea counsel testified the Applicant also relayed his version of events. Plea counsel testified there was a prior plea offer while the Applicant was represented by his first attorney, and that it was for 18 years (before the escape charge). Plea counsel testified the offer was no longer available when he was retained and that he was unsuccessful in having this offer reinstated. Plea counsel testified he explained the nature of a negotiated sentence to the Applicant on two occasions. Plea counsel testified he did not recall the Applicant asking to file an appeal, but that he would have done so if requested. Plea counsel testified there were no appealable issues from the guilty plea hearing.

This Court finds the Applicant failed to meet his burden of proving plea counsel did not adequately meet with him and discuss the case. Plea counsel testified they discussed the discovery materials and charges in this case. Plea counsel admitted at the plea hearing that they had reviewed the evidence. (Plea transcript, p.7). There was a thorough plea colloquy during which the Applicant admitted to the plea judge that he was guilty. (Plea transcript, p.7). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and was pleading guilty freely and voluntarily. (Plea transcript, pp.6-7). The Applicant did not register any complaints he had with plea counsel when

<sup>4</sup> JRM

he pled guilty to this negotiated sentence. This Court also notes the Applicant failed to articulate what more he wanted plea counsel to do in order to prepare this case. See, e.g., Skcen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have filed an appeal. Plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). In order to make this determination, "courts must take into account all the information counsel knew or should have known." Id. (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066). Although not determinative, a highly relevant factor will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because a plea may indicate the defendant seeks an end to judicial proceedings. Id. Plea counsel testified he did not recall the Applicant asking him to file an appeal and that he would have done so if requested. This Court finds plea counsel's testimony is credible. Based on the thorough and complete guilty plea colloquy, it is unlikely a rational defendant would have wanted to appeal. See id.

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

5  
SRD

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel's performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### **CONCLUSION**

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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

#### **IT IS THEREFORE ORDERED:**

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

6 SED

AND IT IS SO ORDERED this 29<sup>th</sup> day of January, 2015.

Eugene C. Griffith, Jr.  
Eugene C. Griffith, Jr.  
Presiding Judge  
Thirteenth Judicial Circuit

Newberry, South Carolina.

7 SEP 2015

**WITNESSES**

Gary Dean Anthony

Pickens County Sheriff's Office

6/8/2012

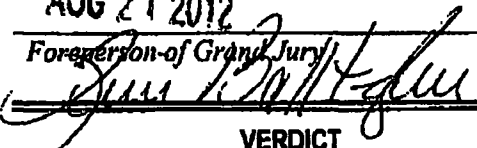
**ARREST WARRANT NUMBER**  
1677900

**ACTION OF GRAND JURY**

~~TRUE BILL~~  
Date:

AUG 21 2012

Foreperson of Grand Jury



**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2012-GS-39-1580**

BMB

**The State of South Carolina**

**County of Pickens**

**COURT OF GENERAL SESSIONS**

**AUG 21 2012 TERM 2012**

**THE STATE**

**vs.**

**RICKY LEE SMITH**

**Indictment for**

**0079**

**BURGLARY FIRST DEGREE**

**VIOLATION § 16-11-0311**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens County present upon their oath:

That RICKY LEE SMITH did in Pickens County, between the dates of April 29, 2012 and May 6, 2012, willfully and unlawfully enter the dwelling of JOSHUA CLARK located at \_\_\_\_\_ Drive, Sunset, South Carolina, without consent and with the intent to commit a crime therein and the Defendant has two or more convictions for burglary or housebreaking or a combination of both and the Defendant armed himself with weapons. This is in violation of §16-11-311 of the South Carolina Code of Laws (1976) as amended.

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

  
\_\_\_\_\_  
SOLICITOR

WITNESSES

Gary Dean Anthony

Pickens County Sheriff's Office

6/8/2012

ARREST WARRANT NUMBER  
1677903

ACTION OF GRAND JURY

TRUE BILL

FILED

AUG 21 2012

Foreperson of Grand Jury

*[Handwritten Signature]*

VERDICT

Foreperson of Petit Jury  
Date:

DOCKET NO. 2012-GS-39-1581

BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUG 21 2012 TERM 2012

THE STATE

vs.

RICKY LEE SMITH

Indictment for

0086

BURGLARY SECOND DEGREE VIOLENT

VIOLATION § 16-11-0312(B)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

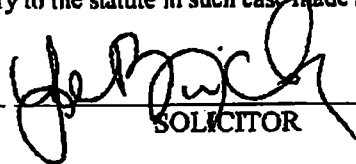
INDICTMENT FOR  
BURGLARY SECOND DEGREE VIOLENT

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens

County present upon their oath:

That RICKY LEE SMITH did in Pickens County, between the dates of April 29, 2012 and May 6, 2012, willfully and unlawfully enter an outbuilding belonging to JOSHUA CLARK located at \_\_\_\_\_ Drive, Sunset, South Carolina, without consent and with the intent to commit a crime therein and the Defendant has two or more convictions. This is in violation of §16-11-312 of the South Carolina Code of Laws (1976) as amended.

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

  
\_\_\_\_\_  
SOLICITOR

**WITNESSES**

Gary Dean Anthony

Pickens County Sheriff's Office

6/8/2012

**ARREST WARRANT NUMBER**

1677908

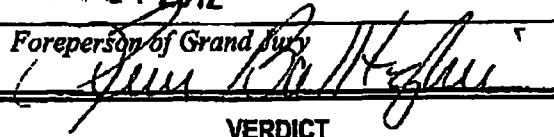
**ACTION OF GRAND JURY**

~~TRUE DATE~~

~~DATE~~

AUG 21 2012

Foreperson of Grand Jury



**VERDICT**

Foreperson of Petit Jury

Date:

DOCKET NO. 2012-GS-39-1582

BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUG 21 2012

TERM 2012

THE STATE

vs.

RICKY LEE SMITH

Indictment for

3420

GRAND LARCENY

VIOLATION § 18-13-0030(B)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
GRAND LARCENY

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens  
County present upon their oath:

That RICKY LEE SMITH did in Pickens County between the dates of April 29, 2012 and May 6, 2012,  
feloniously take and carry away the personal property of JOSHUA CLARK to wit: personal items to  
include firearms, TVs, various grocery items and/or an ATV, with a total value of more than Two  
Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation  
of §16-13-0030 of the South Carolina Code of Laws (1976) as amended.

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

Brenda Batson  
SOLICITOR

**WITNESSES**

Benjamin Dow

Pickens County Sheriff's Office

5/31/2012

**ARREST WARRANT NUMBER**  
M386893

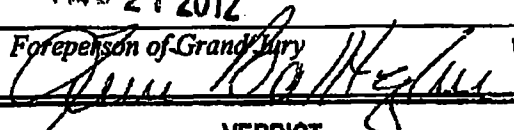
**ACTION OF GRAND JURY**

~~TRUE BILL~~

~~Date~~

AUG 21 2012

Foreperson of Grand Jury



VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012-GS-39-1583  
BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUG 21 2012 TERM 2012

THE STATE

vs.

RICKY LEE SMITH

Indictment for

3420

GRAND LARCENY

VIOLATION § 16-13-0030(B)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
GRAND LARCENY

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens

County present upon their oath:

That RICKY LEE SMITH did in Pickens County between the dates of May 21, 2012 and May 23, 2012, feloniously take and carry away the personal property of BERNT G. IVERSON to wit: personal items to include a TV, laptop computer and/or boat keys, with a total value of more than Two Thousand Dollars with the intent to deprive the owner permanently of such property. This is in violation of §16-13-0030 of the South Carolina Code of Laws (1976) as amended.

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

Branche Patton  
SOLICITOR

**WITNESSES**

Benjamin Dow  
Pickens County Sheriff's Office  
5/31/2012

**ARREST WARRANT NUMBER**  
M386890

**ACTION OF GRAND JURY**

**TRUE BILL**  
Date: AUG 21 2012

Foreperson of Grand Jury  
*[Signature]*  
**VERDICT**

Foreperson of Petit Jury  
Date:

**DOCKET NO. 2012-GS-39-1584**  
BMB

**The State of South Carolina**

**County of Pickens**

**COURT OF GENERAL SESSIONS**

**AUG 21 2012 TERM 2012**

**THE STATE**

**vs.**

**RICKY LEE SMITH**

**Indictment for**  
0079

**BURGLARY FIRST DEGREE**

**VIOLATION § 16-11-0311**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
BURGLARY FIRST DEGREE

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens  
County present upon their oath:

That RICKY LEE SMITH did in Pickens County, between the dates of May 21, 2012 and May 23, 2012, willfully  
and unlawfully enter the dwelling of BERNT G. IVERSON located at \_\_\_\_\_ Road, Pickens,  
South Carolina, without consent and with the intent to commit a crime therein and the Defendant has two or more  
prior convictions of burglary or housebreaking or a combination of both. This is in violation of §16-11-311 of the  
South Carolina Code of Laws (1976) as amended.

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

Brenda Batson  
SOLICITOR

**WITNESSES**

Gary Dean Anthony

Pickens County Sheriff's Office

8/8/2012

**ARREST WARRANT NUMBER**

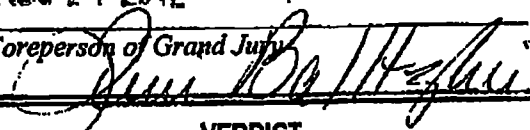
M521997

**ACTION OF GRAND JURY**

~~FILED~~  
~~12/20~~

AUG 21 2012

Foreperson of Grand Jury



**VERDICT**

Foreperson of Petit Jury

Date:

DOCKET NO. 2012-GS-39-1655  
BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUG 21 2012 TERM 2012

THE STATE

vs.

RICKY LEE SMITH

Indictment for

0086

BURGLARY SECOND DEGREE VIOLENT

VIOLATION § 16-11-0312(B)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

INDICTMENT FOR  
BURGLARY SECOND DEGREE VIOLENT

At a Court of General Sessions, convened on **AUG 21 2012** the Grand Jurors of Pickens County present upon their oath:

That RICKY LEE SMITH did in Pickens County, between the dates of May 27, 2012 and May 29, 2012, willfully and unlawfully enter outbuilding belonging to MARVIN HOLLIDAY located at Highway, Norris, South Carolina, without consent and with the intent to commit a crime therein. This is in violation of §16-11-312 of the South Carolina Code of Laws (1976) as amended.

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

Brenda Batson  
SOLICITOR