

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUL 27 2015

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

George C. James, Jr., Circuit Court Judge

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Opinion No. 2015-UP-176 (S.C. Ct. App. filed April 1, 2015)

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CHARLES RAY DEAN,

RESPONDENT,

v.

THE STATE OF SOUTH CAROLINA,

PETITIONER.

---

**APPENDIX**

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS

0810-GS-26-00222

State of South Carolina,

PLAINTIFF,

vs.

Charles Dean Ray,

DEFENDANT.

TRANSCRIPT OF RECORD

August 2, 2010  
Conway, South Carolina

BEFORE:

The Honorable, Larry B. Hyman, Judge

APPEARANCES:

BY: Nancy R. Livesay, Esq.  
Attorney for State

BY: Johnny Gardner, Esq.  
Attorney for Charles Ray Dean

BRENDA R. BABB  
Circuit Court Reporter

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Blair Hearing - August 2, 2010

3

1 The Court: We're here for pretrial motions and  
2 matters in this case. Call your case, if you would.

3 Ms. Livesay: Thank you, Your Honor, State v.  
4 Charles Dean.

5 The Court: All right, Mr. Gardner, I believe  
6 you represent Mr. Dean; is that correct?

7 Mr. Gardner: That's correct, Your Honor.

8 The Court: And how does your client intend to  
9 plead in this matter?

10 Mr. Gardner: Judge, may I approach the bench on  
11 one thing?

12 The Court: Certainly.

13 (Whereupon, a bench conference was held off the  
14 record, but out of the hearing of the audience and court  
15 reporter.)

16 The Court: Let's meet in chambers, okay.

17 (Whereupon, a recess was taken and the following  
18 takes place on the record after the recess.)

19 Ms. Livesay: Your Honor, this ---

20 The Court: All right, the defendant is in  
21 court?

22 Ms. Livesay: He is, Your Honor, and at this  
23 time the State understands that Mr. Dean is here to plead  
24 guilty but mentally ill to murder.

25 The Court: Is that correct, Mr. Gardner?

26 Mr. Gardner: It is, Your Honor.

Dr. Frierson - Direct Examination by Ms. Livesay

4

1           The Court: All right, Ms. Livesay, has there  
2 been a competency hearing?

3           Ms. Livesay: Yes, sir, there has been and Dr.  
4 Frierson is present.

5           The Court: All right, let's have a Blair  
6 hearing to determine whether he's competent to enter this  
7 plea.

8           Ms. Livesay: Yes, sir, at this time the state -

9 --

10          The Court: Has Dr. Frierson seen him today?

11          Ms. Livesay: Yes, sir.

12          The Court: Very well.

13          Ms. Livesay: Thank you, at this time the state  
14 calls Dr. Frierson to the stand, and, Your Honor, if I may  
15 for the Court's purposes, a copy of the Department of  
16 Mental Health, that's what Dr. Frierson will be going off  
17 of.

18          The Court: All right, good to see you, Dr.  
19 Frierson.

20                   Dr. Richard Frierson

21           being first duly sworn, testified as follows:

22           Madam clerk: Please state your full name and  
23 spell your last name for the record.

24           The witness: My name is Richard Lesana  
25 Frierson, F-r-i-e-r-s-o-n.

26                   Direct Examination

Dr. Frierson - Direct Examination by Ms. Livesay

5

1 By Ms. Livesay:

2 Q Dr. Frierson, and where are you currently  
3 employed?

4 A I'm employed by the University of South  
5 Carolina School of Medicine Department of Neuropsychiatry  
6 and Behavioral Science. I do contract work for the  
7 University with the Department of Mental Health forensic  
8 evaluation service.

9 Q Okay, and what exactly are your  
10 responsibilities at the Department of Mental Health?

11 A At the Department of Mental Health I  
12 evaluate criminal defendants from throughout the State of  
13 South Carolina for either competency to stand trial or  
14 criminal responsibility or in a few cases competency to be  
15 executed for those on death row.

16 Q And what kind of education or training have  
17 you undergone in order to fulfill that responsibility?

18 A I have a bachelors degree in actually music  
19 from the University of South Carolina and I then went to  
20 the University South Carolina School of Medicine where I  
21 received my medical doctorate or m.d. degree, completed  
22 four years of residency in general psychiatry at William S.  
23 Hall Psychiatric Institute and then completed a one year  
24 fellowship in forensic psychiatry at William S. Hall  
25 Psychiatric Institute.

26 Q And how long have you been working at the

Dr. Frierson - Direct Examination by Ms. Livesay

6

1 Department of Mental Health?

2 A Full time since 1993.

3 Q Okay, and ---

4 A Seventeen years.

5 Q Okay, and how many of these evaluations  
6 have you performed?

7 A Probably, I stopped counting at about  
8 fifteen hundred.

9 Q Okay, and about how many times have you  
10 testified in court?

11 A Probably around three hundred.

12 Q Okay, have you ever been qualified as an  
13 expert?

14 A Yes.

15 Q Okay, and did you see the defendant in this  
16 case Charles Dean for an evaluation?

17 A Yes.

18 Q Okay, and when did you see Mr. Dean?

19 A I saw Mr. Dean on February 6th, 2008, and  
20 March 5th of 2008.

21 Q Okay, and for what purposes did you see  
22 Charles Dean, the defendant?

23 A We had received two court orders, one had  
24 requested an evaluation of his competency to stand trial.  
25 The other had requested an evaluation of his criminal  
26 responsibility and his capacity to conform his conduct to

Dr. Frierson - Direct Examination by Ms. Livesay 7  
1 the requirements of the law on the date of offense.

2 Q Okay, and conducting these evaluations what  
3 is ---

4 The Court: Excuse me, Doctor, you tell me what  
5 evaluations you conducted?

6 The Witness: Correct, I've conducted an  
7 evaluation of his competency to stand trial

8 The Court: All right.

9 The Witness: And also an evaluation of his  
10 criminal responsibility and his capacity to conform.

11 The Court: And his capacity, okay.

12 Ms. Livesay: Thank you, Your Honor.

13 The Court: Sorry.

14 Ms. Livesay: It's okay.

15 Q (Continuing) And, Dr. Frierson, what is the  
16 procedure when you're doing these evaluations; what exactly  
17 do you do?

18 A First we end up reviewing all the documents  
19 that were provided for the evaluation, that includes the  
20 arrest warrant, incident reports, police reports, written  
21 statements, in this case an autopsy report of the victim.  
22 We reviewed an audio tape recording that was made in the  
23 emergency room with Mr. Dean. We also talked to family  
24 members to get a social history, people who knew the  
25 defendant. We reviewed his prior criminal record.

26 Q And if you don't mind, Mr. Frierson, could

Dr. Frierson - Direct Examination by Ms. Livesay

8

1 you just tell us exactly what you did review for this  
2 evaluation?

3 A Okay, I reviewed all the incident reports,  
4 the arrest warrant, photos, the audio taped interviews,  
5 medical records from Conway Medical Center. I also  
6 reviewed incident reports related to prior police calls to  
7 this family for criminal domestic violent calls, three year  
8 driving record of the defendant and the victim. I reviewed  
9 school records from the Conway public school system,  
10 medical records from J. Reuben Long Detention Center, and  
11 then I personally interviewed Bonnie Russ on the telephone,  
12 that's the defendant's sister, Azalee Allen, who I believe  
13 is his mother in law, Brittany Dean, his daughter, Larry  
14 Dean, the brother.

15 I also in the course of this particular  
16 evaluation, because of a history of significant head  
17 injury, I had him tested for psychological testing. I also  
18 had a CT scan of his brain done, an electro, I'm sorry, an  
19 MRI scan of his brain, a EEG which is a brain wave where we  
20 measure the brain's electrical activity, put a bunch of  
21 wires on their head, it's called an EEG, so those are the  
22 things that I did outside of interviewing Mr. Dean.

23 Q And about how long did the interview with  
24 Mr. Dean last?

25 A I spent a total of three hours and thirty.  
26 minutes with Mr. Dean as well as about fifteen or twenty

Dr. Frierson - Direct Examination by Ms. Livesay

9

minutes today.

Q Okay, and after reviewing the above items and after speaking with the defendant were you able to come to a conclusion as to his competence to stand trial?

A Yes.

Q And could you, please, read to the court exactly what your conclusion was as to his competence?

A Well I concluded in my opinion that Mr. Dean is currently competent to stand trial. He's certainly aware of the charge against him. He appeared to appreciate the seriousness of the charge including the maximum potential sentence he would receive if he were to be convicted, that he was able to identify his attorney and explain the role of his attorney. He stated that he had met with his attorney and could tell his attorney everything he knows about the charges against him. He understood the role and of the judge in deciding a sentence and also the role of the judge in setting a bond. He understands the adversarial role of the solicitor. He knew that a jury consists of people who sit and listen over, people sitting over to the side listening to what's going in and that their job was to decide if you're telling the truth or not and to decide the ultimate guilt or innocence of the defendant.

He was aware of the pleas of guilty and not guilty. Initially he could not define what a plea bargain

Dr. Frierson - Direct Examination by Ms. Livesay

10

1 was, however we educated him about that in February. When  
2 we saw him again in March he had retained that information  
3 and was able to discuss the process of plea bargaining. He  
4 was aware of potential evidence in this case, understood  
5 the strength of the evidence in this case.

6 Q Now so you concluded basically he was  
7 competent to stand trial?

8 A Yes.

9 Q Okay, now as to the evaluation for criminal  
10 responsibility what does that entail?

11 A In addition to reviewing all of the  
12 information that I mentioned previously it involved  
13 actually discussing what happened at the time of the  
14 alleged offense with the defendant and also making sure  
15 that I had read all the written statements of people who  
16 were actually there at the time of the offense.

17 Q Okay, so what are the possibly outcomes as  
18 to his criminal responsibility or possible conclusions that  
19 you can make?

20 A Well on the issue of criminal  
21 responsibility, do you want me to explain capacity to  
22 conform as well?

23 Q Yes, sir, please.

24 Q Okay, criminal responsibility in this state  
25 is to find that the defendant could be found legally insane  
26 or not guilty by reason of insanity. If at the time of the

Dr. Frierson - Direct Examination by Ms. Livesay

11

1 crime the defendant was suffering from a mental disease or  
2 defect to such an extent that they lacked the ability to  
3 distinguish legal or moral right from legal or moral wrong  
4 or to recognize the particular act that they're alleged to  
5 have committed as being legally or morally wrong. So if I  
6 don't think basically they knew right from wrong I could  
7 opine that they were not criminal responsible and  
8 theoretically they could be eligible if the court were to  
9 agree with that finding a verdict of not guilty by reason  
10 of insanity.

11           According to our statute if we find that we  
12 believe someone was criminally responsible and did not have  
13 a mental illness that prevented them to distinguishing  
14 right from wrong we are further ordered to evaluate a  
15 defendant to see whether or not even though they knew right  
16 from wrong they could conform their conduct to the  
17 requirements of the law, that they had some mental disease  
18 or defect that impairs in some way their capacity to  
19 conform.

20           If we believe that a person knew right from wrong  
21 and could conform then they would just be, I guess,  
22 eligible to plead guilty or not guilty and have a trial.

23           If we believe that someone was capable of  
24 distinguishing right from wrong but because of mental  
25 disease or defect lack the capacity to conform then they  
26 would potentially be eligible for a sentence of guilty but

Dr. Frierson - Direct Examination by Ms. Livesay

12

1 mentally ill.

2 Q Okay, and in this particular case after  
3 your evaluation of the defendant what was your conclusion,  
4 could you, please, read that to the court?

5 A Yes. First of all I did not find evidence  
6 of mental disease or defect that would cause Mr. Dean to  
7 lack the ability to distinguish right from wrong. Normally  
8 that would require delusion about the victim or some sort  
9 of psychotic mental illness. He does not have that.

10 What I did discover in the course of this  
11 evaluation was that at a very young age Mr. Dean was  
12 involved in a accident where he was hit by a car. He was,  
13 there's debate as to how old he was, he thought was, he and  
14 his brother disagree on how old he was whether it was three  
15 years old or five years old, but he was young, and was hit  
16 by a car. This resulted in a significant brain injury to  
17 Mr. Dean that required first of all neurosurgical  
18 intervention with a neurosurgeon to repair a defect in his  
19 skull. It also required some extensive rehabilitation in  
20 the areas of learning to walk and talk, that he had lost  
21 some of the ability that he had prior to this head injury.

22 Because of his history I wanted to document to  
23 actually see if that injury was visible still on MRI scan  
24 and EEG and ct and it is. He has a particular damage to a  
25 part of his brain called the frontal lobe which is the part  
26 of the brain that sits above where your eye sockets are.

Dr. Frierson - Direct Examination by Ms. Livesay

13

1 Q Yes, sir.

2 A We call those the orbits, but I think  
3 people are probably more familiar with sockets; and he has  
4 a particular area of this frontal lobe that is injured  
5 which is the part of the brain that lies just immediately  
6 over the eyes, the eye socket, so that the bony part of the  
7 eye socket can sometimes hit the brain during traumatic  
8 events and so he has evidence of brain damage that's  
9 clearly visible on CT scan, MRI scan, and also there's  
10 abnormalities coming from that area on electrical  
11 encephalogram or EEG. So we know functionally something is  
12 wrong, too, because we can see with the electrical activity  
13 to the brain, so I had that combined with a history that  
14 even since a very young age there have been several events  
15 where Mr. Dean appeared to have great difficulty  
16 controlling anger.

17 This area of the brain, injury to this area of  
18 the brain has been associated in numerous studies looking  
19 primarily back to Viet Nam veterans who had brain damage,  
20 it's associated with the inability or lack of inability,  
21 impairment inability might be a better word, to modulate  
22 anger, so that we, this is the part of the brain with the  
23 off switch that you feel yourself getting out of control  
24 and it shuts the anger off or at least helps you control it  
25 and not having something violent, so injuries to this area  
26 of the brain is associated with having that type of

Dr. Frierson - Direct Examination by Ms. Livesay

14

1 difficulty.

2           We know that he put his hand through a window at  
3 like a very young age when someone was making faces at him  
4 on the porch when he was a kid. We have a history of a  
5 serious assault against a sister resulting in a fractured  
6 jaw when he was much younger that was totally out of  
7 proportion to the event that would trigger his anger. We  
8 have a history of him losing control in traffic with  
9 someone cuts him off or whatever, sort of road rage, that  
10 he has trouble, he's jumped out of his car and sort of gone  
11 after someone who's cut him off in traffic. So we have  
12 this chronic pattern that is known to be behavior that  
13 could be associated with this type of brain injury, and so  
14 that is my reasoning that I gave him a diagnosis of  
15 personality change due to head trauma, aggressive type, and  
16 it's my opinion that his difficulty modulating his anger  
17 does significantly substantially impair his capacity to  
18 conform his conduct especially when he gets angry.

19           Q       So your final conclusion there was that he  
20 knew right from wrong but could not conform his behavior?

21           A       Yes.

22           Q       Okay, in your evaluations did you come to  
23 any other conclusions regarding this defendant?

24           A       I don't know what other conclusions, just  
25 competency.

26           Q       Okay, that's fine, and there was nothing

Dr. Frierson - Direct Examination by Ms. Livesay

15

1 other done as far as part of the procedure other than what  
2 you've already told the court?

3 A That's correct.

4 Ms. Livesay: Okay, I have no further questions  
5 for this witness, Your Honor.

6 The Court: Did you introduce the report?

7 Ms. Livesay: I was going to mark it as a  
8 Court's exhibit, Your Honor.

9 The Court: All right, I'd like to do that, any  
10 objection?

11 Mr. Gardner: No, Judge, I was going to ask that  
12 that be marked.

13 The Court: All right, then do you stipulate to  
14 the findings?

15 Mr. Gardner: Yes, sir.

16 The Court: Agree with the findings?

17 Mr. Gardner: Agree with the findings. I have  
18 follow up about two questions, if I may?

19 The Court: I'm going to let you do that, do you  
20 have a clean copy?

21 Ms. Livesay: Yes, sir, I do.

22 The Court: Well does the doctor have one,  
23 perhaps, have it marked as Court's Exhibit 1.

24 Ms. Livesay: I think I've got one more but let  
25 me see if I can you a clean copy, Your Honor.

26 The Court: Thank you, Doctor. Ms. Babb, I have

Dr. Frierson - Cross Examination by Mr. Gardner

16

1 it, Ms. Livesay.

2 Ms. Livesay: Yes, sir.

3 The Court: I've got one.

4 (Whereupon, Court's Exhibit Number 1 marked for  
5 identification.)

6 The Court: All right, Mr. Gardner?

7 Mr. Gardner: Thank you, Judge.

8 Cross Examination

9 By Mr. Gardner:

10 Q Doctor, it may have been asked and I just  
11 missed it. I know she talked to you about prior  
12 qualifications of an expert but I don't know if she  
13 actually moved to have you as an expert for this, if not we  
14 so move.

15 The Court: All right, do you stipulate that he  
16 is an expert?

17 Mr. Gardner: In the field of psychiatric  
18 forensic psychology --

19 The Witness: Forensic psychiatry.

20 The Court: Forensic psychiatry.

21 The Witness: Yes, sir.

22 The Court: All right, were you offering him as  
23 such, Ms. Livesay?

24 Ms. Livesay: Yes, sir.

25 The Court: All right, any questions?

26 Mr. Gardner: No, we stipulate to that, too.

Dr. Frierson - Cross Examination by Mr. Gardner

17

1 Q (Continuing) The other follow up to that  
2 same question, these opinions were they given within a  
3 reasonable degree of psychiatric or medical certainty?

4 A Yes.

5 Q Okay, and the third and last, Doctor, you  
6 did see him today and none of your opinions have changed?

7 A That is correct.

8 Mr. Gardner: Thank you, sir.

9 The Court: All right, Doctor, if I understand  
10 it, you find him competent as that term is applied to  
11 criminal proceedings and you find him legally responsible,  
12 that you find him to be mentally ill?

13 A That's correct.

14 The Court: Thank you, Doctor, anything further,  
15 Ms. Livesay?

16 Ms. Livesay: No, sir.

17 The Court: All right, you may step down,  
18 Doctor, any objection to releasing the doctor?

19 Mr. Gardner: No, Your Honor.

20 Ms. Livesay: Your Honor, can I excuse Dr.  
21 Frierson?

22 The Court: That's what I was just asking.

23 Ms. Livesay: Yes, sir, thank you.

24 The Court: Okay, Dr. Frierson, thank you for  
25 coming, you are excused and released from your subpoena.

26 Ms. Livesay: Thank you, Dr. Frierson.

1 The Court: All right, the Court having  
2 conducted -- anything further?

3 Mr. Gardner: I can't think of anything, Your  
4 Honor.

5 The Court: Anything further?

6 Ms. Livesay: Not as to this hearing, no, sir.

7 The Court: All right, the Court having  
8 conducting a Blair hearing finds that it has been  
9 established certainly by the preponderance of the evidence  
10 that this defendant is competent to stand trial. He's  
11 competent to enter a guilty plea. He is criminally  
12 responsible for the alleged act, acts, as that term is  
13 applied to his guilty plea, and that the mental illness has  
14 been adequately established, okay, and I will make those  
15 findings.

16 Ms. Livesay: Thank you, Your Honor.

17 The Court: All right, are we ready to go  
18 forward with the plea?

19 Ms. Livesay: Yes, sir, we are.

20 The Court: Is that correct, Mr. Gardner?

21 Mr. Gardner: That is correct, Your Honor, based  
22 on those findings that he would enter now a plea of guilty  
23 but mentally ill.

24 The Court: All right.

25 Ms. Livesay: Your Honor, the sentencing sheet.

26 END OF REQUESTED TRANSCRIPT:.....

## CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

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

August 11, 2011

Brenda R. Babb

Brenda R. Babb, CVR

OFFICIAL REPORTER

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS  
0810-GS-26-00222

STATE OF SOUTH CAROLINA,

PLAINTIFF,

vs.

CHARLES RAY DEAN,

DEFENDANT.

TRANSCRIPT OF RECORD

AUGUST 2, 2010  
CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, LARRY B. HYMAN, JUDGE

APPEARANCES:

BY: NANCY R. LIVESAY, ESQ.  
ATTORNEY FOR STATE

BY: JOHNNY GARDNER, ESQ.  
ATTORNEY FOR CHARLES RAY DEAN

BRENDA R. BABB  
Circuit Court Reporter

2

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## GUILTY PLEA - AUGUST 2, 2010

3

1 THE COURT: THE COURT HAVING CONDUCTED A BLAIR  
2 HEARING FINDS THAT IT HAS BEEN ESTABLISHED, CERTAINLY BY A  
3 PREPONDERANCE OF THE EVIDENCE, THAT THIS DEFENDANT IS  
4 COMPETENT TO STAND TRIAL. HE'S COMPETENT TO ENTER A GUILTY  
5 PLEA. HE IS CRIMINALLY RESPONSIBLE FOR THE ALLEGED ACTS AS  
6 THAT TERM IS APPLIED TO HIS GUILTY PLEA AND THAT THE MENTAL  
7 ILLNESS HAS BEEN ADEQUATELY ESTABLISHED, OKAY, AND I WILL  
8 MAKE THOSE FINDINGS.

9 MS. LIVELY: THANK YOU, YOUR HONOR.

10 THE COURT: ARE WE READY TO GO FORWARD WITH THE  
11 PLEA?

12 MS. LIVELY: YES, SIR, WE ARE.

13 THE COURT: IS THAT CORRECT, MR. GARDNER?

14 MR. GARDNER: THAT'S CORRECT, YOUR HONOR, BASED  
15 ON THOSE FINDINGS THAT HE WOULD ENTER NOW A PLEA OF GUILTY  
16 BUT MENTALLY ILL.

17 THE COURT: ALL RIGHT.

18 MS. LIVELY: YOUR HONOR, THE SENTENCING SHEET.

19 THE COURT: YES.

20 THE COURT: YOU, SIR, ARE CHARLES RAY DEAN; IS  
21 THAT CORRECT?

22 DEFENDANT DEAN: YES, SIR.

23 THE COURT: AND, MR. DEAN, I BELIEVE YOU ARE  
24 REPRESENTED BY MR. GARDNER WHO STANDS HERE WITH YOU?

25 DEFENDANT DEAN: YES, SIR.

GUILTY PLEA - AUGUST 2, 2010

4

1 THE COURT: ALL RIGHT, AND, MR. DEAN, YOU'RE  
2 GOING TO HAVE TO SPEAK UP, WOULD YOU MOVE THE MICROPHONE  
3 OVER? I HAVE A COURT REPORTER HERE THAT HAS TO RECORD ALL  
4 YOUR RESPONSES AND IF SHE CAN'T HEAR SHE CAN'T TELL ME WHAT  
5 YOU ARE OR PUT IN THE RECORD WHAT YOU ARE SAYING.

6 HE'S REPRESENTED YOU FOR SOME TIME?

7 DEFENDANT DEAN: YES, SIR.

8 THE COURT: ALL RIGHT, AND, MR. DEAN, DO YOU  
9 UNDERSTAND THE CHARGES THAT YOU HAVE BEFORE ME?

10 DEFENDANT DEAN: YES, SIR.

11 THE COURT: ALL RIGHT, NOW, MR. GARDNER, LET ME  
12 ASK YOU SOME QUESTIONS, HAVE YOU EXPLAINED TO MR. DEAN THE  
13 NATURE OF THIS OFFENSE AND THE POSSIBLE PENALTIES?

14 MR. GARDNER: I HAVE, YOUR HONOR.

15 THE COURT: HAVE YOU EXPLAINED TO HIM THE NATURE  
16 OF THE PLEA OF GUILTY BUT MENTALLY ILL?

17 MR. GARDNER: YES, SIR.

18 THE COURT: DOES HE UNDERSTAND THAT?

19 MR. GARDNER: YES, SIR.

20 THE COURT: MR. DEAN, DO YOU UNDERSTAND THAT  
21 YOU'RE PLEADING GUILTY TO THIS OFFENSE WHICH IS MURDER BUT  
22 YOU ARE PLEADING GUILTY BUT MENTALLY ILL; DO YOU UNDERSTAND  
23 THAT?

24 DEFENDANT DEAN: YES, SIR.

25 THE COURT: HAVE YOU HAD ADEQUATE TIME TO

GUILTY PLEA - AUGUST 2, 2010

5

1 DISCUSS THAT WITH YOUR ATTORNEY; DO YOU KNOW WHAT THAT  
2 MEANS?

3 DEFENDANT DEAN: YES, SIR.

4 THE COURT: DO YOU HAVE ANY QUESTIONS FOR ME  
5 CONCERNING THAT PLEA?

6 DEFENDANT DEAN: NO, SIR.

7 THE COURT: ALL RIGHT, SIR, MR. GARDNER, HAVE  
8 YOU HAD AN OPPORTUNITY TO REVIEW THE DISCOVERY MATERIALS IN  
9 THIS CASE?

10 MR. GARDNER: I HAVE, JUDGE.

11 THE COURT: DO YOU FEEL THAT YOU HAVE THE  
12 DISCOVERY MATERIALS, ALL THE MATERIALS?

13 MR. GARDNER: WE HAVE ALL BUT ONE PART OF ONE  
14 TELEPHONE CONFERENCE BUT I DON'T THINK IT WOULD ADD OR TAKE  
15 AWAY ANYTHING IN THE CASE.

16 THE COURT: ALL RIGHT, YOU'RE SATISFIED WITH THE  
17 DISCOVERY MATERIALS YOU HAVE?

18 MR. GARDNER: I'M SATISFIED WITH THEM.

19 THE COURT: HAS HE GONE OVER THOSE WITH YOU,  
20 THAT'S THE EVIDENCE, HAS HE GONE OVER THE EVIDENCE WITH  
21 YOU, MR. DEAN?

22 DEFENDANT DEAN: YES, SIR.

23 THE COURT: ALL RIGHT, SIR, MR. GARDNER, HAVE  
24 YOU EXPLAINED TO HIM ANY POSSIBLE DEFENSES THAT HE MIGHT  
25 HAVE AND HIS CONSTITUTIONAL RIGHTS?

## GUILTY PLEA - AUGUST 2, 2010

6

1 MR. GARDNER: WE HAVE, YOUR HONOR.

2 THE COURT: IT'S MY UNDERSTANDING, MR. GARDNER,  
3 THAT YOU AGREE WITH YOUR CLIENT'S DECISION TO ENTER THIS  
4 PLEA OF GUILTY BUT MENTALLY ILL; IS THAT CORRECT?

5 MR. GARDNER: I BELIEVE THAT THERE'S A  
6 SUBSTANTIAL FACTUAL BASIS FOR HIS PLEA, YOUR HONOR.

7 THE COURT: ALL RIGHT, DO YOU FEEL THAT IF THE  
8 STATE OR IF HE WERE TO PROCEED TO TRIAL THAT THERE IS HIGH  
9 LIKELIHOOD THAT A JURY WOULD CONVINCE HIM, CONVICT HIM OF  
10 THIS CHARGE?

11 MR. GARDNER: YES, YOUR HONOR.

12 THE COURT: ALL RIGHT, NOW, MR. DEAN, I SEE HERE  
13 THAT YOU ARE 48 YEARS OF AGE; IS THAT CORRECT?

14 DEFENDANT DEAN: YES, SIR.

15 THE COURT: AND, MR. DEAN, FROM WHAT I HEAR FROM  
16 DR. FRIERSON YOU WERE BORN AND RAISED HERE IN HORRY COUNTY;  
17 IS THAT CORRECT?

18 DEFENDANT DEAN: YES, SIR.

19 THE COURT: HAVE YOU EVER BEEN IN THE MILITARY,  
20 MR. DEAN?

21 DEFENDANT DEAN: NO, SIR.

22 THE COURT: MR. DEAN, HOW FAR DID YOU GO IN  
23 SCHOOL?

24 DEFENDANT DEAN: TENTH GRADE, SIR.

25 THE COURT: AND WHERE DID YOU GO, TO CONWAY HIGH

GUILTY PLEA -- AUGUST 2, 2010

7

1 SCHOOL?

2 DEFENDANT DEAN: CONWAY HIGH SCHOOL AND SOCASTEE  
3 SCHOOL.

4 THE COURT: ALL RIGHT, SIR, AND YOU LEFT AFTER  
5 THE TENTH GRADE?

6 DEFENDANT DEAN: YES, SIR.

7 THE COURT: MR. DEAN, WHAT KIND OF WORK DO YOU  
8 DO?

9 DEFENDANT DEAN: NOW?

10 THE COURT: YES, SIR, WHAT KIND, WHAT ARE YOU  
11 DOING?

12 DEFENDANT DEAN: PAINTING, CARPENTER WORK, SIR.

13 THE COURT: PAINTING AND CARPENTER, IS THAT WHAT  
14 YOU'VE ALWAYS DONE?

15 DEFENDANT DEAN: BASICALLY.

16 THE COURT: NOW I UNDERSTAND THAT THE VICTIM IN  
17 THIS MATTER WAS YOUR WIFE; IS THAT CORRECT?

18 DEFENDANT DEAN: YES, SIR.

19 THE COURT: HOW LONG HAD YOU BEEN MARRIED?

20 DEFENDANT DEAN: TWELVE, 13 YEARS, SIR.

21 THE COURT: HOW MANY CHILDREN DID YOU AND SHE  
22 HAVE, IF YOU HAD ANY?

23 DEFENDANT DEAN: TWO.

24 THE COURT: HOW MANY CHILDREN DO YOU HAVE  
25 OTHERWISE FROM OTHER SOURCES?

GUILTY PLEA - AUGUST 2, 2010

8

1 DEFENDANT DEAN: TWO.

2 THE COURT: TWO, I BELIEVE THE REPORT SAID YOU  
3 HAD FOUR CHILDREN, IS THAT CORRECT?

4 DEFENDANT DEAN: YES, SIR.

5 THE COURT: ALL RIGHT, SIR, MR. DEAN, I HAVE  
6 HEARD A FULL PSYCHIATRIC EVALUATION FROM DR. FRIERSON; WAS  
7 THE INFORMATION THAT HE GAVE ME CORRECT?

8 DEFENDANT DEAN: YES, SIR.

9 THE COURT: IS THAT WHAT YOU RECALL?

10 DEFENDANT DEAN: YES, SIR.

11 THE COURT: ALL RIGHT, SIR, HAVE YOU EVER HAD  
12 ANY OTHER PSYCHIATRIC OR PSYCHOLOGICAL CARE OR TREATMENT  
13 OTHER THAN WHAT I HEARD FROM THIS WITNESS STAND?

14 DEFENDANT DEAN: NO, SIR.

15 THE COURT: MR. DEAN, DO YOU UNDERSTAND WHY YOU  
16 ARE HERE?

17 DEFENDANT DEAN: YES, SIR.

18 THE COURT: DO YOU HAVE ANY PROBLEMS  
19 UNDERSTANDING ME?

20 DEFENDANT DEAN: NO, SIR.

21 THE COURT: MR. GARDNER, DO YOU HAVE ANY DOUBTS  
22 WHATSOEVER AS TO YOUR CLIENT'S COMPETENCY TO ENTER THIS  
23 PLEA?

24 MR. GARDNER: NONE, YOUR HONOR.

25 THE COURT: ALL RIGHT, MR. DEAN, HAVE YOU EVER

GUILTY PLEA - AUGUST 2, 2010

9

1 BEEN TREATED FOR ALCOHOLISM OR DRUG ADDICTION?

2 DEFENDANT DEAN: NO, SIR.

3 THE COURT: HAVE YOU TAKEN ANY ALCOHOL OR DRUGS  
4 IN THE LAST TWENTY FOUR HOURS?

5 DEFENDANT DEAN: NO, SIR.

6 THE COURT: MR. DEAN, CAN YOU THINK OF ANY  
7 REASON WHATSOEVER, IS THERE ANYTHING GOING ON IN YOUR LIFE  
8 THAT WOULD PREVENT YOU FROM FULLY AND COMPLETELY  
9 UNDERSTANDING WHAT WE ARE DOING HERE TODAY?

10 DEFENDANT DEAN: NO, SIR.

11 THE COURT: WHY ARE YOU HERE TODAY?

12 DEFENDANT DEAN: TO STAND TRIAL, SIR.

13 THE COURT: ALL RIGHT, AND WHAT ARE YOU DOING AT  
14 THIS POINT?

15 DEFENDANT DEAN: PLEADING GUILTY.

16 THE COURT: YOU'RE PLEADING GUILTY. ALL RIGHT,  
17 SIR, MR. DEAN -- DO I HAVE THE INDICTMENT? I HAVE A TRUE  
18 BILLED INDICTMENT, THIS INDICTMENT ALLEGES THAT ON OR ABOUT  
19 OCTOBER THE 16TH OF 2007 YOU DID WILLFULLY, FELONIOUSLY,  
20 AND INTENTIONALLY KILL ONE JILL DEAN WITH MALICE  
21 AFORETHOUGHT BY MEANS OF ASSAULTING AND STABBING HER AND  
22 THEN SHE DID DIE AS A PROXIMATE RESULT THEREOF; ARE YOU  
23 FAMILIAR WITH THAT CHARGE? DO YOU KNOW WHY WE ARE HERE?

24 DEFENDANT DEAN: YES, SIR.

25 THE COURT: ALL RIGHT, SIR, MS. LIVESAY, IF YOU

GUILTY PLEA - AUGUST 2, 2010

10

1 WOULD GIVE ME THE FACTS OF THE CASE, PLEASE?

2 MS. LIVELY: JUST BRIEFLY, YOUR HONOR, ON OR  
3 AROUND OCTOBER 17TH, 2007, JILL DEAN ALONG WITH HER  
4 DAUGHTER BRITTANY DEAN, HER BOYFRIEND, CODY LARRIMORE, CAME  
5 HOME AROUND 5:30, 6:00 IN THE MORNING. AS SOON AS THEY  
6 ENTERED THE HOME THE DEFENDANT CAME IN THE HOME FROM THE  
7 BACK ENTRANCE. AT THAT TIME HE IMMEDIATELY STARTED  
8 ASSAULTING JILL DEAN, THE VICTIM IN THIS CASE. BRITTANY  
9 DEAN DID STAB THE DEFENDANT IN THE BACK IN ORDER TO TRY TO  
10 GET HIM OFF JILL DEAN. AT THAT TIME SHE LEFT THE RESIDENCE  
11 WHERE THE ASSAULT CONTINUED AND ---

12 THE COURT: WHO LEFT THE RESIDENCE?

13 MS. LIVELY: BRITTANY DEAN.

14 THE COURT: OKAY, ALL RIGHT.

15 MS. LIVELY: SHE LEFT WITH CODY LARRIMORE; THEY  
16 WENT ACROSS THE STREET, CALLED 911. WHEN THE POLICE  
17 ARRIVED MR. DEAN, THE DEFENDANT, WAS SITTING ON THE FRONT  
18 PORCH. HE THEN GOT DOWN, HE WAS CUFFED BY THE OFFICER.  
19 THE OFFICER CAME IN, AT THAT TIME SAW THE VICTIM LAYING,  
20 MULTIPLE STAB WOUNDS, AND THE THROAT CUT, YOUR HONOR.

21 THE COURT: ALL RIGHT, IS THAT WHAT OCCURRED,  
22 MR. DEAN, ESSENTIALLY?

23 DEFENDANT DEAN: THAT'S WHAT THEY SAY, SIR.

24 THE COURT: ALL RIGHT, WELL YOU TELL ME, DID YOU  
25 STAB AND KILL YOUR WIFE?

## GUILTY PLEA - AUGUST 2, 2010

11

1           DEFENDANT DEAN:    I GUESS SO, SIR.

2           THE COURT:    WELL, MR. DEAN, IN ORDER FOR ME TO  
3   ACCEPT YOUR PLEA I HAVE TO DETERMINE THAT THERE'S A  
4   SUBSTANTIAL FACTUAL BASIS AND I HAVE TO DETERMINE WHETHER  
5   OR NOT YOUR PLEA IS FREE AND VOLUNTARY, KNOWING, AND  
6   INTELLIGENTLY MADE, SO I NEED TO KNOW IF THAT IS WHAT  
7   HAPPENED?

8           DEFENDANT DEAN:   YES, SIR.

9           THE COURT:    ALL RIGHT, SIR, NOW, MR. DEAN, DO  
10   YOU REALIZE THAT YOU DO NOT HAVE TO PLEAD GUILTY; YOU HAVE  
11   AN ABSOLUTE RIGHT TO A JURY TRIAL? ANYONE CHARGED WITH ANY  
12   CRIMINAL OFFENSE IN THIS STATE HAS THAT RIGHT. WHEN WE  
13   PLEAD OR WHEN A PERSON PLEADS GUILTY YOU GIVE UP YOUR RIGHT  
14   TO A JURY TRIAL OR YOU WAIVE YOUR RIGHT TO A JURY TRIAL AND  
15   WHEN YOU DO THAT YOU GIVE UP MANY, MANY OTHER RIGHTS THAT  
16   ARE ASSOCIATED WITH A JURY TRIAL OR ARE COLLATERAL TO A  
17   JURY TRIAL.

18           THERE ARE SO MANY THAT WE COULD SPEND THE REST OF  
19   THE WEEK TALKING ABOUT THEM BUT SOME OF THE ONES THAT I  
20   WANT TO GIVE YOU BY WAY OF ILLUSTRATION SO THAT YOU'LL  
21   UNDERSTAND WHAT I'M SAYING IS, THE RIGHT TO REMAIN SILENT.  
22   IN A JURY TRIAL YOU COULD REMAIN SILENT, THAT IS NO ONE  
23   COULD MAKE YOU TESTIFY IN THAT TRIAL UNLESS YOU WANTED TO  
24   TESTIFY AND IF YOU CHOSE TO NOT TESTIFY I WOULD TELL THE  
25   JURY THAT THEY COULD NOT HOLD THAT AGAINST YOU. THAT'S

GUILTY PLEA - AUGUST 2, 2010

12

1 JUST ONE OF THE RIGHTS YOU HAVE.

2 YOU HAVE THE RIGHT TO BE REPRESENTED BY MR.  
3 GARDNER WHO STANDS HERE WITH YOU. MR. GARDNER COULD  
4 CHALLENGE ALL THE EVIDENCE THAT THE STATE HAS AGAINST YOU  
5 AND HE COULD PUT UP EVIDENCE THAT MIGHT BE HELPFUL TO YOU  
6 AND HE COULD DO THAT WHETHER YOU TESTIFIED OR NOT; DO YOU  
7 UNDERSTAND THAT?

8 DEFENDANT DEAN: YES, SIR.

9 THE COURT: DO YOU UNDERSTAND THAT IN A JURY  
10 TRIAL THE STATE WOULD HAVE TO PROVE YOUR GUILT BEYOND A  
11 REASONABLE DOUBT, THAT IS CONVINCE EACH AND EVERY JUROR  
12 THAT YOU ARE GUILTY BEYOND A REASONABLE DOUBT; DO YOU  
13 UNDERSTAND THAT?

14 DEFENDANT DEAN: YES, SIR.

15 THE COURT: THE POINT I'M TRYING TO MAKE, MR.  
16 DEAN, IS THAT I WANT YOU TO UNDERSTAND THAT IF YOU PLEAD  
17 GUILTY, AND THAT'S WHAT I UNDERSTAND YOU'RE DOING, THAT YOU  
18 WAIVE NOT ONLY YOUR GENERAL RIGHT TO A JURY TRIAL, BUT  
19 MANY, MANY OTHER IMPORTANT RIGHTS THAT YOU HAVE. THAT'S  
20 PART OF MY DETERMINATION THAT YOU ARE PLEADING FREELY AND  
21 VOLUNTARILY; DO YOU WISH TO PLEAD GUILTY BUT MENTALLY ILL?

22 DEFENDANT DEAN: YES, SIR.

23 THE COURT: ALL RIGHT, NOW, MR. DEAN, YOU ARE  
24 CHARGED WITH THE OFFENSE OF MURDER; HAS YOUR ATTORNEY  
25 EXPLAINED TO YOU THE POSSIBLE PENALTY THAT YOU MIGHT

## GUILTY PLEA - AUGUST 2, 2010

13

1 RECEIVE IN A MURDER TRIAL?

2 DEFENDANT DEAN: YES, SIR.

3 THE COURT: DO YOU UNDERSTAND THAT IF YOU WERE  
4 CONVICTED OF MURDER THAT YOU WOULD BE LOOKING AT A SENTENCE  
5 RANGE OF 30 YEARS TO LIFE; YOU UNDERSTAND THAT?

6 DEFENDANT DEAN: YES, SIR.

7 THE COURT: KNOWING THAT DO YOU STILL WISH TO  
8 PLEAD GUILTY BUT MENTALLY ILL?

9 DEFENDANT DEAN: YES, SIR.

10 THE COURT: ALL RIGHT, DO YOU UNDERSTAND THAT  
11 THE SOLICITOR IS MAKING NO RECOMMENDATION IN THIS CASE,  
12 THAT IS SHE'S LEAVING IT UP TO ME?

13 DEFENDANT DEAN: YES, SIR.

14 THE COURT: YOU UNDERSTAND THAT I COULD GIVE YOU  
15 FROM 30 TO LIFE; YOU UNDERSTAND THAT? YOU HAVE TO ANSWER  
16 VERBALLY NOW.

17 DEFENDANT DEAN: YES, SIR.

18 THE COURT: ALL RIGHT, NOW I WANT YOU TO TELL ME  
19 ABOUT YOUR ATTORNEY MR. GARDNER; HAS HE ANSWERED ALL THE  
20 QUESTIONS THAT YOU MIGHT HAVE?

21 DEFENDANT DEAN: YES, SIR.

22 THE COURT: HAS HE DONE EVERYTHING YOU WOULD  
23 HOPE THAT HE WOULD DO FOR YOU?

24 DEFENDANT DEAN: YES, SIR.

25 THE COURT: DO YOU NEED ANY MORE TIME WITH HIM?

GUILTY PLEA - AUGUST 2, 2010

14

1 DEFENDANT DEAN: NO, SIR.

2 THE COURT: ARE YOU SATISFIED THAT HE'S GIVEN  
3 YOU ALL THE INFORMATION THAT YOU NEED TO MAKE A KNOWING AND  
4 INTELLIGENT DECISION AS TO WHAT TO DO WITH YOUR CASE?

5 DEFENDANT DEAN: YES, SIR.

6 THE COURT: YOU'RE PERFECTLY SATISFIED?

7 DEFENDANT DEAN: YES, SIR.

8 THE COURT: ALL RIGHT, NOW HAS ANYONE PROMISED  
9 YOU ANYTHING TO GET YOU TO PLEAD GUILTY?

10 DEFENDANT DEAN: NO, SIR.

11 THE COURT: ANYBODY THREATEN YOU OR INTIMIDATED  
12 YOU IN ANY WAY TO MAKE YOU PLEAD GUILTY? HAS ANYBODY TRIED  
13 TO COERCE YOU; I WANT TO KNOW IF ANYONE HAS EVEN TREATED  
14 YOU UNKINDLY IN SUCH A WAY THAT YOU FELT COMPELLED TO PLEAD  
15 GUILTY?

16 DEFENDANT DEAN: NO, SIR.

17 THE COURT: ALL RIGHT, SIR, NOW DO YOU THINK  
18 THAT YOU HAVE HAD PLENTY OF TIME TO REVIEW THIS MATTER AND  
19 MAKE A DECISION IN THIS CASE, MR. DEAN?

20 DEFENDANT DEAN: YES, SIR.

21 THE COURT: DO YOU BELIEVE THAT WHAT YOU ARE  
22 DOING IS IN YOUR BEST INTEREST?

23 DEFENDANT DEAN: YES, SIR.

24 THE COURT: DO YOU HAVE ANY MORE QUESTIONS THAT  
25 YOU WOULD LIKE TO ASK YOUR ATTORNEY, YOUR FAMILY, YOUR

GUILTY PLEA - AUGUST 2, 2010

15

1 FRIENDS, DO YOU WANT TO ASK ME ANYTHING? I CANNOT ADVISE  
2 YOU LEGALLY BUT WHAT I CAN DO IS ANSWER ANY QUESTIONS YOU  
3 MAY HAVE ABOUT THESE PROCEEDINGS; DO YOU HAVE ANY QUESTIONS  
4 LIKE THAT YOU NEED TO ASK ANYONE?

5 DEFENDANT DEAN: NO, SIR.

6 THE COURT: YOU STILL WISH TO PLEAD GUILTY?

7 DEFENDANT DEAN: YES, SIR.

8 THE COURT: ALL RIGHT, SIR, DO YOU UNDERSTAND,  
9 MR. DEAN, THAT YOU HAVE A RIGHT OF APPEAL FROM THIS PLEA?  
10 MOST PEOPLE DO NOT UNDERSTAND THAT YOU CAN APPEAL A GUILTY  
11 PLEA. IF I WERE TO DO SOMETHING WRONG YOU WOULD HAVE THE  
12 RIGHT TO HAVE MY ACTIONS REVIEWED; DO YOU UNDERSTAND THAT?

13 DEFENDANT DEAN: YES, SIR.

14 THE COURT: DO YOU UNDERSTAND WHAT AN APPEAL IS?

15 DEFENDANT DEAN: YES, SIR.

16 THE COURT: OKAY, I WANT TO ADVISE YOU THAT YOUR  
17 RIGHT TO APPEAL IS LIMITED TO ANY APPEAL THAT YOU MAY FILE  
18 IN THE NEXT TEN DAYS. IF YOU DON'T FILE ANY APPEAL WITHIN  
19 THE NEXT TEN DAYS YOU WAIVE YOUR RIGHT TO APPEAL; IS THAT  
20 CLEAR?

21 DEFENDANT DEAN: YES, SIR.

22 THE COURT: AND I WANT TO ADVISE YOU THAT MR.  
23 GARDNER WHO STANDS THERE WITH YOU KNOWS WHERE AND HOW TO  
24 FILE A NOTICE OF INTENT TO APPEAL, I'M SURE YOU DON'T KNOW,  
25 YOU'RE A LAYPERSON, BUT MR. GARDNER DOES KNOW AND HE WOULD

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16

1 BE HAPPY TO DO THAT FOR YOU, RIGHT, MR. GARDNER?

2 MR. GARDNER: THAT'S CORRECT, JUDGE.

3 THE COURT: ALL RIGHT, SIR, DO YOU UNDERSTAND  
4 THAT, MR. DEAN?

5 DEFENDANT DEAN: YES, SIR.

6 THE COURT: ALL RIGHT, I FIND THAT THERE IS A  
7 SUBSTANTIAL FACTUAL BASIS FOR THE PLEA. I FIND IT IS MADE  
8 FREELY, VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY, AFTER  
9 THE ADVISE OF A VERY COMPETENT ATTORNEY AND THAT SUCH  
10 EVIDENCE HAS BEEN PRESENTED TO THIS COURT AS TO SATISFY ME  
11 THAT A PLEA OF GUILTY BUT MENTALLY ILL IS APPROPRIATE.

12 NOW WHAT WE WANT TO HEAR FROM THE STATE?

13 MS. LIVELY: YOUR HONOR, AZALEE ALLEN WOULD LIKE  
14 TO SPEAK.

15 THE COURT: VERY WELL.

16 MS. LIVELY: THANK YOU.

17 MS. ALLEN: MY NAME IS AZALEE ALLEN.

18 THE COURT: YES, MS. ALLEN?

19 MS. ALLEN: I'D JUST LIKE TO SAY A FEW WORDS,  
20 YOUR HONOR.

21 THE COURT: ALL RIGHT.

22 MS. ALLEN: WE ARE ALL GOD'S PEOPLE, GOD'S  
23 CHILDREN, AND HE LOVES US ALL. I WOULD LIKE TO TELL  
24 CHARLIE THAT THEY WERE A FEW PEOPLE IN MY FAMILY THAT LOVED  
25 HIM, JILL, BRITTANY, MAX, AND ME. I HAVE FELT SORRY FOR

GUILTY PLEA - AUGUST 2, 2010

17

1 CHARLIE BECAUSE HE DID NOT KNOW THE LORD AND PEOPLE THAT DO  
2 NOT KNOW GOD DO NOT KNOW HOW TO LOVE AND I HAVE FELT THAT  
3 HE DID NOT KNOW HOW TO LOVE. ALL MY DAUGHTER, JILL, WANTED  
4 FROM HIM WAS FOR HIM TO LOVE HER, TO RESPECT HER, TO HELP  
5 WORK, AND SUPPORT HER AND THE TWO CHILDREN, THAT WAS ALL  
6 SHE ASKED OF HIM. AND I PRAY THAT SOME DAY CHARLIE WILL  
7 TURN TO GOD, WILL BE SAVED, WILL FIND PEACE, AND I ASK ALL  
8 OF YA'LL TO PRAY FOR US BECAUSE WE HAVE BEEN THROUGH A LOT  
9 AND IT HAS CHANGED OUR LIVES COMPLETELY.

10 IT ALSO HAS BROUGHT US CLOSER TOGETHER AND THE  
11 PEOPLE HAVE PRAYED FOR US WITH THEIR SUPPORT AND THE  
12 PRAYERS WE WILL MAKE IT THROUGH AND WE PUT THIS DAY BEHIND  
13 US, THANK YOU, YOUR HONOR.

14 THE COURT: THANK YOU.

15 MS. LIVELY: YOUR HONOR, BRITTANY DEAN IS  
16 PRESENT BUT DOES NOT WISH TO SPEAK.

17 THE DEFENDANT DOES HAVE A PRIOR RECORD OF ABHAN,  
18 ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE FROM  
19 1984, POSSESSION ---

20 MR. GARDNER: YOUR HONOR, I'M GOING TO OBJECT TO  
21 ANYTHING OVER TEN YEARS IN THE GUILTY PLEA.

22 MS. LIVELY: IT'S JUST FOR SENTENCING PURPOSES.

23 THE COURT: I HAVE HEARD IT. I UNDERSTAND HE  
24 HAS A RECORD AND THAT WAS TESTIFIED TO BY DR. FRIERSON. IN  
25 FACT IT WAS PART OF HIS, FORMED A BASIS FOR HIS DIAGNOSIS.

GUILTY PLEA - AUGUST 2, 2010

18

1 I'M FULLY AWARE OF THE CRIMINAL RECORD.

2 MS. LIVELY: THANK YOU, YOUR HONOR, THERE'S  
3 NOTHING FURTHER FROM THE STATE.

4 THE COURT: ALL RIGHT.

5 MR. GARDNER: THANK YOU, JUDGE. JUDGE, I DON'T  
6 THINK THERE'S ANYTHING TO TELL YOU ABOUT HIM. YOU'VE READ  
7 ALL THE REPORTS AND YOU'VE HEARD THE DOCTOR, YOU KNOW WHAT  
8 THIS IS. WE GOT THIS CASE READY FOR TRIAL. EVERYBODY IS  
9 HERE. I LIKE THE FACT YOU TOLD HIM HE COULD STILL HAVE A  
10 TRIAL IF HE WANTED ONE; HE DOESN'T WANT ONE, HE WANTS  
11 CLOSURE, DOESN'T WANT TO PUT THE FAMILY THROUGH IT OR  
12 ANYTHING THERE. HE ACCEPTS RESPONSIBILITY. WE'D ASK THAT  
13 YOU SENTENCE HIM TO THE MINIMUM SENTENCE. HE'S 48-YEARS-  
14 OLD. THIRTY YEARS IS 30 YEARS AS I UNDERSTAND IT AND I  
15 BELIEVE THAT WOULD BE APPROPRIATE AND ---

16 THE COURT: THAT'S DAY FOR DAY.

17 MR. GARDNER: AND WE'D ASK THAT YOU ---

18 THE COURT: HOW IS YOUR CLIENT'S HEALTH? HOW IS  
19 YOUR HEALTH, MR. ALLEN?

20 DEFENDANT DEAN: GOOD, SIR.

21 THE COURT: DO YOU HAVE ANY HEALTH PROBLEMS?

22 DEFENDANT DEAN: NO, SIR.

23 THE COURT: AND YOU'RE HOW OLD NOW?

24 DEFENDANT DEAN: FORTY-EIGHT, SIR.

25 THE COURT: DO YOU WANT TO TELL ME ANYTHING, MR.

GUILTY PLEA - AUGUST 2, 2010

19

1 DEAN? DO YOU WANT, IF YOU WANT TO TELL ME, SAY ANYTHING TO  
2 ME BEFORE I SENTENCE YOU?

3 DEFENDANT DEAN: YES, SIR.

4 THE COURT: LET'S HEAR IT?

5 DEFENDANT DEAN: I'M SORRY FOR WHAT HAPPENED, I  
6 PAY FOR IT EVERY DAY. I'VE LOST MY FAMILY, EVERYTHING. I  
7 KNOW I HAVE A PROBLEM BUT I DID IT SO I MEAN I GOT HURT,  
8 YOUR HONOR, I PAID FOR IT.

9 MR. GARDNER: JUDGE, I'M SORRY, I FORGOT. THE  
10 SISTER BONNIE LEE RUSS WOULD LIKE TO ADDRESS THE COURT.

11 THE COURT: ALL RIGHT, CERTAINLY.

12 MS. RUSS: MY NAME IS BONNIE RUSS. I'M SORRY  
13 FOR WHAT HAPPENED. I'M SORRY ABOUT WHAT HAPPENED TO JILL;  
14 I'M SORRY FOR MS. AZALEE'S LOSS; I'M SORRY FOR THE  
15 CHILDREN, I LOVE THE CHILDREN. THIS IS MY BROTHER AND I  
16 LOVE HIM DEARLY. I HAVE SEEN A TREMENDOUS CHANGE IN HIM IN  
17 THIS TIME THAT HE'S BEEN IN JAIL. HE'S TOLD THAT HE'S GIVE  
18 HIS HEART TO THE LORD. USED TO EVERY WORD THAT CAME OUT OF  
19 HIS MOUTH WAS A CUSS WORD BUT I CAN HONESTLY SAY I HAVEN'T  
20 HEARD HIM SAY ANY CUSS WORDS SINCE HE HAS TOLD ME HE GOT  
21 SAVED. I'M A CHRISTIAN LADY, I GO TO CHURCH. I DO THE  
22 BEST, I LIVE THE BEST LIFE I KNOW HOW TO LIVE. THE JAILERS  
23 AT THE JAILHOUSE TOLD ME THEY SEE HIM PRAY, THEY SEE HIM  
24 READ HIS BIBLE. ALL I KNOW IS WHAT THEY TELL ME. I'M VERY  
25 PROUD FOR HOW HE HAS CHANGED IN MY PRESENCE WHEN I SEE HIM.

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20

1 AND ALL I KNOW IS WHAT HE'S TOLD ME AND I KNOW HE'S TRYING.  
2 I PRAY THAT YOU HAVE MERCY ON HIM. I LOST MY MOTHER AND  
3 FATHER AND I KNOW HOW MS. AZALEE, I DON'T KNOW HOW SHE  
4 FEELS. I'M SORRY, I'M SORRY, I DON'T, I DON'T KNOW HOW SHE  
5 FEELS, IT WAS HER CHILD, BUT I PRAY THAT YOU HAVE MERCY ON  
6 HIM, THANK YOU.

7 THE COURT: THANK YOU, MA'AM, ANYTHING FURTHER,  
8 MR. GARDNER?

9 MR. GARDNER: THAT WILL BE ALL, YOUR HONOR.

10 THE COURT: ALL RIGHT, MR. DEAN, YOU KNOW I HAVE  
11 SITUATIONS LIKE THIS COME BEFORE ME OFTEN. IT SEEMS AND I  
12 THINK STATISTICALLY IT'S BEEN PROVEN THAT YOU'RE MORE  
13 LIKELY TO MURDER SOMEBODY YOU LOVE THAN A STRANGER. I SEE  
14 SITUATIONS LIKE THIS THAT, THAT ESCALATE, GET OUT OF HAND,  
15 THIS WAS YOUR WIFE, IT INVOLVES YOUR CHILDREN,  
16 UNFORTUNATELY NOW AS YOU SAID YOU'VE LOST NOT ONLY YOUR  
17 WIFE BUT YOU'VE LOST YOUR CHILDREN AS WELL. THAT'S A SAD  
18 DAY. I DON'T KNOW BUT I DOUBT YOU'LL EVER SEE YOUR  
19 CHILDREN AGAIN, MAYBE ONE DAY YOU'LL RECONCILE WITH THEM  
20 AND THEY'LL SEE YOU BUT NOW IT'S INCUMBENT UPON ME TO DRAFT  
21 A SENTENCE THAT WOULD BE APPROPRIATE IN THIS MATTER.

22 I DO GIVE YOU THE BENEFIT OF THE FORENSIC  
23 PSYCHOLOGIST FINDINGS THAT YOU ARE GUILTY BUT MENTALLY ILL.  
24 I THINK YOUR MENTAL ILLNESS ACCORDING TO HIS TESTIMONY PAID  
25 A GREAT PART, PAID A GREAT PART IN WHAT OCCURRED. I'M

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21

1 SORRY, MR. DEAN, THAT THIS OCCURRED. I'M AS SORRY AS YOU  
2 ARE THAT IT OCCURRED. I'M AS SORRY AS THESE VICTIMS ARE  
3 THAT IT OCCURRED. I WISH I NEVER SAW THIS COME BEFORE ME  
4 EVER AGAIN BUT I KNOW THAT IF NOT THIS WEEK IT WILL BE  
5 BEFORE ME AGAIN SOON AND IT IS A SAD, SAD, SAD SITUATION  
6 AND IT GIVES ME NO PLEASURE BUT I HAVE TO PUNISH YOU, MR.  
7 DEAN.

8 THE SENTENCE OF THE COURT IS THAT YOU BE CONFINED  
9 TO THE STATE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 30  
10 YEARS. MR. DEAN, THAT'S PROBABLY GOING TO BE A LIFE  
11 SENTENCE FOR YOU AT 48. IT WILL PROBABLY BE THE REST OF  
12 YOUR LIFE BECAUSE YOU'RE NOT ELIGIBLE FOR PAROLE ON THAT.  
13 YOU HAVE TO SERVE IT DAY FOR DAY, SO IT'S 30 DAYS TO SERVE,  
14 30 YEARS TO SERVE, I KEEP SAYING DAYS BUT IT'S 30 YEARS AND  
15 THAT'S AN AWFULLY LONG TIME. GOOD LUCK TO YOU, MR. DEAN, I  
16 HOPE YOU CAN MAKE SOMETHING GOOD FROM THIS.

17 MS. LIVELY: THANK YOU, YOUR HONOR.

18 THE COURT: ALL RIGHT.

19 END OF REQUESTED TRANSCRIPT.....  
20  
21  
22  
23  
24  
25

## CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

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

August 5, 2011

Brenda R. Babb

BRENDA R. BABB, CVR

OFFICIAL REPORTER

(H)

## FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Charles Ray Dean 342070  
 Full name and prison number (if any) of Applicant.

IN THE COURT OF COMMON PLEAS

11

5020

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in a 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 Lee Correctional Institution
2. Name and location of Court which imposed sentence Horry County
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) Warrant No: J-479496 / murder
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) Aug-2-2010
  - (b) 30 years day for day

Revised 3/2003

- (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. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) lawyer refused to appeal sentence
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

10. (A) Trial Counsel was ineffective for Not allowing me to appeal the sentence in 10-days.

(B) Failure to notify me or the Court of doctors statement before plea agreement was made.

(C) Plea terms were changed after negotiated by my self the judge and my lawyer.

(D) Doctors proof of my incompetents to stand trial.

(E) I asked to go in front of a judge for sentencing.

### Relevant Facts

Upon my request Counsel refused to bring me back in front of a judge.

(B) A sentence of 30 years 85% was agreed upon before day of sentencing. The judge then ruled 30 years 100% Counsel never disputed sentence.

(C) Once I was sentence then counsel directed doctor to stand and give statement to the court on my behalf.

(D) Doctor stated if my wound was never caused the situation would never happened.

(E)

Doctors proved after several test. I was in competent to stand trial, due a prior accident the front lobe of my brain is damaged. Which causes me to not be able to control my anger.

(F) When I was sentenced I was shipped to the Gillian Center. I had no outside contact to family for 16-days or my lawyer. Once released I recieved a letter at LEE Correctional saying Counsel will no longer represent me in the court of law.

(a) Trial Counsel was ineffective

(b) See back Attachment

(c) \_\_\_\_\_

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

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

(b) See back Attachments

(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? 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 (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

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

(a) the specific nature thereof:

i. N/A

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

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

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

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

i. N/A

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

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

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

(c) the disposition thereof:

i. N/A

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

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

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

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

N/A

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

- (a) which grounds have been presented:

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

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

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

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

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

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

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

- i. Johney Gardner P.O. Box 1001
- ii. 212 Main Street Conway South Carolina 29526
- iii. \_\_\_\_\_

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

- i. Arraignment, Sentencing
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

A time reduction and the plea agreed upon Post 85%

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

N/A

5020

STATE OF SOUTH CAROLINA

VERIFICATION

County of

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 conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Charles R. Dean

SWORN to and subscribed before me this 15  
day of June, 2011

Prayer Smith  
Notary Public

(L.S.)

My Commission Expires: 5-16-11

CLERK OF COURT  
CLANIE HUGGINS-WARD  
2011 JUN 16 PM 12:08  
ED  
COUNTY

5020

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

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.

Charles R. Dean  
Applicant

SWORN or affirmed to and subscribed before me this

6 day of June, 2011  
Abraham Sumner  
Notary Public

My Commission Expires: 5-16-15

JUN 16 PM 12:08  
CLANIE HUGGINS-WARD  
CLERK OF COURT

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

Charles Ray Dean, # 342070,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

2011-CP-26-5020

**RETURN**  
**(Attorney Appointment Requested)**

Respondent, making its Return to the Application for post-conviction relief filed June 16, 2011, by Charles Ray Dean, would respectfully show this Court:

#### I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in January 2008 for the murder of Jill Dean (2008-GS-26-222). Johnny Gardner, Esquire, represented the Applicant. On August 2, 2010, the Applicant pled "guilty but mentally ill" before the Honorable Larry B. Hyman, Jr. Judge Hyman imposed a sentence of 30 years. No direct appeal was filed.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction and the Applicant's records from the South Carolina Department of Corrections. The guilty plea transcript will be forwarded upon receipt from the court reporter. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

#### II. – Allegations and Relief Sought

In his Application, Mr. Dean alleges that his custody is unlawful for the following reasons:

- (1) Trial counsel was ineffective for not allowing me to appeal the sentence in 10 days – counsel refused to bring me back in front of a judge.

- (2) Failure to notify me or the court of the doctor's statement before the plea agreement was made—once I was sentenced then counsel directed the doctor to stand and give a statement to the court on my behalf;
- (3) Plea terms were changed after the negotiations by myself, the judge, and my lawyer, from 30 years at 85% to 30 years at 100%;
- (4) Doctor's proof of my incompetence to stand trial – prior brain injury caused me to not be able to control my anger;
- (5) I asked to go in front of a judge for sentencing – after sentencing, was shipped to Gilliam (Psychiatric Hospital) and had no outside contact with family or my lawyer. Once released I received a letter at Lee Correctional saying counsel will no longer represent me in the court of law.

The Applicant states he is seeking "a time reduction and the plea agreed upon first - 85%."

### III.

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where an 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 (1984); Butler, 334 S.E.2d 813.

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was deficient and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). However, a guilty plea is a solemn, judicial admission of the truth of the charges against a defendant. Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Therefore, statements made during the plea will be considered conclusive unless the defendant presents persuasive reasons why he should be

allowed to depart from the truth of those statements. See Crawford v. U.S., 519 F.2d 347 (4<sup>th</sup> Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4<sup>th</sup> Cir. 1976).

Respondent submits that the record will support that the Applicant did not receive ineffective assistance of counsel and that his guilty plea was freely and voluntarily made. Nevertheless, the allegations may raise questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve any issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

V.

WHEREFORE, having made its Return, the Respondent requests that counsel be appointed and an evidentiary hearing held.

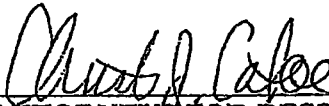
Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

CHRISTINA J. CATOE  
Assistant Attorney General

  
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

July 21, 2011

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Charles Ray Dean,

vs.

State of South Carolina.

IN THE COURT OF COMMON PLEAS  
2011-CP-26-05020

TRANSCRIPT OF RECORD

January 23, 2011  
CONWAY, SOUTH CAROLINA

BEFORE:

The Honorable, George C. James, Jr.

APPEARANCES:

BY: Christina J. Catoe, Esq.  
Attorney for State of South Carolina

BY: Paul Archer, Esq.  
Attorney for Charles Ray Dean.

Brenda R. Babb  
Circuit Court Reporter

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Mr. Dean - Direct Examination by mr. Archer

3

1 The Court: This is Charles Ray Dean v. The  
2 State; is that right?

3 Ms. Catoe: It is, Your Honor.

4 The Court: Okay, everybody ready?

5 Mr. Archer: Yes, sir.

6 The Court: Okay.

7 Charles Ray Dean

8 being first duly sworn, testified as follows:

9 Mr. Archer: Your Honor, just a little  
10 background, this case is about the defendant stabbed his  
11 wife to death and there was a plea of thirty years,  
12 actually it was non negotiated plea, it was a straight up  
13 plea for murder and he received a thirty year sentence.

14 The Court: All right, I've read, I've read  
15 file, you can go ahead.

16 Direct Examination

17 By Mr. Archer:

18 Q Mr. Dean, how are you today?

19 A Fine, sir.

20 Q That's good, all right, I explained to you  
21 that the purpose of this post conviction relief is  
22 ineffective assistance of counsel which is Johnny Gardner  
23 was your attorney and that what you have to do today is  
24 convince this judge that because of his errors, but for his  
25 errors you would not have pled guilty and you should have

Mr. Dean - Direct Examination by mr. Archer

4

1 gone to trial, so basically what you're asking this judge  
2 to do today is to grant your PCR so you can have your day  
3 in court and have a trial; am I stating this correctly?

4 A Yes, sir.

5 Q All right, I understand that at the time in  
6 the plea of thirty years you were under the impression that  
7 that was eighty-five percent; is that correct?

8 A Yes, sir.

9 Q And how old were you at the time that this  
10 happened?

11 A Forty-eight, sir.

12 Q All right, so if you took the thirty years  
13 you'd be what, seventy eight?

14 A Yes, sir.

15 Q All right, if you went to trial and even  
16 got a life sentence that's about, I don't know what's a  
17 life expectancy is in a prison but I don't think you live  
18 to be ninety, but in any event you felt that if you knew  
19 this you obviously would have taken your chance and gone to  
20 trial; is that right?

21 A Correctly, sir.

22 Q All right, let's get into some of the  
23 facts, when was the first time you met Mr. Gardner, was he  
24 retained or appointed, how did you, how did you be  
25 represented?

Mr. Dean - Direct Examination by Mr. Archer

5

1 A He was appointed.

2 Q He was appointed?

3

4 Madam Court Reporter: Speak up a little bit.

5 The Court: Get a little bit closer to the  
6 microphone, please, sir.

7 The Witness: (Continuing)

8 A He was appointed, sir.

9 Q All right, and when did you meet him? Were  
10 you in jail, were you on bond, how did you meet?

11 A Yes, sir, I was in jail, sir.

12 Q All right, did he come out to see you?

13 A Yes, sir.

14 Q And did he discuss all your options at the  
15 time?

16 A No, sir, not directly as I would have  
17 thought he would have but from what I learned later.

18 Q Let me ask you just some direct questions  
19 and then we're going to get into the facts of the case. It  
20 is my understanding that what happened was that your wife  
21 and your daughter and then it was the daughter's boyfriend;  
22 is that correct?

23 A Correct, sir.

24 Q Came home one night and you were married to  
25 her and living at this residence where the crime happened;

Mr. Dean - Direct Examination by mr. Archer

6

1 is that correct?

2 A Correct, sir.

3 Q And then you came in in the morning and  
4 just tell the Court basically what happened after that when  
5 you came into the house, there was an argument?

6

7 A Whenever I came in I come to pack my stuff,  
8 I packed my stuff and I had some young puppies at the time  
9 and one of them was hollering so ---

10 Q I don't mean to interrupt you, why did you  
11 pack your stuff?

12 A Cause I was leaving.

13 Q Why?

14 A Cause we had a fight that afternoon, a  
15 fuss, and she called the police on me and I came to get my  
16 stuff. The van wasn't there, there was no one there. The  
17 van wasn't at Ms. Azalee's and so I went in I got my stuff.

18 Q And that's because she told you to leave;  
19 is that correct?

20 A Cause she called the cops on me.

21 Q All right, so you came back to the house,  
22 you walked in the door?

23 A Yes, sir.

24 Q And then what happened, how did this all  
25 happen?

Mr. Dean - Direct Examination by Mr. Archer

7

1           A     It was approximately thirty minutes later  
2 before they came up cause I was, I packed my stuff like I  
3 said and went outside to see what was wrong with the puppy  
4 and when I came back in they were coming through the door.

5           Q     Okay, and what happened when they came  
6 through the door?

7           A     And I thought I could talk with her and we  
8 started talking in the hallway, she grabbed the phone and  
9 then we started talking in the hallway and the next thing I  
10 know Brittany, I suppose, stabbed me in my back.

11          Q     Okay, who's Brittany.

12          A     My daughter.

13          Q     Okay, she stabbed you in the back?

14          A     That's what I suppose.

15          Q     All right, how did you know she stabbed you  
16 in the back?

17          A     Because it burnt.

18          Q     But how did you know it was her?

19          A     When I looked around I seen her.

20          Q     All right, what did you do after that?

21          A     I said, Brittany, you stabbed me in my back  
22 and I looked back at Jill she had a little thing like a  
23 push thing where the kid, little Max played on, and then  
24 she was swinging it at me and she's laughing.

25          Q     Okay, and now this is your daughter?

Mr. Dean - Direct Examination by mr. Archer

8

1                   A       And that's the last thing I remember, that  
2 was my wife.

3                   Q       Your wife, all right, so your wife, your  
4 wife is swinging something at you?

5                   A       A little scooter, yes, sir.

6                   Q       And the way that I understand it is that  
7 she was stabbed by the knife that you pulled out of your  
8 back; is that correct?

9                   A       I think so.

10                  Q       All right, when you saw Mr. Gardner did,  
11 did he explain to you that you may have a case of say self  
12 defense; did he ever bring that up to you?

13                  A       No, sir.

14                  Q       Did he ever explain to you that you were  
15 provoked and this could be a manslaughter case say killing  
16 somebody in the heat of passion?

17                  A       No, sir.

18                  Q       So all that you discussed was murder; is  
19 that correct, there was never an alternative for it?

20                  A       Life or thirty years.

21                  Q       All right, when you saw him and you told  
22 him about the facts I understand that you had some  
23 psychiatric problems at the time or some psychological  
24 problems?

25                  A       Yes, sir.

Mr. Dean - Direct Examination by mr. Archer

9

1 Q All right, did he have you examined; do you  
2 know?

3 A Yes, sir.

4 Q And you were examined by the State,  
5 correct?

6 A Correctly.

7 Q All right, and it's my understanding that  
8 the State said that you had some kind of an anger problem  
9 with a frontal lobe and that you couldn't control your  
10 anger; is that correct?

11 A Correctly, sir.

12 Q Had you ever had a problem with this, you  
13 were forty four years old at the time of this?

14 A I've had anger problem but I never knew why  
15 I would get mad so easy, but like the doctor said I  
16 couldn't control it, it's something that's --

17 Q Yes, but my point is have you ever acted  
18 that out where you've been arrested?

19 A No, sir.

20 Q Okay, so this really wasn't a problem?

21 A I just couldn't figure out why I got mad so  
22 quickly.

23 Q All right, but my, but my point is is that  
24 this would not have been a problem, you don't have a  
25 history of walking down the street stabbing people?

Mr. Dean - Direct Examination by mr. Archer

10

1 A Oh, no, sir.

2 Q Or you don't have a history of any arrests  
3 because you have some sort of a frontal lobe problem?

4 A No, sir.

5 Q So that's not even an issue, correct?

6 A Correctly, sir.

7 Q All right, so the reason that you stabbed  
8 her is basically because you got stabbed in the back,  
9 correct?

10 A I don't know.

11 Q You don't know, all right, but that's what  
12 happened?

13 A Yes, sir.

14 Q All right, and did Mr. Gardner that you  
15 know did he investigate your past behavior to see whether  
16 you were walking down the street stabbing people or were  
17 arrested?

18 A I'm not sure, sir.

19 Q All right, has there ever been a charge of  
20 criminal domestic violence filed by anybody?

21 A Once before that she stabbed me back  
22 several years ago.

23 Q So the, the criminal domestic violence is  
24 not something that she brought against you, it was  
25 something that you brought against her cause she stabbed

Mr. Dean - Direct Examination by mr. Archer

11

1 you?

2 A Yes, sir, but I never followed through with  
3 it, followed through with it.

4 Q Okay, but my question to you is the  
5 criminal domestic violence is something because you were  
6 stabbed?

7 A Yes, sir.

8 Q So she had a history of this?

9 A Yes, sir.

10 Q All right, I'd also noticed that when in  
11 your plea transcript when the judge first asked you are you  
12 pleading guilty because you are guilty you really didn't  
13 say, you kind of hesitated and he asked you again and you  
14 hesitated; what was that about, tell us?

15 A Cause I wasn't sure of my actions, sir, I  
16 wasn't sure exactly what I had did cause I didn't do it  
17 intentionally. It was something that I don't know what  
18 happened.

19 Q All right?

20 A I've laid and thought about it and thought  
21 about it and cried about it and pleaded with myself and I  
22 can't figure it out.

23 Q Did there come a point after you all this  
24 happened and you were stabbed and obviously she was stabbed  
25 you told your daughter to go call 911, correct?

Mr. Dean - Direct Examination by mr. Archer

12

1 A Yes, I remember that.

2 Q Did you flee?

3 A No, sir, I didn't, her and Cody were  
4 sitting on the couch, when I come down the hall I told  
5 Brittany to go call 911 for her mama.

6 Q All right, well tell the judge a little bit  
7 more of what happened in your eyes starting from when you  
8 came in the house, that you remember?

9 A When I came in they come in and I tried to  
10 talk with Jill and she grabbed the phone and the next thing  
11 I know Brittany hit me in my back and she grabbed this  
12 little scooter that was laying in the hallway and when I  
13 looked at her she was laughing and swinging it at me.

14 The Court: That's your wife?

15 A Yes, sir, and after that it's like somebody  
16 put a black trash bag or something over my head, everything  
17 went black till I can remember, till I come [sic] around  
18 the corner seeing Brittany sitting on the couch, her and  
19 Cody, I can remember that.

20 Q If you knew that you had to do the full  
21 thirty years would you have taken this?

22 A No, sir.

23 Q Do you remember anything where Mr. Gardner  
24 explained all this to you that you had to do thirty days, I  
25 mean thirty years is thirty years in murder day for day?

Mr. Dean - Direct Examination by Mr. Archer

13

1 A No, sir, he did not, sir.

2 Q All right, do you remember in the plea  
3 transcript it does say something to that affect, do you  
4 remember anything about the plea?

5 A Yes, sir.

6 Q All right, do you remember that part of it?

7 A What the judge told me, yes, sir.

8 Q Okay, so in other words you didn't hear it  
9 from Mr. Gardner?

10 A No, sir.

11 Q All right, and, and, and just to go over  
12 this again as far as you're concerned the facts would be  
13 that you know that now, that you remember; is that true?

14 A I can remember some things.

15 Q Do you feel that you should have gone to  
16 trial, and that's what you're asking for today ---

17 A Yes, sir.

18 Q --- for a number of reasons, and number one  
19 by getting the thirty years it's almost a life sentence,  
20 you'd be seventy something years old?

21 A Yes, sir.

22 Q You really have nothing to lose?

23 A And in my mind I could get work credits and  
24 work and things like that and be eighty five percent but it  
25 wasn't.

Mr. Dean - Direct Examination by mr. Archer

14

1 Q All right, so that would be reason, number  
2 one, number two, if you went to trial there's a good chance  
3 that the jury might find you guilty of some sort of  
4 manslaughter charge, correct?

5 A Correctly, sir.

6 Q And, number three, you could have been  
7 found not guilty; it could have been a self defense,  
8 correct?

9 A Correctly, sir.

10 Q Did he ever tell you that there were any  
11 eyewitnesses, in other words was the daughter, was your  
12 daughter or boyfriend were to testify against you? Did  
13 they see anything?

14 A I can't see how.

15 Q All right, well explain that?

16 A Because like I say whenever I came to my  
17 senses Brittany and Cody were sitting on the couch and the  
18 couch is around the corner from where we was at down the  
19 hallway, I mean they were just sitting there.

20 Q So there's no way that they saw you  
21 stabbing her?

22 A I have no idea.

23 Q All right, and you're claiming, well there  
24 was two knives you told me, but the knife that was used to  
25 kill her you pulled out of your back, correct?

Mr. Dean - Direct Examination by Mr. Archer

15

1 A Yes, sir, one of ---

2 Q Did you wind up in the hospital because of  
3 that?

4 A For a while I was there, they was checking  
5 for internal bleeding and stuff.

6 Q So there's no question you were stabbed in  
7 the back?

8 A But I can't see, if I didn't use the knife  
9 out of my back how did blood get on my money when I stuck  
10 my hand in my pocket, it had to have, I had to use that  
11 knife first because there was blood on my money when I  
12 stuck my hand in my pocket to get my knife and it wasn't my  
13 blood so it had to be hers so that means I had to use the  
14 knife that came out of my back to cut her with.

15 Q All right, well you didn't testify to the  
16 second knife so there's two knives, so one you took out of  
17 your back that she stabbed you with and then you had a  
18 pocket knife?

19 A Yes, sir.

20 Q So the murder weapon would be the knife  
21 that you took out of the, out of the back?

22 A I suppose.

23 Q All right, and when you were in the  
24 hospital did you have some defensive wounds also; do you  
25 recall?

Mr. Dean - Cross Examination by Ms. Catoe

16

1 A Yes, sir, my arms.

2 Q All right, well explain that?

3 A Where I was hit with the scooter thing she  
4 had cause my arms were swollen and bruised, both arms.

5 Q And you were treated for these wounds,  
6 where were they, on your hands, well just explain, put your  
7 hands up and explain what was injured?

8 A I can't, sir, I'm strapped, just across  
9 here and my arms.

10 Q And what was there?

11 A Bruises and swoll places where it was  
12 swollen.

13 Q All right, and then what do you believe  
14 caused that?

15 A The scooter she was swinging at me.

16 Q Swinging at you?

17 A Cause they said that I used that scooter,  
18 my DNA and fingerprints wasn't on it so I never touched it.

19 Mr. Archer: I have no further questions.

20 The Court: Ms. Catoe?

21 Ms. Catoe: May it please the Court?

22 The Court: Yes, ma'am.

23 Cross Examination

24 By Ms. Catoe:

25 Q Mr. Dean, can you describe the scooter that

Mr. Dean - Cross Examination by Ms. Catoe

17

1 you're talking about that your wife was swinging?

2 A It's a little silver scooter with little  
3 skateboard like wheels on it with handles.

4 Q Okay, and are you aware of what eighty-five  
5 percent actually means as far as that you may be eligible  
6 for parole at eighty five percent but it's not guaranteed,  
7 are you aware of that?

8 A No, ma'am.

9 Q Okay, what did you think eighty five  
10 percent meant?

11 A It would be like instead of a hundred  
12 percent you done eighty-five percent of your time.

13 Q In other words you get out after eighty-  
14 five percent?

15 A Yes, ma'am, and your work credits would  
16 knock it down even lower.

17 Q And where did you get that understanding  
18 from?

19 A From people I spoke with in the county.

20 Ms. Catoe: Okay, I have no further questions  
21 for this witness, Your Honor.

22 The Court: Any objection to me questioning the  
23 witness?

24 Ms. Catoe: No, Your Honor.

25 Mr. Archer: No, sir.

Mr. Gardner - Direct Examination by Ms. Catoe

18

1           The Court:   How would you say your daughter did  
2 not see what happened if she was the one who stabbed you in  
3 the back?

4           A           Because ---

5           The Court:   Are you saying she stabbed you and  
6 then just went and sat on the couch?

7           A           Ran back in the living room, sir. I can  
8 remember that cause I looked like this and I looked back  
9 Jil was swinging that thing and laughing at me.

10          The Court:   All right, no further questions, any  
11 follow up?

12          Ms. Catoe:   No, Your Honor.

13          Mr. Archer:   No.

14          The Court:   You can have a seat, thank you, sir.  
15 Next witness?

16          Mr. Archer:   I have no witness.

17          The Court:   All right, Ms. Catoe?

18          Ms. Catoe:   Your Honor, the State would call  
19 Johnny Gardner to the stand.

20          The Court:   Come on up, Mr. Gardner.

21                       Johnny Gardner

22               being first duly sworn, testified as follows:

23          Ms. Catoe:   May it please the Court?

24          The Court:   Yes, ma'am.

25                       Direct Examination

Mr. Gardner - Direct Examination by Ms. Catoe

19

1 By Ms. Catoe:

2 Q Good afternoon, Mr. Gardner, will you first  
3 just tell us how long you've been practicing in the area of  
4 criminal law?

5 A I think this is my twentieth year.

6 Q All right, and ---

7 A I started in 1992.

8 Q Okay, and how did you become involved in  
9 this case?

10 A I was appointed.

11 Q All right, so the public defender's office  
12 was, was conflicted out somehow?

13 A I'm not sure how that happened, I just know  
14 that I was appointed.

15 Q All right, and did you meet with Mr. Dean  
16 to discuss the charges?

17 A We did.

18 Q And was that in jail?

19 A Some of it was in jail, some of it was at  
20 my office. We didn't go into the facts of the case for a  
21 long time. I first met him it may have been this very  
22 courtroom, he was doing a bond hearing or what turned into  
23 an order to be evaluated and I met with him at the jail and  
24 then I met with him at up in Columbia for the evaluation,  
25 and the reason that Judge Cottingham ordered an evaluation

Mr. Gardner - Direct Examination by Ms. Catoe

20

1 was because Mr. Dean had no recollection, or almost no  
2 recollection of the event. So we went to Columbia for the  
3 evaluation, and there was, I'm not a medical doctor, but  
4 there was something at issue there because they, they kept  
5 him going back several times, so it was a combination of  
6 what I thought was a test to see if he would remember what  
7 happened as opposed to reading the file and then  
8 remembering what was in the file. Also Charlie didn't want  
9 a copy of the discovery at the jail and didn't want to go  
10 into it right away so it was a mutual decision. I think it  
11 was at the time it was the best thing for him to focus on  
12 the mental aspect of it as opposed to what the discovery  
13 was:

14 Q All right, and what was the, the result of  
15 the evaluation?

16 A Ultimately after at least three, I made at  
17 least, I want to say at least three trips to Columbia, it  
18 might have been more, and I know that Charlie was there for  
19 a diagnostic part that I wasn't allowed to participate in,  
20 at least twice maybe, but ultimately he was, he was  
21 competent for trial but the other part he was, he didn't  
22 have the capacity to conform or to understand, I think it's  
23 what it was.

24 Q All right, didn't have the capacity to  
25 conform his conduct to the requirements of the law?

Mr. Gardner - Direct Examination by Ms. Catoe

21

1           A       That's my memory I think that's what it  
2 was.

3           Q       All right, and speaking of his competency  
4 did you have any difficulties in your communications with  
5 him or did he seem to be competent during, during the  
6 representation?

7           A       He seemed to be competent, he was a great  
8 client. I mean we, we talked about what we had to talk  
9 about given the fact that he unlike any other client I ever  
10 had he could tell me things about the incident or the scene  
11 or the actions, Charlie just couldn't remember any of that,  
12 most of it he couldn't remember.

13          Q       All right, but you did ultimately discuss  
14 what facts he could recall?

15          A       Yes, ma'am.

16          Q       And what did he tell you?

17          A       What he told me was consistent with what he  
18 testified here to today.

19          Q       All right?

20          A       And I can go into that again if you want me  
21 to.

22          Q       That's all right, and did you discuss or  
23 did you go over the discovery with him at some point?

24          A       We did, there was very, I think it was very  
25 traumatic for Mr. Dean cause one of the things that he

Mr. Gardner - Direct Examination by Ms. Catoe

22

1 asked me for early on was, was, was there evidence that his  
2 wife was dead in the discovery, not like some people might  
3 think that you want to know if they could prove the case,  
4 he wanted to know if she was dead. He wasn't positive that  
5 she was dead, if I remember it right, which I thought  
6 validated what the psychiatrist talked about with Charlie  
7 not remembering what happened, but we got past all that and  
8 we did go through the discovery.

9 Q All right, and what was your understanding  
10 of what witnesses the State might call if the case were to  
11 go to trial?

12 A Well other than the normal witnesses that  
13 the State calls, you know police officers and the coroner,  
14 the pathologist, I thought they would call the daughter and  
15 maybe her boyfriend.

16 Q All right, and did you ever speak with  
17 them?

18 A No, I did not.

19 Q All right, and did you have any statements  
20 from them?

21 A We, we had their statements that they gave  
22 to the police.

23 Q All right, do you remember what they said  
24 in their statements?

25 A I don't remember everything but I think it

Mr. Gardner - Direct Examination by Ms. Catoe

23

1 was consistent with what Mr. Dean testified to earlier  
2 today. Basically that Mr. Dean went home to get some of  
3 his belongings, he was packing up to leave, and I think  
4 that that they happened upon him while he was there, and I  
5 don't remember if at some point in time the daughter, she  
6 admitted to stabbing Charlie. So there was no doubt that  
7 Charlie was stabbed, and I think that she went across, the  
8 daughter she went across the street to somebody's house and  
9 to call the police, so they would have testified to that  
10 and that was their statements were basically to that  
11 affect.

12 Q Okay, and there were no other witnesses  
13 than that as far as you understand?

14 A Other than police officers that's all I can  
15 think of.

16 Q Okay, and did you and Mr. Dean in your  
17 discussions talk about possible defenses if the case were  
18 to go to trial?

19 A We did.

20 Q What defenses did you discuss?

21 A Well we discussed, most of our discussion  
22 was on manslaughter and I think that started out because  
23 one of the early, it might have been the first time that we  
24 visited the doctor in Columbia the doctor talks through  
25 some different concepts of law and one of those that

Mr. Gardner - Direct Examination by Ms. Catoe

24

1 Charlie and I, Charlie would bring up on occasion would be,  
2 Mr. Dean, I'm sorry, would say you know that doctor said it  
3 was manslaughter, and I'd say I don't think the doctor said  
4 it was manslaughter because the doctor, you know, wasn't  
5 there. I think what the doctor was saying is these are the  
6 different types of charges, but we got into that pretty  
7 good and so we talked about that and we thought that it was  
8 manslaughter. The prosecutor made a plea offer of twenty-  
9 five years for murder, that was what the offer said and so  
10 I want and met with her and ---

11 Q And who was the prosecutor in this case?

12 A Nancy Livesay, and I asked her did she  
13 really mean that twenty-five years was a fair sentence or  
14 that was an offer of a sentence or did she mean that  
15 murder, she didn't quite understand what I was talking  
16 about. Ultimately without trying to sound like I'm,  
17 ultimately it was my belief that she was trying to work out  
18 a twenty-five year sentence. I never to the best of my  
19 knowledge never told Mr. Dean that because it was never  
20 officially made because once the prosecutor found out that  
21 the minimum sentence on murder was thirty she changed it to  
22 where there would be no offer or an offer of thirty or no  
23 offer, in other words, there was no twenty-five year offer  
24 any more. So the focus with me and Mr. Dean was on the  
25 manslaughter aspect of the case.

Mr. Gardner - Direct Examination by Ms. Catoe

25

1 Q All right, and did you ever discuss self  
2 defense?

3 A We discussed self defense and I think that  
4 depending on how the evidence would have played out, if it  
5 would have played out the way that I think it would have  
6 played out I think that the judge would have been within  
7 his rights to charge, to charge that to the jury.

8 Q All right, and did you discuss with Mr.  
9 Dean your opinion about what might happen in a trial?

10 A I did, we talked about that if, if the  
11 judge, as long as the evidence was there that I felt that  
12 the judge could charge the jury with that, what the jury  
13 would do with it would be up to the jury..

14 Q All right, and did you go, did you have  
15 enough time to prepare and consider the case?

16 A I think so.

17 Q All right, did you discuss with Mr. Dean  
18 the options available to him in terms of the benefits and  
19 drawbacks of making a guilty plea versus going to trial?

20 A We did, I felt that the judge if he was  
21 found guilty of murder, which is a possibility, it's always  
22 a possibility, that the judge would give him life without  
23 parole or life as they call it.

24 Q What was that based upon, your telling him  
25 that?

Mr. Gardner - Direct Examination by Ms. Catoe

26

1           A       Well it was based upon the fact that it was  
2 a murder case and the judge said if he doesn't, I mean the  
3 judge said something along the lines that he would lighten  
4 him up if the jury found him guilty, load him up, I'm  
5 sorry.

6           Q       Load him up, was this a chambers discussion  
7 that you had?

8           A       Yes.

9           Q       Okay, and did that appear to play into the  
10 applicant's decision to ultimately plead guilty?

11          A       Well I don't, almost positive that I didn't  
12 tell him what a judge would tell me in chambers, I would  
13 never tell anybody that but I mean it was my decision ---

14          Q       But you knew he could get life without  
15 parole?

16          A       That was what was going through my head.

17          Q       Okay --

18          A       But Charlie knew that, you know, he knew  
19 the ranges what the judge could do.

20          Q       All right, and did you ever discuss with,  
21 with Mr. Dean whether or not the murder plea would be  
22 eighty five percent or a hundred percent, did you ever  
23 discuss those collateral type consequences?

24          A       Yes, we did.

25          Q       And what did you tell him about that?

Mr. Gardner - Direct Examination by Ms. Catoe

27

1           A     Okay, I, keep in mind that we were trying  
2 to get this case into a manageable time or sentence for him  
3 and if the Solicitor thought twenty-five years was fine we  
4 weren't necessarily agreeing with that but twenty-five  
5 would certainly be better than life; and towards the end of  
6 our trial preparations another lawyer who I trust had made  
7 the comment that it would only be eighty-five percent under  
8 the new law so we did talk about that.

9           Q     All right, so you, did you specifically  
10 tell Mr. Dean that it would be eighty five percent?

11          A     I don't remember the exact words but that  
12 was discussed.

13          Q     All right, and would you have explained to  
14 him that parole was not guaranteed at eighty-five percent,  
15 that it was just an option?

16          A     We never, we never talked about parole.

17          Q     All right --

18          A     We never discussed anything about parole or  
19 work credits cause I don't know how work credits work.

20          Q     All right, how did he ultimately come to  
21 the decision to enter this plea for murder?

22          A     I don't know, this was a tough case. This  
23 is probably the toughest case that I've ever been a part  
24 of. It was tough on the victim's family. It's tough on  
25 his family, it was tough on Mr. Dean, I'm sure it was tough

Mr. Gardner - Direct Examination by Ms. Catoe

28

1 on his daughter. It was tough on everybody. We talked it  
2 through and I don't know how, I don't know how, what, what  
3 special weight he may have attached to the certain things.  
4 I mean there's no doubt in my mind that, that we should  
5 have tried the case and that's it in a nutshell we should  
6 have tried it. We were here, we were ready to go and he  
7 pled.

8 Q All right, did you ever discuss with Mr.  
9 Dean how at trial how it might affect the jury in a  
10 particular manner in which the victim died as far as, I  
11 believe one of the elements was that her throat was cut; is  
12 that right?

13 A That, yeah, that was, that was one of the  
14 facts, factual allegations. We had, there were pictures,  
15 crime scene people took pictures and if they were bad  
16 pictures we talked about moving to have just like any other  
17 trial that we'd done in the past where we had, we had, some  
18 pictures we consent to and some pictures we object to and  
19 the judges normally puts one picture in the middle of the  
20 range, but we talked about that. We talked, I think we  
21 talked about everything in the case.

22 Q All right, and did you ever put any  
23 pressure on him or coerce him to get him to enter this  
24 plea?

25 A I don't think I put any pressure on him. I

Mr. Gardner - Direct Examination by Ms. Catoe

29

1 did tell him, I think I did my job as far as letting him  
2 know what the different verdicts could be and what the  
3 different ranges of sentence would be. I told him that the  
4 jury, I may have told him this about the self defense part,  
5 that I didn't think that a jury would buy from that. I did  
6 not know, I could not predict the future, but I did not  
7 think a Horry County jury would buy off on self defense  
8 based on the severity of the wounds the victim had, but as  
9 far as manslaughter I did tell him that the range of that  
10 was thirty years and that that judge would probably give  
11 him thirty years even on a manslaughter.

12 Q All right, do you feel there's anything  
13 else, absent the eighty-five percent issue do you feel  
14 there's anything else that you could have discussed with  
15 him that, that you didn't?

16 A No, I don't, I don't think so. As soon as  
17 this case was over I mean we, we were, we were having  
18 second thoughts about it.

19 Q All right, so in hindsight at this point  
20 you wish you had tried the case; is that right?

21 A Yes, ma'am.

22 Ms. Catoe: All right, I have no further  
23 questions, Mr. Gardner, thank you.

24 Mr. Archer: Your Honor, if it please the Court?

25 The Court: Yes, sir.

By Mr. Archer:

A      Good afternoon, sir.

Q You and I have been practicing criminal law here in Horry County for quite some time, correct?

A Yes, sir.

Q       Isn't it true that if you go to trial and you are found guilty of murder in Horry County that the normal sentence range is probably more like thirty to forty years?

A     Yeah, I think on a normal, the one I tried before this one was a two-drug dealer kind of, my words, I don't know what who else might call it, but the judge gave them thirty years, and I think it was because of the nature it was. I've read in the paper since then some people have gotten forty years on a regular murder type case, so if your question is would it be more than forty I've seen some more than forty. I've got one client doing two lifes.

Q But knowing these facts isn't it true that, that in, in your experience or just in Horry County that basically you get life without the possibility of parole if it's a premeditated murder, if it's a premeditated murder and in this case this is not a premeditated murder, knowing the facts that he had a knife in his back and he was

Mr. Gardner - Cross Examination by Mr. Archer

31

1 stabbed and he was obviously somehow provoked and it was  
2 the heat of passion and you even admitted it could have  
3 been manslaughter the chances of him getting life without  
4 parole knowing these facts would be I think and you agree  
5 with me would be very small that he would get life without  
6 parole?

7 A I agree with you.

8 Q So, therefore, at his age by having him  
9 stand up and plea and giving him, giving him a thirty year  
10 sentence where he would serve until he's seventy-six that's  
11 basically a life without parole sentence, isn't it?

12 A Yes, sir.

13 Q So looking at all that you really had, you  
14 really had no reason not to go to trial?

15 A None, whatsoever.

16 Q Just let me eliminate one thing. I just  
17 want to see, there is, there is a defense of not guilty by  
18 reason of insanity, did you ever him privately evaluated?

19 A I did, and it didn't change anything.

20 Q All right, so even that was out of the  
21 picture, there was no question on that?

22 A Right.

23 Q So the question would be self defense or  
24 some sort of manslaughter?

25 A Correct.

Mr. Gardner - Redirect Examination by Ms. Catoe

32

1 Q You also testified that you thought that he  
2 would get thirty years on manslaughter, well that's, that  
3 again I'm going to give you the same thing, as a practicing  
4 attorney here for so many years that's a, that's a maximum?

5 A Yes, sir, that is.

6 Q So if he's found guilty on manslaughter  
7 isn't it true that more likely he would probably get in the  
8 range of fifteen to twenty years?

9 A That's most of the manslaughters.

10 Q Right ---

11 The Court: Found guilty by a jury or pled  
12 guilty?

13 Mr. Archer: No, found guilty by a jury then,  
14 then what he said he thought he would get thirty years,  
15 that's the maximum for it.

16 Q (Continuing) So my question to you is  
17 knowing Horry County like you and I know Horry County the  
18 judge probably would have given him more like fifteen to  
19 twenty years not thirty years?

20 A Yeah, you're probably right. I don't know  
21 if I would have made that, I know I did not make that  
22 statement but I don't know if I would make that statement  
23 on my own cause I've always worried about what, what the  
24 judge would do on a, on a jury like this the judge says  
25 it's different when you plead to a fifteen year

Mr. Gardner - Redirect Examination by Ms. Catoe

33

1 manslaughter as opposed to a sentence of fifteen years on a  
2 jury verdict.

3 Q Well my point again is you really had  
4 nothing to loose by going to trial, that's really what my  
5 point is?

6 A Yes, sir, and I think I, I'm sorry I may  
7 have got sideways in the numbers and stuff but you're  
8 right, I agree with you.

9 Q So knowing, knowing what the applicant has  
10 to prove today which is to convince this judge and knowing  
11 all the facts that were presented would it be your opinion  
12 that you basically made a mistake by not going to trial,  
13 that you should have taken this case to trial?

14 A Yes, sir, it would be.

15 Mr. Archer: All right, thank you.

16 The Court: Redirect?

17 Ms. Catoe: Yes, Your Honor, just one question.

18 Redirect Examination

19 By Ms. Catoe:

20 Q Mr. Gardner, maybe I misunderstood you but  
21 did you say earlier that the judge specifically indicated  
22 to you in chambers that he would give a life without parole  
23 sentence?

24 A He didn't say that, he said I think I first  
25 thought it was light, but I think load him up.

Mr. Gardner - Redirect Examination by Ms. Catoe

34

1 Q Okay, and you, you took that to mean it  
2 would not be thirty years?

3 A That's what I took it to mean that. I  
4 don't know if he was just, because I don't think he would  
5 have got into the facts of it, I think he was just, a lot  
6 of times right before trial some of the judges will say  
7 that to try to, I don't know any way to interpret it, to  
8 try to force a plea.

9 Ms. Catoe: All right, thank you.

10 The Court: Any objection to me questioning the  
11 witness?

12 Mr. Archer: No, sir.

13 Ms. Catoe: I don't.

14 The Court: Mr. Gardner, when you say or you  
15 agreed with Mr. Archer that you made a mistake in not going  
16 to trial, who makes the decision as to whether or not a  
17 plea is or is not entered?

18 A The client, Your Honor.

19 The Court: And was Mr. Dean coerced or forced  
20 or pressured or in any entering the plea against his will?

21 A No, sir.

22 The Court: Did you counsel him as fully as you  
23 knew how to do as to whether or not he should or should not  
24 plead?

25 A To the best of my ability, yes, sir.

Mr. Gardner - Redirect Examination by Ms. Catoe

35

1           The Court: Did you tell him he shouldn't plead  
2 or did you tell him he should plead or did you just leave  
3 it up to him after consulting with him?

4           A       We talked about it a good bit, Judge, I  
5 don't think I said to him specifically you should not plead  
6 or specifically you should, should not, should plead, I  
7 don't think I said that.

8           The Court: Do you think that your performance  
9 fell below accepted professional norms and, if so, how?

10          A       Judge, I don't want to say that I fell  
11 below the norms; I do believe that I should have tried the  
12 case. I do believe looking at all the different factors  
13 that we should have let the jury decide whether or not it  
14 was manslaughter or not.

15          The Court: Going back to the statement of  
16 daughter Brittany, did the statement include any of her  
17 observations was to whether or not she stabbed her father,  
18 this was her father, correct?

19          A       My understanding, yes, sir.

20          The Court: Stabbed Mr. Dean before or after the  
21 victim had been stabbed or before or after a verbal  
22 argument or before or after anything with this scooter?

23          A       I, without my file, and I have my file, I  
24 don't know the answer to which came first. It was the best  
25 of my memory that it all sort of happened but one of the

Mr. Gardner - Redirect Examination by Ms. Catoe

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1 things that I was reminded of while I was sitting here  
2 today is that it was Mr. Dean did have his knife at some  
3 point in time and he had taken his knife out of his  
4 pockets. When he was arrested the police took other stuff  
5 out of his pockets which had, I think, it was money and  
6 maybe something else, it had blood on it which would  
7 indicate that Mr. Dean had been stabbed before he got his  
8 knife out of his pocket. I don't know, one of the things  
9 that I struggle with is if somebody comes at you with a  
10 razor, scooter, one of those metal scooters, I mean do you,  
11 do you pull out a knife and stab them. I didn't know, we  
12 have to respond with the same or proportional type of  
13 defenses and I didn't know how that would play out. As far  
14 the exact timing had somebody else stabbed somebody before  
15 the daughter stabbed him I'm not sure.

16 The Court: All right.

17 A The thing that stuck with me the most is in  
18 the Solicitor's transcription of an interview that took  
19 place at the emergency room where Mr. Charlie Dean was  
20 taken after the police came, they took him to the emergency  
21 room to treat him, two things stick out about that. One  
22 was when he gave a statement I don't think the statement  
23 hurt him. I don't think it would have hurt him at all had  
24 it been used, but the doctor in Columbia pointed out that  
25 Mr. Dean was sedated heavily under morphine at the time. I

Mr. Gardner - Recross Examination by Mr. Gardner

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1 don't know that may have been a good enough reason to have  
2 it suppressed but even if it wasn't I don't think it hurt  
3 him too much cause he had no memory of what happened, but  
4 the transcription of the interview with the doctor, one of  
5 the doctors, doesn't have anything about defensive wounds  
6 but when I got the tape and played the tape late into the  
7 preparations of the case the doctor told the police, yes,  
8 that he, this was definitely defensive wounds. He was  
9 definitely defending himself, words to that affect. That  
10 troubled me a great deal. If that doctor would have  
11 testified I don't see how in the world with all the other  
12 things that both lawyers here today have pointed out I  
13 don't see how in the world we could have not got a  
14 manslaughter and maybe even a self defense but at least a  
15 manslaughter charge.

16 The Court: All right, anything else, Mr.  
17 Archer, of this witness?

18 Mr. Archer: Yes, sir, I'd like to ask him one  
19 question, just noticed, I didn't notice it, I just recalled  
20 it.

21 Recross Examination

22 By Mr. Archer;

23 Q In the plea transcript --

24 The Court: Page what?

25 Mr. Archer: On page ten --

Mr. Gardner - Recross Examination by Mr. Gardner

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1           The Court:   Of the plea or the.--

2           Mr. Archer:   The plea.

3           The Court:   All right, okay.

4           Q       On page ten where Ms. Livesay, the  
5 Solicitor, is going over the facts the defendant Dean says  
6 that's what they say, sir, and then when the judge says,  
7 all right, well tell me did you stab and kill your wife,  
8 Mr. Dean says, I guess so, sir. It seems to me right then  
9 and there he's not really admitting to any of this; do you  
10 recall any of this during the plea or what was his  
11 demeanor?

12          A       What, did, what was the judge's next line,  
13 did the judge get after him?

14          Q       Yeah, then the judge got after him said  
15 well I can't take your plea unless you say yes and then he  
16 did say, yes, but do you remember anything about that, his  
17 attitude at the plea that he was reluctant to do this cause  
18 that's what it sounds like from here?

19          A       It may have been, I took it and took it to  
20 be that Charlie really didn't have, he didn't really  
21 remember. The cops said that he, that he killed his wife  
22 and he don't remember if he killed his wife or if he didn't  
23 kill his wife, but, yeah, it wasn't an easy plea. It  
24 wasn't, it wasn't easy.

25          Q       So by him saying in the plea, yes, sir, I

Mr. Gardner - Recross Examination by Mr. Gardner

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1 did this, you don't think he really remembered if he did or  
2 he didn't kill her?

3 A Oh, no, no, no, sir, not at all.

4 Q So in other words when he was standing  
5 there and taking this plea it would indicate that at first  
6 until the judge said something it seems as though he didn't  
7 really know whether he was pleading guilty or not pleading  
8 guilty cause he didn't know what he was pleading guilty to;  
9 would that be a fair statement?

10 A Well I think it's fair to a certain degree,  
11 I mean I think that he didn't, he probably didn't know what  
12 he was pleading to in that he didn't know how it happened  
13 or anything like that but I think that he knew that he was  
14 pleading guilty.

15 Q No, but we're talking about the facts?

16 A Oh, the facts, yes, sir, I think the facts  
17 he probably didn't know, I think that's been consistent  
18 from the beginning.

19 Q Right, so when he said if that's what you  
20 say he's just, he's just saying well if that's what the  
21 Solicitor said I guess that's true, but that's not what he  
22 really believed?

23 A I don't know, sir. I don't think he ever  
24 believed that or I don't think or what had in his favor I  
25 don't think that he ever believed that that happened, but I

Mr. Gardner - Redirect Examination by Ms. Catoe

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1 don't, we don't have, we don't have any conclusive  
2 evidence, I mean she was dead. I mean it's not like she  
3 wasn't, she was dead, whether or not it was manslaughter or  
4 something else.

5 Q Did you find him remorseful?

6 A Absolutely, once, I think I misspoke, he  
7 was very sorry that his wife was dead; he was very sorry  
8 that she was dead. He just did not believe that he could  
9 have done it, did not believe he did it, did not believe  
10 that she was dead at the beginning because the only  
11 knowledge, the only stuff that he, the way he learned about  
12 it was the cops telling him by the way she's dead.

13 Q So that would be more consistent with a  
14 manslaughter, heat of passion or whatever?

15 A Everything about this case is more  
16 consistent with manslaughter.

17 Mr. Archer: All right, thank you, sir.

18 The Court: Ms. Catoe?

19 Ms. Catoe: Just one question, Your Honor.

20 Redirect Examination

21 By Ms. Catoe:

22 Q Mr. Gardner, have you reviewed the plea  
23 transcript to some degree?

24 A I looked it over a while ago when we  
25 sitting there and also out in the hallway with you.

Mr. Gardner - Redirect Examination by Ms. Catoe

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1 Q Okay, and are you aware that the plea  
2 transcript, in the plea transcript the judge mentions a  
3 couple of times that it's a day for day sentence?

4 A We talked about that out in the hallway, I  
5 was not aware, it looked to me like it's mentioned in there  
6 two times.

7 The Court: What pages?

8 Ms. Catoe: Beg the Court's indulgence one  
9 moment, Your Honor.

10 It's, well the last page is twenty-one and also  
11 on page eighteen lines fourteen through sixteen.

12 The Court: What lines, fourteen through  
13 sixteen?

14 Ms. Catoe: Page eighteen, Your Honor.

15 The Court: Okay, I got it.

16 The Witness: (Continuing)

17 A Okay, I don't have a copy of it with me but  
18 if that first section you're talking about that we looked  
19 at out in the hallway I thought it was one line where the  
20 judge may have said something like day for day or something  
21 like that.

22 Q All right.

23 A Is that matching up?

24 Q Yes, it is.

25 A Okay.

Mr. Gardner - Redirect Examination by Ms. Catoe

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1 Q There's one line, line sixteen?

2 A Okay, that I did not have any recollection  
3 of as far as the guilty plea. I'm not disputing it but I  
4 did not hear that part. What I did hear was at the end of  
5 it where the judge said it all which that caught us all by  
6 surprise because we had talked about this even in chambers  
7 and when we got to the lock up Mr. Dean was highly upset  
8 with me because the judge had said that at the end of the  
9 plea. If the judge would have said that at the beginning  
10 of the plea there is no doubt in my mind that the plea  
11 would have never taken place.

12 Q Thank you.

13 A But he said it at the end and Mr. Dean  
14 asked to go back out there and right or wrong I made the  
15 decision not to go back out there because that my belief  
16 was that judge was not going to at that time let him  
17 withdraw the plea.

18 The Court: So he would have been willing to do  
19 twenty four and a half, twenty five and a half and not  
20 thirty?

21 A I think that's what it all boiled down to,  
22 Judge.

23 The Court: So would it have been a situation  
24 where you think he shouldn't have pled at all or to an  
25 eighty five percent thirty year sentence?

1           A     I think if he would have, if he would have  
2 been, I think you hit the nail on the head, Your Honor, I  
3 think that if it's two things but, number one, for Mr.  
4 Dean, I think Mr. Dean based on the way he was after the  
5 plea that if he would have, if it would have been eighty  
6 five percent he would be good to go. The other part of it  
7 is as far as from a lawyering standpoint and with somebody  
8 complaining about lawyering I firmly believe that the case  
9 should have been tried because it was as one of the lawyers  
10 said it was a manslaughter type case, my words.

11           The Court:   Okay, all right, any other  
12 questions, Mr. Archer?

13           Mr. Archer:   No, sir.

14           The Court:   Ms. Catoe?

15           Ms. Catoe:   No, Your Honor.

16           The Court:   All right, step down, any other  
17 witnesses?

18           Ms. Catoe:   No, Your Honor.

19           Mr. Archer:   No, sir.

20           The Court:   Any argument, Mr. Archer?

21           Mr. Archer:   Yes, sir, Your Honor, in this case  
22 there are two aspects, one would be this eighty five  
23 percent. Mr. Dean has a tenth grade education. I've  
24 spoken to him, I don't know how bright he is. I don't know  
25 what reflects in some of these people's mind whether they

1 calculate what eighty-five percent of the sentence is, I  
2 don't know, but there may have been some confusion on that  
3 and I think he thought he was going to get less time  
4 obviously, but I think more important and most of my  
5 argument will be that in all fairness and especially  
6 towards judicial system I think he should have his day in  
7 court.

8           The Court: But didn't he have that opportunity,  
9 and I understand all the testimony a hundred percent, and I  
10 don't know whether Mr. Gardner's fallen on his sword or  
11 what, but what is the evidence that his performance fell  
12 below accepted professional norms?

13           Mr. Archer: Well here's, here's my argument, my  
14 argument is that these people listen to their lawyers and I  
15 think that if Mr. Gardner looked at all his facts, the fact  
16 that he pulled a knife out of the back and all the rest of  
17 it I think and he even testified it's a manslaughter case,  
18 so what I'm saying and my point is is that as his lawyer  
19 and as somebody with a tenth grade education who relies on  
20 criminal defense lawyers to basically tell them what to do  
21 they listen to you. I think Mr. Gardner should have said,  
22 Mr. Dean, at your age you really don't have anything to  
23 loose, you're not twenty years old, and even if you got a  
24 life sentence what's the difference, you're still going to  
25 be in your mid seventies or whatever. At that point ---

1           The Court:   How many times, how many times have  
2 you tried a case where your client did go to trial and your  
3 client did get loaded up, if that's the vernacular you want  
4 to use, and then your client comes back on PCR and says you  
5 should have made me plead guilty, so how, how was a lawyer  
6 to know absent a crystal ball?

7           Mr. Archer:   Only by the facts, knowing these  
8 facts and being a criminal defense attorney these are not,  
9 this is not premeditated murder. It's not like Mr. Gardner  
10 can say well there were eyewitnesses. The facts show that  
11 the girlfriend, I mean his sister and the boyfriend, they  
12 didn't really see it.

13           The Court:   The daughter.

14           Mr. Archer:   The daughter, the daughter and her  
15 boyfriend actually didn't really see it.

16           The Court:   How could the daughter not see it if  
17 she stabbed him in the back?

18           Mr. Archer:   Well she wasn't going to testify to  
19 that and Mr. Gardner said that.

20           The Court:   Does either side think ---

21           Mr. Archer:   She saw him stab him in the back  
22 but she ---

23           The Court:   Would it not be in either side's  
24 presentation of the evidence that at least put in the  
25 record not what the daughter would testify to if she took

1 the stand but what she said in her statement; isn't that  
2 what's in the lawyer ---

3 Mr. Archer: Yeah, that's manslaughter.

4 The Court: Well why don't I have it?

5 Mr. Archer: But that's exactly the point.

6 The Court: He had it?

7 Mr. Archer: She would have testified that she  
8 stabbed him in the back and that provoked him.

9 The Court: Well, no, sir, no, sir.

10 Mr. Archer: It actually would have worked in  
11 his favor.

12 The Court: That's not my question, that's not  
13 in the record.

14 Mr. Archer: Well what else is she going to  
15 testify to, there's nothing else she can testify to.

16 The Court: Okay, so ---

17 Mr. Archer: She's telling the truth she stabbed  
18 him in the back.

19 The Court: So where I'm sitting from right here  
20 you're telling me it has been presented to me what the  
21 daughter was going to say?

22 Mr. Archer: Well then she doesn't testify at  
23 all what else could she testify to; there's nothing else  
24 she can testify to.

25 The Court: No, my question is for this hearing

1 why hasn't somebody given or put a copy of her statement in  
2 the record to show what the lawyers state of mind was, if  
3 you will, or what the defendant's state of mind was? I  
4 don't know what she would have said; I don't know what they  
5 think she would have said.

6 Mr. Archer: I don't think that, I don't think  
7 that's important because this is what, this is what Mr.  
8 Gardner believed so this is what's in his mind and I say  
9 that what's in his mind he has an obligation to tell his  
10 client you've got a pretty good case here and I don't see  
11 any reason why you should take a plea and that's my  
12 argument, and I'm asking you to grant him ---

13 The Court: And where is the evidence that,  
14 where is the evidence that your client would have taken  
15 that advice?

16 Mr. Archer: We don't know that but what I'm  
17 saying is is that's the reason you have a post conviction  
18 relief is because the attorney takes the stand and  
19 basically says, yes, I did, I did screw up, I was  
20 ineffective because I should have told him as his attorney  
21 you've got a pretty good case for either self defense or  
22 manslaughter and you shouldn't take this plea.

23 The Court: And the second prong of the test is  
24 but for counsel's deficient performance Mr. Dean would not  
25 have pled guilty; where is the evidence of that?

1           Mr. Archer:   We don't know that, but he could  
2 have told, he could have directed Mr. Dean because the way  
3 it is he basically had nothing to loose by going to trial  
4 because of his age and because of Horry County that if he  
5 went to trial he even admitted that most of the time you  
6 don't get life without parole unless it's some vicious  
7 premeditated murder.

8           The Court:   And stabbing someone in their home  
9 and with the throat cut --

10          Mr. Archer:   With the knife you pulled out of  
11 your back, I don't think he would get life without parole.

12          The Court:   The knife having ---

13          Mr. Archer:   He pulled the knife out of his  
14 back.

15          The Court:   The knife having been put there by  
16 somebody else.

17          Mr. Archer:   Yes, he was stabbed, what I'm  
18 saying he didn't go to that house to kill his wife. He  
19 went there to go, he was trying to do a good thing. He  
20 went there to go get his bag and so he could leave. He  
21 didn't go there to go kill her, this is not a premeditated  
22 murder. If he went in that house with a knife and he went  
23 in and knowing that she was going to kick him out of the  
24 house and he went and cut her throat etcetera, yeah, he'd  
25 probably get life, but he went in there to do the right

1 thing. She wanted him out. He went in there to do the  
2 right thing. He was going to get his, get his belongings,  
3 then he gets taunted and laughed at and then he feels  
4 something in his back and he gets stabbed in the back,  
5 that's, that's, that, those are facts where in my opinion  
6 the lawyer should have said to his client you should go to  
7 trial on this case.

8 The Court: And then ---

9 Mr. Archer: And that's my argument.

10 The Court: And then what would your client's  
11 answer to that have been?

12 Mr. Archer: Yes, obviously, if he's being  
13 directed ---

14 The Court: Well a few minutes ago you said, a  
15 few minutes ago you said I don't know what his answer would  
16 be.

17 Mr. Archer: No, I thought you said what the  
18 jury would say, I don't know the answer to that, talking  
19 about what he would say.

20 The Court: No, I'm saying what would your  
21 client's answer ---

22 Mr. Archer: Well I asked him when he first got  
23 up there, are you here to ask for a trial he said, yes, he  
24 would have gone to trial, he said that under oath he would  
25 go to trial.

1           The Court:   If what, if he would have known he  
2 was going to get thirty years.

3           Mr. Archer:   No, he would have gone to trial  
4 knowing the facts as they were presented and knowing these  
5 facts that Mr. Gardner should have told him we have a  
6 pretty good case, you should go to trial; that's my whole  
7 argument.

8           The Court:   I just don't remember that being in  
9 his testimony. All right, anything else?

10          Mr. Archer:   No, sir.

11          The Court:   All right, yes, ma'am?

12          Ms. Catoe:   Your Honor, I think what we have in  
13 this case is a case of buyers remorse on the part of both  
14 the defendant and former defense counsel, but it's the  
15 State's position that defense counsel's performance did not  
16 fall below the accepted level of professional norms. He  
17 said there was nothing further that he could have discussed  
18 with him. They fully discussed the involuntary man-, or  
19 the voluntary manslaughter, self defense, and I would point  
20 out that a jury charge on murder would specifically say  
21 that premeditation need not be, you know, days in advance,  
22 it can just be a moment and so that, you know, may have  
23 been proven, you know, in this case.

24                 I think just because in hindsight defense counsel  
25 would have wanted to take it to trial doesn't, doesn't mean

1 that the plea was actually involuntary and that would be  
2 the State's presentation, Your Honor.

3 The Court: All right, anything else, Mr.  
4 Archer?

5 Mr. Archer: No, sir.

6 The Court: All right. I took notes, Mr.  
7 Archer. He testified that if he knew he had to do the full  
8 thirty years he wouldn't have pled guilty and obviously an  
9 eighty-five percent crime is not, it's a no parole offense  
10 either way. Murder you're going to do day for day,  
11 voluntary manslaughter is a no parole offense. You just  
12 come out on community supervision after you do the eighty-  
13 five percent of the sentence, so I know that people loosely  
14 refer to it as, as parole but it's not, but be that as it  
15 may, I don't recall any testimony from the applicant that  
16 if his lawyer had told him to take a trial he'd had done  
17 it. He just said that if he knew in advance he had to do  
18 the full thirty years he wouldn't have plead guilty and I  
19 don't know about the business pertaining to, well in Horry  
20 County if you plead to voluntary manslaughter you're going  
21 to get this, if you get found guilty by a jury of voluntary  
22 manslaughter you're only going to get fifteen to twenty. I  
23 don't know of any empirical data on that. I'm just a  
24 little perplexed about these prongs that I'm restricted to  
25 looking at and now, Ms. Catoe, as an officer of this court

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1 did anyone, specifically the applicant, testify that if he  
2 had been fully educated about self defense or voluntary  
3 manslaughter by his attorney that he would have taken a  
4 trial, that he would not have plead guilty; is there any  
5 evidence of that?

6 Ms. Catoe: I don't believe I heard that from  
7 the witness stand today, Your Honor.

8 Mr. Archer: Can I answer that?

9 The Court: Yes, sir.

10 Mr. Archer: He, he, he made a statement to me  
11 which was, which was very enlightening, I spoke to him for  
12 a half an hour --

13 The Court: I'm talking about today.

14 Mr. Archer: Today.

15 The Court: I'm talking about from the witness  
16 stand, I'm not talking about between ya'll.

17 Mr. Archer: Yes, but this is, this is  
18 interesting what he said, he said, Mr. Archer, what you  
19 have explained to me today is more than Johnny Gardner's  
20 explained to me the whole time I saw him. He wasn't even  
21 aware of the stuff ---

22 The Court: That's not in the record, that's not  
23 in the record. I can't, I can't consider that.

24 Mr. Archer: But that was the whole testimony  
25 today, that was my whole point. He didn't know any of this

1 stuff until I brought it up to him. All this is I just  
2 brought this up to him doing so many of these and looking  
3 at all this the minute I read this I said wait a second  
4 this is self defense here, there's a manslaughter thing  
5 here. When I brought that to his attention he realized  
6 that there is.

7 The Court: So is the standard that in any  
8 murder case that if someone gets sentenced after a plea  
9 that if an independent eye looks at it and they say well  
10 the jury would have been told about self defense and  
11 voluntary manslaughter then they get a redo?

12 Mr. Archer: No, I'm not saying that at all.  
13 I'm just saying that he obviously was not told all this by  
14 Mr. Gardner.

15 The Court: Mr. Gardner says that they did talk  
16 about it, talked about self defense and voluntary  
17 manslaughter.

18 Mr. Archer: I'm not saying what he testified  
19 to. I'm just saying that it was an interesting comment  
20 that I think that if Mr. Gardner put it to him in the  
21 correct way and he even admitted it I think he definitely  
22 would have gone to trial. There's no question in my mind  
23 he would have gone to trial. Now you may see differently,  
24 that's your prerogative.

25 The Court: No, I'm just trying to, I'm trying

1 to sort through the evidence and it's not an altogether  
2 unusual thing for a defense lawyer to have some type of  
3 buyers remorse, too, but that is not part of the two prong  
4 standard that I wish we would have done it differently.  
5 I'm going to review this in detail.

6 Mr. Dean, I don't want you think that my comments  
7 today, or my questions today, think that I have any  
8 preconceived notion but I have a two prong test that I am  
9 required to follow and Monday morning quarterbacking is not  
10 part of the equation, at least in the strictest sense.

11 All right, anything else, Mr. Archer?

12 Mr. Archer: No, sir.

13 The Court: Ms. Catoe?

14 Ms. Catoe: No, Your Honor.

15 The Court: All right, please notify your client  
16 about the fact that he'll have thirty days to appeal my  
17 decision after you, Mr. Archer, receive written notice of  
18 the entry of my order. Of course, Ms. Catoe, you know  
19 about the State's right to appeal as well if the State's  
20 dissatisfied with my decision.

21 Does he have something that he wants to say to  
22 you, Mr. Archer, or to me?

23 Mr. Dean: To you, sir.

24 The Court: If it's testimony tell your lawyer  
25 what it is and if it's testimony then I'll have to think

1 about it. Yes, sir?

2 Mr. Archer: What he's saying is that he had no  
3 time to speak with Mr. Gardner. Apparently they put him in  
4 a psychiatric hospital, you can explain that, I didn't know  
5 about that.

6 The Court: Any objection to that, Ms. Catoe?

7 Ms. Catoe: Your Honor, the State would have to  
8 object at this point since he's already had his chance to  
9 testify.

10 The Court: All right, go ahead and tell me over  
11 State's objection, you're still under oath.

12 Mr. Dean: Yes, sir, like Mr. Gardner said I  
13 told him I wanted to go back in front of the judge and he  
14 wouldn't take me back in front of the judge but I wanted to  
15 pull my plea and then they sent me to GPH where I couldn't  
16 write nobody or call nobody or nothing for fifteen days, I  
17 was locked down, sir. I had no contact with the outside  
18 world so then when I did get a hold of him he said it was  
19 too late, I wanted to pull my plea.

20 Mr. Archer: What is GPH?

21 Mr. Dean: It's a psychiatric Hospital at  
22 Kirkland, but that day I wanted to pull my plea and he  
23 wouldn't take me back in front of the judge. He set right  
24 there and said it.

25 The Court: All right, anything, anything in

1 response, Ms. Catoe?

2 Ms. Catoe: No, Your Honor.

3 The Court: There hasn't been no ground advanced  
4 that he was not advised of his right to file an appeal  
5 within ten days. It's in the, well it is in the original  
6 petition and it's referenced in the State's return; any  
7 further argument on that, on the failure to advise him of  
8 the right to an appeal?

9 Mr. Archer: He's saying it's not a right to  
10 appeal, it's a right he wanted to go to trial, he wanted to  
11 go back and didn't have a chance cause he was locked up in  
12 a psychiatric.

13 The Court: I see.

14 Mr. Archer: This is what he's saying.

15 The Court: Okay, I got you.

16 Ms. Catoe: If I may just respond briefly, Your  
17 Honor?

18 The Court: Yes, ma'am?

19 Ms. Catoe: I would just point out that on page  
20 fifteen of the transcript the judge did advise the party  
21 that there was a ten day, you know, window to appeal.

22 Mr. Archer: But he admits that, Your  
23 Honor, I spoke to him about that.

24 The Court: All right, all right, thank you very  
25 much, I appreciate it. (End of Requested Transcript)

## CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina.

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

June 8, 2012  
Brenda R. Babb  
Brenda R. Babb, CVR

OFFICIAL REPORTER

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT

Charles Ray Dean, # 342070,

2011-CP-26-5020

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER DENYING  
POST-CONVICTION RELIEF**

This matter came before the Court pursuant to an Application for post-conviction relief filed June 16, 2011, by Charles Ray Dean. Respondent made a Return dated July 21, 2011. An evidentiary hearing was convened at the Horry County Courthouse on January 23, 2012. The Applicant was present in court and represented by Paul Archer, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in January 2008 for the murder of Jill Dean (2008-GS-26-222). Johnny Gardner, Esquire, represented the Applicant. On August 2, 2010, the Applicant pled "guilty but mentally ill" before the Honorable Larry B. Hyman, Jr. Judge Hyman imposed a sentence of 30 years. No direct appeal was filed.

**STANDARD OF REVIEW**

In a post-conviction relief proceeding, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514, 517 (2000); Rule 71.1(e). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a

just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, supra. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case." Caprood, supra, at 109, 525 S.E.2d at 517 (citations omitted). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. In order to receive relief, the applicant must prove both ineffective assistance and resulting prejudice. See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

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 (1985). However, a guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. See Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (2007). Statements made during a plea should be considered conclusive unless the defendant presents persuasive reasons why he should be allowed to depart

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

### ALLEGATIONS

In his PCR Application, Mr. Dean raised several allegations explaining why his custody was unlawful. However, at the evidentiary hearing, two overarching issues were raised:

- (1) The guilty plea was unknowing and involuntary because the Applicant believed that a thirty-year sentence for murder was an "85% sentence" rather than a "day-for day" sentence; and
- (2) The guilty plea was unknowing and involuntary as a result of ineffective assistance of counsel because counsel failed to discuss with the Applicant potential defenses and lesser-included offenses, including self-defense and voluntary manslaughter.

### Background Facts

The facts of the case are as follows. On October 16, 2007, the Applicant's wife, daughter, and daughter's boyfriend arrived at home around 5:30-6:00 am. The Applicant, who was in the process of gathering his belongings so that he could move out of the house, came inside from the backyard and subsequently engaged in an argument with his wife. During the argument, the Applicant's daughter stabbed the Applicant in the back in an attempt to get him to stop fighting her mother. The Applicant ended up stabbing his wife multiple times and slitting her throat. At some point, the Applicant's daughter and her boyfriend left the home and went across the street to call 911. When police arrived, the Applicant was sitting on the front porch and he was taken into custody. The Applicant's wife died on the scene. The Applicant maintained that he essentially blacked out during the time of the killing and could not recall actually stabbing his wife or slitting her throat.

Johnny Gardner, Esquire, was appointed to represent the Applicant. On August 2, 2010, a hearing was held regarding the Applicant's competency. Dr. Richard Frierson testified at this hearing. Dr. Frierson found that, because of a previous car accident and resulting frontal lobe

brain injury, the Applicant had difficulty controlling his anger. Dr. Frierson concluded that the Applicant's condition substantially impaired his capacity to conform his conduct to the requirements of law; in other words, the Applicant was guilty but mentally ill. After the competency hearing, the Applicant pled guilty but mentally ill, without recommendations or negotiations, to the murder charge. Judge Hyman sentenced him to the mandatory minimum sentence of thirty years.

#### Summary of Relevant PCR Hearing Testimony

At the PCR hearing, the Applicant testified that on the day before the killing, he and his wife had an argument and his wife called the police on him. Therefore, the Applicant left the marital home. Early the next morning he returned when no one was home to pack some of his belongings. While he was outside tending to his dogs, his wife, along with his daughter and her boyfriend, returned home. The Applicant and his wife began talking and arguing in the hallway and his wife then "grabbed the phone" (presumably to call the police again). The next thing the Applicant knew, his daughter Brittany stabbed him in the back with a small knife. When he turned back around his wife was swinging a child's toy scooter at him and laughing. The Applicant claimed that was the last thing he remembered before the killing.

After it was over, the Applicant recalled walking around the corner and seeing his daughter and her boyfriend on the couch, and he then told Brittany to go call 911 for her mother. He stated he did not believe there were any eyewitnesses to the crime because when he "came to" his daughter and her boyfriend were on the couch, which was around the corner from where he and his wife were arguing. He stated that he was taken to the hospital to be checked out regarding the stab wound to his back. He also stated that his arms were swollen and bruised because his wife hit him with the toy scooter.

The Applicant testified that when his appointed counsel came to see him in jail he did not

discuss all of his options at the time. He testified that Mr. Gardner did not explain to him that he might have a case for self-defense and did not explain to him that he was provoked and that this could be a manslaughter case whereby he killed his wife in the heat of passion. He indicated that the only charge they ever discussed was murder, which he stated carried a sentence of "life or thirty years." The Applicant testified that counsel did have him mentally examined and that the State also examined him. The State concluded that the Applicant had a frontal lobe problem impairing his ability to control his anger. The Applicant testified that he was not sure exactly what happened during the events surrounding the killing of his wife because "everything went black" until after it was over.

The Applicant testified that prior to his plea he was under the impression that a thirty-year sentence would be an 85% sentence and that work credits would be available. He stated that he received this information from "people he spoke with in the county." He stated that Mr. Gardner did not tell him that a thirty-year sentence for murder would be day-for-day. The Applicant stated that he did remember the plea judge telling him that the sentence would be day-for-day. He stated that if he had known prior to the plea that a thirty-year sentence was a day-for-day sentence, he would have taken his chances and gone to trial.

The Applicant also testified that he now believes he should have gone to trial because he had "nothing to lose" since thirty years is almost the equivalent of a life sentence at his age, and because there was a good chance the jury would find him guilty of the lesser offense of manslaughter or find him not guilty because of self-defense.

Johnny Gardner, Esquire, the Applicant's former plea counsel, also testified at the PCR hearing. He testified that he had been practicing criminal law for approximately twenty years. Initially, counsel and the Applicant decided to wait to review the discovery materials and discuss the factual details until after the Applicant's mental evaluation was completed. Counsel testified

that the State's doctors concluded that the Applicant was competent for trial but, at the time of the crime, he was unable to conform his conduct to the requirements of law. Counsel also had the Applicant privately evaluated but it did not change the ultimate conclusion. Counsel stated that he never had any problem communicating with the Applicant and that the Applicant was a "great client" except for the fact that he could not recall certain details about the incident itself. They did discuss the facts that the Applicant was able to remember, and counsel stated that what the Applicant told him then was consistent with what he stated in his PCR hearing testimony.

Counsel testified that after the mental evaluations were complete, he and the Applicant reviewed the discovery. When asked about the witnesses that would have been called at trial, counsel stated that in addition to the "normal witnesses" such as police officers and the pathologist, he expected the State to call the Applicant's daughter and her boyfriend as witnesses. He stated that he had obtained their statements to police, and it was his recollection that they would have testified to what they observed on the date in question. Counsel testified that he and the Applicant did discuss possible defenses for trial. He stated that most of their discussions in this regard focused upon manslaughter. He stated that they "got into that pretty good" and they believed the offense committed by the Applicant was indeed manslaughter rather than murder.<sup>1</sup> Of course, it would ultimately be up to the jury to determine whether or not the State established voluntary manslaughter as opposed to murder. Counsel stated that they also discussed self-defense, and he stated that if the evidence played out the way he thought it would, the judge in a trial would probably charge self-defense to the jury. Counsel told the Applicant that it would be up to the jury to decide whether to accept it or not, but he advised the Applicant that due to the nature and severity of the victim's injuries (i.e., multiple stab wounds and a

<sup>1</sup> Counsel stated that although the solicitor initially made a plea offer for a twenty-five year sentence for murder, the offer was withdrawn once the solicitor realized that the mandatory minimum sentence for murder was thirty years. No further plea offers were made.

slashed throat), and considering the requirement of proportionality to the threat posed, a Horry County jury probably would not buy a self-defense theory. They also discussed the possibility of moving to suppress damaging photographs of the victim and her injuries. Counsel told the Applicant that being found guilty of murder was a possibility. The trial judge told counsel in a chambers discussion that if the jury found the Applicant guilty, he would "load him up," which counsel interpreted to mean he would probably give him life without parole. Although counsel did not specifically tell the Applicant what the judge told him in chambers, the Applicant was aware of the sentence range for the offense.

Counsel stated that he and the Applicant had some discussions about whether a sentence under the plea would be an 85% sentence or a day-for-day sentence. Counsel stated that a lawyer he trusted made the comment that under the new law, a thirty-year sentence would be only 85%. Counsel stated that "we did talk about that" although he could not remember the exact words of the conversation. However, counsel denied ever discussing any parole considerations or work credit considerations with the Applicant. Counsel acknowledged that the guilty plea transcript reflected that the judge mentioned on the record two times that any sentence would be day-for-day. However, counsel stated that he did not hear the judge the first time. The second time occurred at the end of the plea, and counsel stated that it caught them by surprise. Counsel also asserted that if the judge would have mentioned "day-for-day" at the beginning of the plea the plea would have never taken place. Counsel stated that the Applicant would have been willing to do 25 ½ years but not 30 years.

Counsel stated that this case was probably the toughest case that he had ever been a part of. He testified that, in hindsight, he wished that he had taken the case to trial. In fact, he stated that they had second thoughts about the plea as soon as it was over. He testified that the Applicant really had no reason to not go to trial because, at the Applicant's age, a thirty-year

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sentence is essentially the same as a life sentence. Counsel stated that he felt he made a mistake by not taking the case to trial. However, he acknowledged that the Applicant made his own choice to enter the guilty plea. He also testified that he did not put any pressure on the Applicant to force him to plead guilty against his will. He also stated that he counseled the Applicant as fully as he knew how regarding whether or not he should plead guilty or go to trial, but he never urged him to plead guilty. When asked by this Court whether he felt his performance fell below accepted professional norms, counsel stated, "Judge, I don't want to say that I fell below the norms; I do believe that I should have tried the case."

In closing argument, the Applicant's PCR counsel argued that, as to the 85% issue, "there may have been some confusion on that and I think he thought he was going to get less time." As to the other issue, the "more important" issue, PCR counsel argued that plea counsel should have told the Applicant that he had a "pretty good case" for manslaughter and that he should go to trial since he had nothing to lose at his age by doing so. He argued that the Applicant's testimony supported that he would not have pled guilty had counsel properly advised him. In contrast, the State argued that both the Applicant and his former counsel were suffering from "buyer's remorse" and that a hindsight re-evaluation of the decision to plead guilty did not render the guilty plea involuntary at the time it was given.

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

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At the PCR hearing, this Court had before it the Applicant's PCR file, including all pleadings filed, the records of the Horry County Clerk of Court regarding the convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. This Court carefully listened to all of the testimony presented at the hearing and

weighed the same according to credibility.

Involuntary Guilty Plea: 85% Issue

The Applicant first alleged that he would not have pled guilty had he known that a thirty-year sentence for murder was a day-for-day sentence rather than an 85% sentence. Plea counsel appeared to agree with the Applicant on this point; however, he never testified that he expressly assured the Applicant that a thirty-year sentence was in fact an 85% sentence. This Court is not convinced by a preponderance of the evidence that counsel provided any actual misadvice upon which the Applicant relied, especially considering the Applicant's testimony that he received information regarding the 85% sentence from people he spoke with in the county rather than from his attorney. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (if trial counsel actively misinforms the defendant about parole eligibility, *the defendant must prove he relied on the misinformation to receive PCR*) (citations omitted) (emphasis added); Caprood v. State, *supra* (in a post-conviction relief proceeding, the applicant bears the burden of proving his allegations by a preponderance of the evidence).

In any event, even assuming that counsel provided actual misadvice that a thirty-year sentence was an 85% sentence rather than a day-for-day sentence, this Court cannot find that such misadvice rendered the Applicant's guilty plea involuntary where it is undisputed that the Applicant pled "straight-up," with no recommendations or negotiations. The Applicant pled guilty facing a potential sentence of thirty years up to a sentence of life without parole. Counsel stated there was no question that the Applicant was aware of the sentence range, and the plea judge clearly told the Applicant he was facing thirty years to life pursuant to his plea. (See Plea Transcript, p. 13, lines 14-17). Further, the Applicant specifically told the judge that he understood the solicitor was making no recommendation as to the sentence and that the sentence was left up to the judge. (See Plea Transcript, p. 13, lines 10-13). The Applicant also told the

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judge that no one made any promises to get him to plead guilty and that no one threatened or coerced him. (See Plea Transcript, p. 14, lines 8-16).

At the PCR hearing, the Applicant never testified that he was promised a thirty-year sentence; in fact, he never even expressly stated that he was *hoping* for thirty years. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). It necessarily follows that if the Applicant pled guilty knowing he could receive a sentence of life without parole, then whether a thirty-year sentence was 85% or 100% was not a critical distinction, and misinformation regarding this could not have affected the voluntariness of his plea. It would strain credulity to suggest that if the Applicant had been told that the thirty-year minimum sentence was to be served day for day, that he would not have pled guilty. See Roscoe v. State, 345 S.C. 16, 21, 546 S.E.2d 417, 419 (2001). Accordingly, this Court must reject the Applicant's claim of involuntary guilty plea on this basis.

Involuntary Guilty Plea: Failure to Properly Advise Regarding Potential Defenses and Lesser-Included Offenses

The Applicant also alleged that counsel failed to properly advise him regarding the probable success of potential defenses and lesser-included offenses, particularly voluntary manslaughter. Essentially, the Applicant claimed that counsel never informed him of the lesser-included offense of voluntary manslaughter and the potential defense of self-defense, and claimed that he now believed that he should have taken the case to trial because he had "nothing to lose" and because he could have likely convinced a jury that this was a case of voluntary manslaughter. However, this Court did not find credible the Applicant's testimony that counsel never discussed potential defenses and lesser-included offenses with him. Instead, this Court found credible plea counsel's testimony indicating that he and the Applicant thoroughly

*Ad 10*

discussed all potential defenses and lesser-included offenses, including voluntary manslaughter and self-defense. This Court is unable to find any ineffective assistance of counsel with respect to counsel's discussions with the Applicant regarding potential defenses, lesser-included offenses, and the benefits and drawbacks of pleading guilty versus proceeding to trial.

This Court also found credible counsel's testimony that he did not coerce the Applicant to plead guilty; instead, at the time, the Applicant made his own free, voluntary, and intelligent decision to plead guilty. The fact that the Applicant and plea counsel later regretted the Applicant's decision to plead guilty does not retroactively negate the voluntariness of the plea. See Brady v. U. S., 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision."). As counsel stated at the guilty plea hearing, the case was ready for trial, but the Applicant did not wish to go to trial; instead, the Applicant wanted to accept responsibility, did not want to put the family through a trial, and just wanted "closure." (See Plea Transcript, p. 18, lines 8-12). Considering the testimony at the PCR hearing and the Applicant's sworn statements at the guilty plea, this Court must conclude that the Applicant failed to meet his burden of proof to show that his guilty plea was unknowing or involuntary at the time it was made. See Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (2007) ("[S]tatements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements.") (citations omitted).

### CONCLUSION

In sum, this Court finds that the Applicant failed to meet his burden of proof to show his entitlement to post-conviction relief. Accordingly, the PCR Application must be denied and

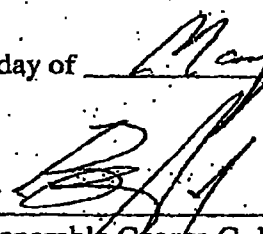
dismissed with prejudice for failure to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(e), SCRPC, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-80 (2003). This Court further advises that if Applicant desires to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days of the service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for post-conviction relief is **DENIED and DISMISSED with PREJUDICE.**
2. The Applicant must remain in the custody of the State for completion of his sentence.

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

  
 The Honorable George C. James, Jr.  
 Presiding Judge  
 Fifteenth Judicial Circuit

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

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM HORRY COUNTY  
HONORABLE GEORGE C. JAMES, JR.

Case # 2011-CP-26-5020

CHARLES RAY DEAN 342070.....APPLICANT

STATE OF SOUTH CAROLINA.....RESPONDENT

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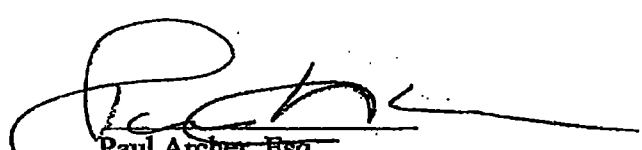
NOTICE OF APPEAL

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Charles Ray Dean appeals the Order of the Honorable George C. James, Jr. dated May 1, 2012.

Other Counsel of record:

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



Paul Archer, Esq.  
Attorney for Petitioner  
233 Muirfield Drive  
Pawleys Island, SC 29585  
(843) 979-4000

Dated: May 3, 2012

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE HONORABLE  
HONORABLE GEORGE C. JAMES, JR.

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Case # 2011-CP-26-5020

CHARLES RAY DEAN.....APPLICANT

STATE OF SOUTH CAROLINA.....RESPONDENT

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PROOF OF SERVICE

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The undersigned, Attorney for the Applicant, hereby certifies that a true copy of the Notice Of Appeal in the above case has been served upon the following by mailing a copy to each in a properly addressed envelope on May 1, 2012

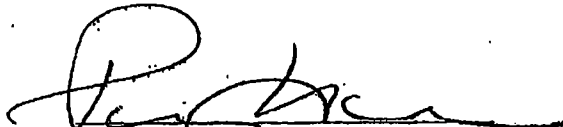
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Charles Ray Dean #342070  
Lee Correctional  
990 Wisacky Highway  
Bishopville, SC 29010

Christina Catoe, Esq.  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549

Office Of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, SC 29201

Horry County Clerk's Office  
P.O. Box 677  
Conway, SC 29528



Paul Archer, Esq.

STATE OF SOUTH CAROLINA )

INDICTMENT FOR:

COUNTY OF HORRY )

MURDER

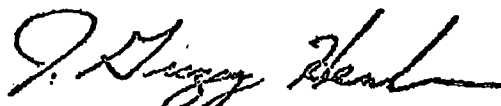
At a Court of General Sessions, convened on January 24, 2008, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That CHARLES RAY DEAN did in Horry County, on or about October 16, 2007, willfully, feloniously, and intentionally kill the victim, JILL DEAN, with malice aforethought, either express or implied, by means of assaulting and stabbing the victim, and the victim did die as a proximate result thereof on or about October 16, 2007, in Horry County, in violation of Section 16-03-0010, S. C. 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

T. TROXELL, HCPD

WITNESSES

ARREST WARRANT NO.

J479496 DOA: 10/16/07

CDR: 0116 16-03-0010,0020

TRUE BILL

Foreman of Grand Jury

JAN 2 4

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2008-GS-26-222

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY  
87532 NL

COURT OF GENERAL SESSIONS

JANUARY TERM 2008

THE STATE

vs.

NAME: CHARLES RAY DEAN W/M

5200 ADRIAN

CONWAY SC 29526-5833

DOB: 04/07/1962

SSN: 248-13-2817

ATTORNEY: JOHNNY GARDNER

INDICTMENT FOR:

MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

## ARREST WARRANT

J-479496

STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Horry

THE STATE

7109251

against

Charles Ray Dean

Address:

Phone:

SSN

Sex: M

Race: W

Height:

Weight:

DL State:

DL #:

011665341

DOB: 4/11/1962

Agency ORI #:

SC0240400

Prosecuting Agency:

Horry County Police Department

Prosecuting Officer:

Timothy Troxell - 3048

Offense: Murder / Murder

Offense Code:

0116

Code/Ordinance Sec:

16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☐ County/☐ Municipality of

The accused

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

(L.S.)

Signature of Judge

Date:

## RETURN

A copy of this arrest warrant was delivered to  
defendant Charles Ray Dean

on

10-16-07

Signature of Constable/Law Enforcement Officer

## RETURN WARRANT TO:

General Sessions  
PO Box 677  
1301 2nd Avenue  
Conway, SC 29528

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

## STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Horry

Personally appeared before me the affiant Timothy Troxell

who

being duly sworn deposes and says that defendant Charles Ray Deandid within this county and state on or about 10/16/2007

violate the criminal laws of the

State of South Carolina (or ordinance of

☒ County/☐ Municipality of

Horry

In the following particulars:

DESCRIPTION OF OFFENSE Murder / MurderI further state that there is probable cause to believe that the defendant named above did commit  
the crime set forth and that probable cause is based on the following facts:That on October 16, 2007 at the 5200 Adrian Highway, in the Conway section of Horry County, one Charles Ray Dean did without  
cause or adequate provocation, and with malice aforethought assault and stab his wife one Jill Dean, resulting in her death. Said  
information is based on evidence produced by the investigation to include witness statements, post Miranda statements made by  
Charles R. Dean, and physical evidence collected pursuant to a lawful search warrant. Based on the above listed facts there is  
probable cause to believe Charles Ray Dean has violated South Carolina Criminal Code of Laws section 16-3-10; Murder.RECEIVED  
OCT 22 2007

OCT 22 2007

Signature of Affiant

## STATE OF SOUTH CAROLINA

☒ County/☐ Municipality of

Horry

Affiant's Address 2560 N. Main StreetConway, SC 29526Affiant's Telephone (843) 915-5350

## ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 10/16/2007 defendant Charles Ray Dean

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

☒ County/☐ Municipality of

Horry

) as set forth below:

DESCRIPTION OF OFFENSE: Murder / MurderHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or  
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as  
soon thereafter as is practicable  
Sworn to and subscribed before meon 10/16/2007Signature of Issuing Judge  
Bradley Dwyer MayersJudge Code: 5089

(L.S.)

Judge's Address 1201 Third AvenueConway, SC 29526-5105Judge's Telephone (843) 915-5290

Issuing Court:

☒ Magistrate☐ Municipal☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by  
S.C. Attorney General  
April 21, 2003  
SCCA 618

## AFFIDAVIT

FILED  
HORRY COUNTY  
CLERK OF COURT  
2007 OCT 22 AM 9:22

## STATE OF SOUTH CAROLINA

## IN THE COURT OF GENERAL SESSIONS

COUNTY OF  
STATE

Horry

VS.

Charles Ray Dean

AKA:

Race: W

Sex: M

Age: 48

DOB:

SS#:

Address:

City, State, Zip: C

DL#:

SID#:

\*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was  
TO: Murder / Murder

INDICTMENT/CASE#: 2008GS2600222

A/W#: J479496

Date of Offense: 10/16/2007

S.C. Code §: 16-03-0010, 0020

CDR Code#: 0116

## SENTENCE SHEET

☐ CONVICTED OF or☒ PLEADS Guilty  
but  
Mentally Ill

in violation of § 16-03-0010, 0020

of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS(CSC

within 1st or Lowd Act)

☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(defendant's initials)

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

ATTEST

Livesay, Nancy

SC Bar#

Defendant:

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections,☐ County Detention Center,

for a determinate term of

30 YEARS

or

☐ under the Youthful Offender Act not to exceed

years

and/or to pay a fine of \$

; provided that upon the service of

days/months/years and/or payment

of \$ ; plus costs and assessments as applicable\*; the balance is suspended with probation for

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

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

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

## SPECIAL CONDITIONS:

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

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

\*Fine:

§ 14-1-206 (Assessments 107.5 %)

\$

§ 14-1-211(A)(1) (Conv. Surcharge)

\$100

§ 14-1-211(A)(2) (DUI Surcharge)

\$100

§ 56-3-2995 (DUI Assessment)

\$12

§ 56-1-286 (DUI Breath Test)

\$25

Proviso 47.9 (Public Def/Prob)

\$500

§ 14-1-212 (Law Enforce. Funding)

\$25

§ 14-1-213 (Drug Court Surcharge)

\$150

§ 50-21-114(BUI Breath Test Fee)

\$50

§ 56-5-2942(J) (Vehicle Assessment)

\$40/ea

Proviso 90.3 (SCCJA Surcharge)

\$5

§ 44-53-430(C) (Conditional Discharge)

\$350

3% to County (if paid in installments)

\$

TOTAL

\$

Clerk of Court Deputy Clerk

\$

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 25.00 beginning 09/02/2040

\$ paid to Public Defender Fund

Other: Guilty but Mentally Ill

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition.☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

2152

8/2/10

173.90

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County  
George C. James, Jr., Circuit Court Judge

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CHARLES RAY DEAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212092

---

PETITION FOR WRIT OF CERTIORARI

---

DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in holding that petitioner's Sixth Amendment right to effective assistance of counsel was not violated where it was undisputed that plea counsel gave petitioner erroneous advice regarding sentencing and petitioner would have gone to trial but for plea counsel's error?

STATEMENT

On January 24, 2008, Charles Dean was indicted in Horry County for the murder of his wife, Jill Dean. App. 125. On August 2, 2010, petitioner entered a plea of guilty but mentally ill before the Honorable Larry B. Hyman. App. 36, ll. 6 – 11. Prior to taking the plea, a hearing was held pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). App. 3, ll. 5 – 6. Dr. Richard Frierson testified that while petitioner had the ability to distinguish right from wrong, he could not conform his conduct to the requirements of the law because of a brain injury. App. 14, ll. 19 – 21. Specifically, petitioner suffered a significant injury to the frontal lobe of his brain when he was a child. App. 12, ll. 10 – 26. Dr. Frierson said petitioner's brain damage was "clearly visible" in both a CT scan and in an MRI. App. 13, ll. 2 – 9. The damaged portion of petitioner's brain also performs abnormally when tested with an EEG. App. 13, ll. 9 – 16. The frontal lobe affects a person's ability to control their anger and prevent violent behavior. App. 13, l. 17 -14, l. 18. Following Dr. Frierson's testimony, Judge Hyman found that petitioner was competent to stand trial and that his mental illness had been adequately established. App. 18, ll. 7 – 15. Judge Hyman then accepted petitioner's plea and sentenced him to thirty years' imprisonment. App. 36, ll. 6 – 11; App. 40, ll. 8 – 16. Petitioner did not appeal.

On June 16, 2011, petitioner filed a PCR application. App. 41. On July 21, 2011, the State filed its Return. App. 51. On January 23, 2012, a hearing was held before the Honorable George C. James, Jr. App. 54. Paul Archer represented petitioner and Christina J. Catoe represented the State. App. 54. On May 1, 2012, Judge James denied petitioner's PCR application. App. 111-22. This appeal follows.

ARGUMENT

The PCR court erred in holding that petitioner's Sixth Amendment right to effective assistance of counsel was not violated where it was undisputed that plea counsel gave petitioner erroneous advice regarding sentencing and petitioner would have gone to trial but for plea counsel's error.

The PCR court erred in holding petitioner could not prove deficient performance or prejudice under the two-pronged approach of Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Laffler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

Plea counsel told petitioner that he would only have to serve eighty-five percent of his sentence. App. 79, l. 20 – 80, l. 12. This constituted deficient performance because a murder sentence is a day-for-day sentence. At the PCR hearing, plea counsel testified as follows:

Q. All right, and did you ever discuss with, with Mr. Dean whether or not the murder plea would be eighty-five percent or a hundred percent, did you ever discuss those collateral type consequences?

A. Yes, we did.

Q. And what did you tell him about that?

A. Okay, I, keep in mind that we were trying to get this case into a manageable time or sentence for him and if the Solicitor thought twenty-five years was fine we weren't necessarily agreeing with that but twenty-five years would certainly be better than life, and towards the end of our trial preparations another lawyer who I trust had made the comment that it would only be eighty-five percent under the new law so we did talk about that.

Q. All right, so you, did you specifically tell Mr. Dean that it would be eighty-five percent?

A. I don't remember the exact words but that was discussed.

App. 79, l. 20 – 80, l. 12. Plea counsel's testimony corroborates petitioner's testimony at the PCR hearing:

Q. All right, I understand that at the time in the plea of thirty years you were under the impression that that was eighty-five percent; is that correct?

A. Yes, sir.

Q. And how old were you at the time that this happened?

A. Forty-eight, sir.

Q. All right, so if you took the thirty years, you'd be what, seventy-eight?

A. Yes, sir.

Q. All right, if you went to trial and even got a life sentence that's about, I don't know what's a life expectancy is in prison but I don't think you live to be ninety, but in any event you felt that if you knew this you obviously would have taken your chance and gone to trial; is that right?

A. Correctly, sir.

App. 57, ll. 5 – 21.

The PCR court used this testimony to find that plea counsel "never testified that he expressly assured the Applicant that a thirty-year sentence was in fact an 85% sentence." App. 118. This finding misinterprets plea counsel's testimony. The PCR court made no adverse credibility finding with respect to plea counsel or petitioner's testimony on this issue. Respectfully, the only way to interpret their testimony is that plea counsel misinformed petitioner regarding the day-for-day nature of his sentence.

The PCR court also misconstrues petitioner's testimony regarding where petitioner learned that his sentence would be an eighty-five percent sentence. The PCR court repeatedly states that petitioner "received information regarding the 85% sentence from people he spoke with in county rather than from his attorney." App. 119. This erroneous finding is based upon the following testimony from petitioner on cross-examination:

Q. Okay, what do you think eighty-five percent met?

A. It would be like instead of a hundred percent you done eighty-five percent of your time.

Q. In other words you get out after eighty-five percent?

A. Yes, ma'am, **and your work credits would knock it down even lower.**

Q. **And where did you get that understanding from?**

A. **From people I spoke with in the county.**

App. 70, ll. 9 – 19 (emphasis added). As the emphasized text shows, petitioner received information about work credits from other inmates, not information regarding an eighty-five percent sentence. The PCR court took petitioner's answer out of context. The PCR court's interpretation of this answer is inconsistent with petitioner and plea counsel's testimony.

This Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. This Court found such advice deficient and reversed the PCR court. Id.; see also Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

This case is analogous to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. This Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

As in Jordan, petitioner entered the plea hearing expecting an eighty-five percent sentence. Plea counsel did not hear the judge state that the sentence would be day-for-day until after the plea had been accepted. App. 95, ll. 2 - 17. Plea counsel stated:

What I did hear was at the end of it where the judge said it all which that caught us all by surprise because we had talked about this even in chambers and when we got back to lock up Mr. Dean was highly upset with me because the judge said that at the end of the plea. If the judge would have said that at the beginning of the plea there is no doubt in my mind that the plea would have never taken place. . . . But he said it at the end **and Mr. Dean asked to go back out there and right or wrong I made the decision not to go back out there because my belief was that judge was not going to at that time let him withdraw the plea.**

App. 95, ll. 4 – 17 (emphasis added). Plea counsel's recognition of his error, compounded by his failure to ask the court to withdraw the plea, is analytically indistinguishable from counsel's error in Jordan. Therefore, the PCR court erred in finding that plea counsel was not ineffective.

Petitioner also can demonstrate that he was prejudiced by counsel's error. In order to prove prejudice under Strickland in a plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S.Ct. at 1384. "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 130 S.Ct. at 1485. Under questioning from the court, plea counsel unambiguously testified that petitioner would not have pled guilty had he known he would have to serve thirty years instead of twenty-five. App. 95, l. 18 – 96, l. 10. Petitioner also emphatically testified that he would not have pled guilty had he known he would have to serve the full thirty years. App. 65, ll. 20 – 22. Therefore, the only evidence before the PCR court is that petitioner would not have pled guilty. See Alexander, at 543, 402 S.E.2d at 485 ("In fact, the only evidence in the record on [the prejudice] point is petitioner's own testimony that had trial counsel not misinformed him . . . he would not have pled guilty. Thus the second part of the test has been met."); see also Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999) (finding prejudice based on defendant's testimony that he would not have pled guilty despite plea counsel's assertion that even if he had understood defendant's potential sentence, he still would have advised defendant to plead guilty).

Petitioner and plea counsel's testimony regarding the facts of the case demonstrate not only that petitioner had nothing to lose by going to trial, he actually had a chance of success at receiving either a not guilty verdict or a guilty verdict on a lesser-included offense. Petitioner testified at the PCR hearing regarding what he remembered of the crime. Petitioner and his wife had been in a

fight and petitioner was moving out of the marital home. App. 58, l. 24 – 60, l. 4. Petitioner was alone at the house packing his belongings when his wife, daughter, and his daughter's boyfriend returned unexpectedly. App. 60, l. 1 – 65, l. 5. The last thing he remembered was his daughter stabbing him in the back with a knife and his wife laughing while swinging a metal scooter at him. App. 60, l. 1 – 65, l. 5; App. 89, ll. 9 – 10. Petitioner's wife previously stabbed him and he brought a criminal domestic violence charge against her. App. 63, l. 19 – 64, l. 9. Petitioner was treated in the hospital for the knife wound in his back and defensive wounds on his forearms. App. 89, l. 17 – 90, l. 15.

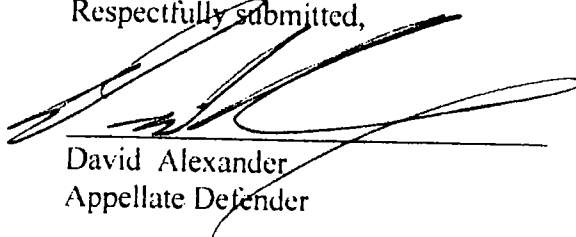
Plea counsel substantiated petitioner's version of events. App. 74, ll. 17 – 18. Plea counsel testified that he was confident that had they gone to trial, the trial judge would have charged the jury on manslaughter and self-defense. App. 76, l. 16 – 79, l. 7. Plea counsel admitted that his performance was deficient and prejudiced petitioner, stating, "I mean there's no doubt in my mind that, that we should have tried the case and that's it in a nutshell we should have tried it. We were here, we were ready to go and he pled." App. 81, ll. 4 – 7. Dr. Frierson was present and ready to testify regarding petitioner's brain injury. As plea counsel pointed out, given petitioner's age (48), thirty years was effectively a life sentence so petitioner had nothing to lose by going to trial. App. 86, ll. 3 – 14. Pleading guilty was not "rational under the circumstances." Padilla, 130 S.Ct. at 1485. Combined with plea counsel and petitioner's unequivocal testimony that petitioner would not have pled guilty but for the erroneous advice regarding sentencing, these facts demonstrate that petitioner was prejudiced. See Rolan v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) (finding prejudice from attorney's failure to move to withdraw a guilty plea even though it was likely the judge would not have allowed withdrawal because "the plea judge was not able to exercise his discretion").

Furthermore, the PCR court's holding on the prejudice prong uses reasoning that has been discredited by this Court. The PCR court held that since petitioner knew he was facing a potential life sentence, that it "would strain credulity that if the Applicant had been told that the thirty-year minimum sentence was to be served day for day, that he would not have pled guilty." App. 120. This Court rejected such a rationale in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991). In Ray, plea counsel was ineffective for erroneously advising the defendant that he faced a sentence of life without parole. Id. at 375, 401 S.E.2d at 152. The State argued that since the defendant faced a possible seventy-five year sentence, he could not have been prejudiced by the erroneous advice. Id. at 376, 401 S.E.2d at 152-53. This Court dismissed the State's reliance on a "possible" maximum sentence because had the defendant proceeded to trial, he could have faced a much shorter sentence. Id. Just as in Ray, had petitioner proceeded to trial, he could have received a shorter sentence on a lesser-included offense or been acquitted. Therefore, the PCR court's prejudice finding is not based on any finding of fact, but on speculation and discredited reasoning. This Court should reverse and grant petitioner a new trial.<sup>1</sup>

#### CONCLUSION

This Court should grant certiorari with the ultimate relief of a new trial.

Respectfully submitted,

  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of November, 2012.

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<sup>1</sup> Should the Court find that a new trial is not the appropriate remedy, it should remand the case to allow the circuit court to consider whether to allow petitioner to withdraw his guilty plea as was done in Rolen. Rolen at 414, 683 S.E.2d at 474.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Horry County  
George C. James, Jr., Circuit Court Judge  
\_\_\_\_\_

CHARLES RAY DEAN,

PETITIONER,

V.

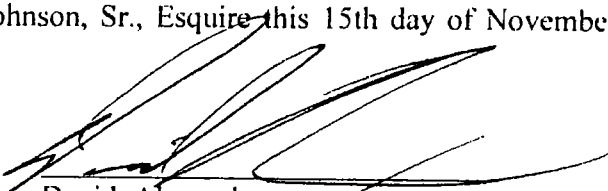
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212092

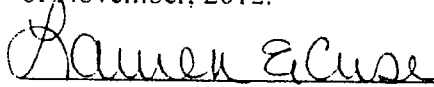
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Tyson Andrew Johnson, Sr., Esquire this 15th day of November, 2012.

  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 15th day  
of November, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Horry County  
The Honorable George C. James, Jr., Circuit Court Judge  
Appellate Case No. 2012-212092

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CHARLES RAY DEAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR RESPONDENT**

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**ISSUE PRESENTED**

**The denial of post-conviction relief must be upheld where Petitioner failed to credibly meet his burden of proof.**

## STATEMENT OF THE CASE

Petitioner was indicted in January 2008 for the murder of his wife, Jill Dean. On August 2, 2010, Petitioner pled "guilty but mentally ill" before the Honorable Larry B. Hyman, Jr. Judge Hyman imposed a sentence of thirty years. No direct appeal was filed.

Petitioner filed an Application for post-conviction relief on June 16, 2011. The State made a Return on July 21, 2011. An evidentiary hearing was convened before the Honorable George C. James, Jr., on January 23, 2012. On May 1, 2012, Judge James issued an order denying post-conviction relief. A timely notice of appeal was served and filed, and, subsequently, a Petition for Writ of Certiorari was submitted. This Return follows.

## ARGUMENT

**The denial of post-conviction relief must be upheld where Petitioner failed to credibly meet his burden of proof.**

Applicable Law and Standard of Review

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citations omitted). Strickland v. Washington established a two-prong test for evaluating claims of ineffective assistance of counsel. Strickland, 466 U.S. 668 (1984). The first prong of the test requires that a defendant prove his counsel's deficiency by demonstrating counsel's performance fell below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006).

The second part of the test requires a defendant to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. In a case involving a guilty plea, the "prejudice" requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, Petitioner must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber, 371 S.C. at 558, 640 S.E.2d at 886.

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the

record made at the time of the entry of the guilty plea and the record of the post-conviction hearing.” Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). “When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing.” Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 420 (2000). Further, in considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

On certiorari in a PCR action, this Court applies an “any evidence” standard of review. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). An appellate court gives great deference to the PCR court’s findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). Any evidence of probative value in the record is sufficient to uphold the PCR court’s ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). Significantly, if matters of credibility are involved, this Court gives deference to the PCR court’s findings because this Court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994); see Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (“The PCR court’s findings on matters of credibility are given *great deference* by this Court.”) (emphasis added).

#### Discussion

In Petitioner’s case, the denial of post-conviction relief must be upheld because there is no basis to overturn the PCR judge’s findings. First, regarding the deficiency

prong, the PCR judge was not "convinced by a preponderance of the evidence" that counsel provided any actual misadvice upon which Petitioner relied; in other words, Petitioner failed to credibly meet his burden. (App. p. 119). See Suber v. State, 371 S.C. at 558, 640 S.E.2d at 886 (*the applicant* in a PCR case bears the burden of establishing that he is entitled to relief). This finding has support in the record because plea counsel was unable to provide any details regarding what he specifically told Petitioner about a thirty-year sentence being an 85% sentence. (See App. p. 79-80). It is not clear that plea counsel actually made an incorrect statement to Petitioner, since plea counsel testified only that "towards the end of our trial preparations another lawyer who I trust had made the comment that it would be only eighty-five percent under the new law so we did talk about that." (R. p. 80, lines 5-8). Counsel declined to testify that he actually told Petitioner a thirty-year sentence would be an 85% sentence. In fact, when asked if he specifically told Petitioner that a thirty-year sentence would be 85%, he stated, "I don't remember the exact words but that was discussed." (R. p. 80, lines 9-12). Thus, while counsel testified that he and Petitioner discussed *something* about an 85% sentence, it is not clear that counsel told Petitioner that he *necessarily could expect that*, assuming he received a thirty-year sentence, it would automatically be an 85% sentence.<sup>1</sup>

Moreover, Petitioner himself never testified that he received any *erroneous* information regarding the thirty-year sentence *from his lawyer*. (See App. p. 56-70; see also p. 65, line 23 – p. 66, line 10). In that vein, Petitioner's testimony at least suggested that he might have received incorrect information regarding an 85% sentence, including

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<sup>1</sup> For example, counsel's testimony on this issue could be interpreted as stating that he merely related the trusted attorney's comment about a thirty-year sentence being an 85% sentence, but did not adopt the statement or tell Petitioner that he should necessarily rely on it. (See App. p. 80, lines 5-12).

information about work credits, from talking with other inmates in the county jail.<sup>2</sup> (See R. p. 70, lines 17-19). Notably, even Petitioner's PCR counsel did not argue that Petitioner actually received misadvice from his plea counsel; instead, he asserted that "there may have been some confusion" regarding a thirty-year sentence and that Petitioner "thought he was going to get less time." (R. p. 97, lines 1-4).

More importantly, as to the prejudice prong, it is clear that Petitioner pled guilty with a full awareness of the sentence range, i.e., thirty years to life, and with knowledge that the solicitor was making no recommendation as to the sentence. (See App. p. 32, lines 3-17; p. 79, lines 18-19). Petitioner never testified that counsel or anyone else promised him that he would necessarily receive a thirty-year sentence if he pled guilty. In fact, Petitioner never even stated he believed a thirty-year sentence was likely or that he had been *hoping for* or *expecting to receive* a thirty-year sentence. (See App. p. 56-70). In short, Petitioner provided no evidence he was counting on receiving a thirty-year sentence, *much less* a thirty-year sentence at 85%. If Petitioner was satisfied with the possibility of receiving a *life without parole* sentence (or something *between* thirty years and life) as a result of his plea, then it is not believable that whether a thirty-year sentence was 85% or day-for-day was a critical factor in his decision to plead guilty, especially where he was pleading guilty, without pressure or coercion, for other reasons; specifically, because he wanted to accept responsibility, did not want to go through a trial or put his family through a trial, and just wanted "closure." (See App. p. 37, lines 8-12; p. 87, line 14 – p. 88, line 7).

Since Petitioner *did not know in advance* that he would be receiving a thirty-year sentence, his claim that he was relying on the fact that a thirty-year sentence would be an

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<sup>2</sup> Plea counsel denied telling Petitioner anything about work credits or parole. (App. p. 80, lines 16-19).

85% sentence was less than credible and more likely based upon - and skewed by - hindsight. (See App. p. 119-120). In that vein, Petitioner presented no testimony or evidence explaining why the difference between 85% of thirty years and 100% of thirty years was so significant to him at the time he was making his decision to plead guilty.<sup>3</sup> See Hammond v. U. S., 528 F.2d 15, 18 (4<sup>th</sup> Cir. 1975) (in a case where a guilty plea defendant had been misadvised about his sentence exposure, the Fourth Circuit noted that “[a] mistake of a few years in advice about the length of what would otherwise be a long term would not constitute ineffectiveness of counsel.”).

Contrary to Petitioner’s assertions on appeal, the PCR judge was not required to accept the PCR hearing testimony at face value. See Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (“The fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation.”) (citation omitted). Instead, the PCR judge could properly take into account whether Petitioner’s and plea counsel’s PCR hearing testimony made sense in light of the posture of the case and considering their apparent “buyer’s remorse” and desire to conduct “Monday morning quarterbacking” regarding Petitioner’s decision to plead guilty.<sup>4</sup> (See App. p. 107, lines 1-3 & 8-10). See Solomon v. State, 313 S.C. at 529, 443 S.E.2d at 542; Goins v. State, 397 S.C. at 573, 726 S.E.2d at 3 (both holding that the PCR court’s findings on matters of credibility must be given great deference by the appellate court).

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<sup>3</sup> Petitioner testified at the PCR hearing that he had “nothing to lose” by going to trial since thirty years was essentially a “life sentence” for him. (App. p. 66, lines 15-25; see also p. 84, lines 8-15). However, twenty-five-and-a-half years is also essentially a life sentence for Petitioner.

<sup>4</sup> The PCR judge also pointed out that it appeared plea counsel might have “fallen on his sword.” (See App. p. 97, lines 9-11).

Petitioner asserts in his Petition for Writ of Certiorari that the PCR judge's order is based on "speculation" and "discredited reasoning." (See Petition for Writ of Certiorari, p. 10). First, Respondent would point out that "[s]peculation is a necessary component of most PCR cases" since prejudice is determined under a "reasonable probability" standard. Rolen v. State, 384 S.C. 409, 416, 683 S.E.2d 471, 475 (2009) (Pleicones, J., dissenting). Second, the case upon which Petitioner relies for his contention that the PCR judge utilized "discredited reasoning" is distinguishable. In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), the defendant was charged with grand larceny, second degree burglary, and two counts of armed robbery. Counsel erroneously advised him that he would face a mandatory life without parole sentence if he went to trial and was convicted on the two armed robbery charges. Ray at 375, 401 S.E.2d at 152. The defendant pled guilty to reduced charges because he was scared of receiving a life without parole sentence at trial. Id. at 375-76, 401 S.E.2d at 152. Since the defendant pled guilty almost solely for the purpose of avoiding a mandatory life without parole sentence at trial, and since he was, in fact, facing only a term of years (as little as ten years but up to seventy-five years), he established sufficient prejudice to warrant relief. See id. at 376, 401 S.E.2d at 152-53. This Court found that the "real distinction" between the lowest possible sentence the defendant *could* receive at trial - ten years - and the sentence he was told he *would* receive at trial - life without parole - was sufficient to satisfy the prejudice prong of Strickland. See id. at 376, 401 S.E.2d at 153.

In Ray, the defendant believed he was facing life without parole if he went to trial, when, in fact, he was facing a *range* of ten to seventy-five years. Because there were four separate charges, his total sentence would be impacted by whether the trial

judge decided to run the sentences concurrently or consecutively. In other words, there was a very large discrepancy between the sentence the defendant was advised he would receive after a trial - mandatory life without parole - and the reality that, although he was facing the possibility of a total of seventy-five years, he could receive as little as ten years with concurrent sentencing. The State's prejudice argument in Ray failed to take this aspect of the case into account and was therefore rejected by this Court. See Ray at 376, 401 S.E.2d at 152-53.

In Petitioner's case, the reasoning employed by the PCR judge is not the same as the reasoning rejected in Ray. Here, the PCR simply found that, since Petitioner was prepared to accept receiving up to a life sentence, it was not sufficiently believable that the difference between an 85% thirty-year sentence and a day-for-day thirty-year sentence - a difference of only four-and-a-half years - would have affected his decision to plead guilty, considering the other facts and circumstances in the case. See supra, p. 7-8. (See App. p. 119-120). Accordingly, the Ray case is distinguishable, and, contrary to Petitioner's argument, the reasoning employed by the PCR judge in this case is not "discredited."

The other cases cited by Petitioner are also distinguishable because they all involved much larger discrepancies between the sentence described in the attorney's erroneous advice and the actual sentence. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999). Further, the case of Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), is distinguishable because it involved a solicitor reneging on a plea bargain and specifically involved the issue of whether plea counsel was ineffective

for failing to move to withdraw the defendant's guilty plea - an issue not raised or ruled upon in Petitioner's case. (See App. p. 113; p. 118-21). The case of Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), is similarly distinguishable because the defendant in that case specifically raised the issue of counsel's failure to move to withdraw his guilty plea. Because this issue was not raised in Petitioner's case, a remand pursuant to Rolen v. State, as Petitioner suggests on page ten of his Petition, would not be appropriate.

There are high societal costs to awarding a retrial to a defendant several years after the crime took place. See Calderon v. Coleman, 525 U.S. 141, 146 (1998) ("The social costs of retrial or resentencing are significant . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced. . . ."); see also Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("Retrying defendants whose convictions are set aside also imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'") (citation omitted). It is for this reason that PCR applicants bear the burden to establish their claims. Here, Petitioner bore the burden to credibly establish, by a preponderance of the evidence, that, but for some misadvice of counsel, he would not have pled guilty but would have elected to go to trial. Here, the most Petitioner established was that both he and plea counsel, in hindsight, now regretted Petitioner's decision to plead guilty and wanted another chance at a trial. Since Petitioner failed to establish, to the PCR judge's satisfaction, that he suffered prejudice from deficient performance by counsel, this Court should affirm the denial of relief. See

Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2009) (great deference must be given to the PCR court's findings of fact and conclusions of law, and the appellate court is only concerned with whether "any evidence" of probative value exists to support the PCR court's decision).

### CONCLUSION

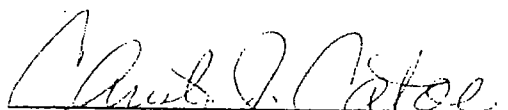
For the reasons discussed above, Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent asks permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

April 4, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Horry County  
The Honorable George C. James, Jr., Circuit Court Judge  
Appellate Case No. 2012-212092

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CHARLES RAY DEAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**

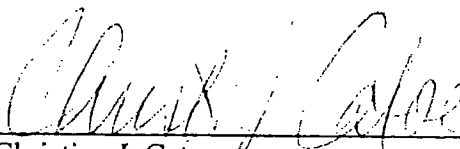
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I hereby certify that I have served the **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**David Alexander, Esquire  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589**

I further certify that all parties required by Rule to be served have been served.

This 4<sup>th</sup> day of April, 2013.

  
Christina J. Catoe  
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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

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CHARLES RAY DEAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212092

---

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in holding that petitioner's Sixth Amendment right to effective assistance of counsel was not violated where it was undisputed that plea counsel gave petitioner erroneous advice regarding sentencing and petitioner would have gone to trial but for plea counsel's error?

STATEMENT

On January 24, 2008, Charles Dean ("Dean") was indicted in Horry County for the murder of his wife, Jill Dean. App. 125. On August 2, 2010, petitioner entered a plea of guilty but mentally ill before the Honorable Larry B. Hyman. App. 36, ll. 6 – 11. Nancy R. Livesay represented the State. App. 1. Johnny Gardner represented Dean. App. 1. Judge Hyman accepted Dean's GBMI plea and sentenced him to thirty years' imprisonment. App. 36, ll. 6 – 11; App. 40, ll. 8 – 16. Petitioner did not appeal.

On June 16, 2011, petitioner filed a PCR application. App. 41. On July 21, 2011, the State filed its Return. App. 51. On January 23, 2012, a hearing was held before the Honorable George C. James, Jr. App. 54. Paul Archer represented petitioner and Christina J. Catoe represented the State. App. 54. On May 1, 2012, Judge James denied petitioner's PCR application. App. 111-22. On April 11, 2014, this Court granted Dean's petition for certiorari and ordered further briefing. This brief follows.

ARGUMENT

The PCR court erred in holding that petitioner's Sixth Amendment right to effective assistance of counsel was not violated where it was undisputed that plea counsel gave petitioner erroneous advice regarding sentencing and petitioner would have gone to trial but for plea counsel's error.

Relevant Facts*The Facts Surrounding Jill Dean's Death*

Since this case involves a guilty plea and a PCR, the facts of the incident obviously were not developed through witnesses subject to the adversarial testing of a trial. Therefore, Petitioner will point out the source of the facts provided about the death of Dean's wife, Jill Dean ("Wife"). However, the basic facts do not seem to be in serious dispute. An altercation occurred at the marital home and Dean killed Wife. From petitioner and plea counsel's memory, it appeared Dean had the strong possibility of receiving a self-defense charge or the lesser-included offense of voluntary manslaughter. Petitioner Dean challenges his guilty plea for Wife's murder as involuntary because of plea counsel's erroneous advice regarding sentencing, but these facts should be considered when weighing whether Dean's plea was voluntary.

The solicitor provided the State's version of Wife's death at the guilty plea. App. 29, ll. 2 – 20. On October 17, 2007, Wife, their daughter Brittany Dean ("Brittany"), and Brittany's boyfriend arrived home early in the morning. App. 29, ll. 2 – 20. Dean entered from the rear of the home. App. 29, ll. 2 – 20. The solicitor described Dean as "assaulting" Wife. App. 29, ll. 7 – 8. Brittany stabbed Dean in the back App. 29, ll. 8 – 10. Brittany and her boyfriend then went across the street to call 911. App. 29, ll. 15 – 16. The police arrived and found Dean sitting on the porch. App. 29, ll. 16 – 19. Dean came down from the porch and the police handcuffed him,

apparently without incident. App. 29, ll. 18 – 19. The police entered the house and found Wife's body. App. 29, ll. 18 – 20. Her throat was cut and she had multiple stab wounds. App. 29, ll. 18 – 20. After the solicitor's recitation of the facts, Judge Hyman asked Dean, "All right, well you tell me, did you stab and kill your wife?" App. 29, ll. 24 – 25. Dean replied, "I guess so, sir." App. 30, l. 1.

At the PCR hearing, Dean testified regarding what he remembered about the night of Wife's death. Dean and Wife had been in a fight and Dean was moving out of the marital home. App. 58, l. 24 – 60, l. 4. Petitioner was alone at the house packing his belongings. App. 59, ll. 7 – 9. Dean's puppy began making noise, so he went outside to check on it. App. 59, l. 7 – 60, l. 4. When Dean walked back inside, Wife, Brittany, and Brittany's boyfriend "were coming through the door." App. 60, l. 1 – 65, l. 5.

Dean thought he could discuss things with Wife and they began talking in the hallway. App. 60, ll. 7 – 10. Wife had the phone. App. 60, ll. 7 – 10. Dean was still talking to Wife in the hallway when "the next thing I know Brittany, I suppose, stabbed me in my back." App. 60, ll. 7 – 10. Dean said, "Brittany, you stabbed me in my back," then turned to look at Wife who had a child's scooter "and then she was swinging it at me and she's laughing." App. 60, ll. 21 – 24. Dean said, "And that's the last thing I remember, that was my wife." App. 61, ll. 1 – 2. The knife used to kill Wife was the same one Dean pulled out of his back. App. 61, ll. 6 – 9. Petitioner had defensive wounds on his arm. Tr. 68, l. 23 – 59, l. 18. Petitioner's wife previously stabbed him and he brought a criminal domestic violence charge against her. App. 63, l. 19 – 64, l. 9.

Plea counsel testified at the PCR hearing that Dean's version of events was consistent with the discovery provided to him by the State. App. 75, l. 9 – 76, l. 11. Brittany and her boyfriend gave statements to the police and were expected to testify. App. 75, ll. 9 – 22. Plea counsel stated

"there was no doubt that [Dean] was stabbed." App. 76, ll. 6 – 7. Plea counsel could not remember if Brittany admitted to stabbing Dean. App. 76, ll. 3 – 6. The evidence showed that Dean took his own knife out of his pocket, but already had blood on his hands when he reached into his pocket because blood was found on items in his pocket. App. 89, ll. 1 – 8. Plea counsel inferred this meant that Dean was "stabbed before he got his knife out of his pocket." App. 89, ll. 1 – 12. Dean was treated in the hospital for the knife wound in his back and defensive wounds on his forearms. App. 89, l. 17 – 90, l. 15. Plea counsel stated that one of things Dean asked him "early on" was whether his wife was dead. App. 74, l. 22 – 75, l. 8.

*Facts from the Blair Hearing*

Immediately prior to taking the plea, a hearing was held pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981). App. 3, ll. 5 – 6. Dr. Richard Frierson ("Frierson") testified that while Dean had the ability to distinguish right from wrong, he could not conform his conduct to the requirements of the law because of a brain injury. App. 14, ll. 19 – 21. A car hit Dean when he was a child. App. 12, ll. 10 – 16. Dr. Frierson said the car accident "resulted in a significant brain injury to Mr. Dean." App. 12, ll. 10 – 16. A neurosurgeon had to operate on Dean "to repair a defect in his skull." App. 12, ll. 16 – 19. Dean also required "extensive rehabilitation" to relearn how to walk and talk. App. 12, ll. 10 – 21.

Dr. Frierson said Dean's brain damage was "clearly visible" in both a CT scan and in an MRI. App. 13, ll. 2 – 9. The damaged portion of Dean's brain also performs abnormally when tested with an EEG. App. 13, ll. 9 – 16. The frontal lobe affects a person's ability to control their anger and prevent violent behavior. App. 13, l. 17 -14, l. 18. Dr. Frierson detailed a history of events in Dean's life following the accident showing he had "great difficulty controlling anger." App. 13, l. 11 – 14, l. 18. Following Dr. Frierson's testimony, Judge Hyman found that

petitioner was competent to stand trial and that his mental illness had been adequately established. App. 18, ll. 7 – 15.

The Guilty Plea

The guilty plea hearing took place the same day as the Blair hearing. Before accepting the plea, plea counsel told Judge Hyman he had discussed the possible penalties for murder with Dean. App. 23, ll. 11 – 14. Plea counsel said he discussed the possible defenses. App. 24, l. 23 – 25, l. 1. Before accepting the plea, the trial court told Dean he would be looking at a sentencing range of “30 years to life” and Dean said he understood. App. 32, ll. 3 – 6. Dean said he understood that the solicitor was making no recommendation. App. 32, ll. 10 – 13. Dean then responded positively to multiple questions regarding plea counsel’s performance and interaction with him. App. 32, l. 18 – 33, l. 23. After further advisement of his rights, Judge Hyman accepted Dean’s plea of guilty but mentally ill. App. 16, ll. 6 – 11.

After accepting the plea and hearing from Wife’s mother, the State, and plea counsel on sentencing, the trial judge remarked that a sentence would be “day for day.” App. 35, l. 12 – 37, l. 16. Dean then expressed remorse and his sister spoke on his behalf. App. 37, l. 18 – 39, l. 9. Judge Hyman remarked that the case was “a sad, sad, sad situation” and then gave Dean the minimum sentence of thirty years. App. 40, ll. 2 – 10. Immediately after stating his sentence, Judge Hyman said:

Mr. Dean, that’s probably going to be a life sentence for you at 48. It will probably be the rest of your life because you’re not eligible for parole on that. You have to serve it day for day, so it’s 30 days to serve, 30 years to serve, I keep saying days but it’s 30 years and that’s an awfully long time.

App. 40, ll. 8 – 16. Judge Hyman then wished Dean luck and the plea hearing concluded. App. 40, ll. 15 – 19.

The Aftermath of the Guilty Plea

Both Dean and plea counsel testified at PCR about what happened immediately after the plea hearing. Dean remembered learning for the first time from the judge, not his attorney, that a thirty year sentence was "day for day." App.65, l. 23 – 66, l. 10. After the hearing, he told plea counsel he "wanted to go back in front of the judge" and withdraw his plea. App. 108, ll. 12 – 19. Plea counsel refused to take him back to court. App. 108, ll. 12 – 19. Dean was then whisked away to a psychiatric unit where he had no contact with the outside world. App. 108, ll. 12 – 19. Dean stated that when he finally was able to communicate again with plea counsel and tell him he "wanted to pull my plea," plea counsel told him it was too late. App. 108, ll. 12 – 24.

Plea counsel agreed with Dean about what happened immediately after the plea. App. 95, ll. 2 – 17. Plea counsel did not hear the judge state that the sentence would be 100% until after the plea had been accepted. App. 95, ll. 2 – 17. Plea counsel stated:

What I did hear was at the end of it where the judge said it all which that caught us all by surprise because we had talked about this even in chambers and when we got back to lock up Mr. Dean was highly upset with me because the judge said that at the end of the plea. If the judge would have said that at the beginning of the plea there is no doubt in my mind that the plea would have never taken place. . . . But he said it at the end **and Mr. Dean asked to go back out there and right or wrong I made the decision not to go back out there because my belief was that judge was not going to at that time let him withdraw the plea.**

App. 95, ll. 4 – 17 (emphasis added).

The PCR Hearing and the PCR Court's Ruling

At the PCR hearing, plea counsel testified as follows:

Q. All right, and did you ever discuss with, with Mr. Dean whether or not the murder plea would be eighty-five percent or a hundred percent, did you ever discuss those collateral type consequences?

A. Yes, we did.

Q. And what did you tell him about that?

A. Okay, I, keep in mind that we were trying to get this case into a manageable time or sentence for him and if the Solicitor thought twenty-five years was fine we weren't necessarily agreeing with that but twenty-five years would certainly be better than life, and towards the end of our trial preparations another lawyer who I trust had made the comment that it would only be eighty-five percent under the new law so we did talk about that.

Q. All right, so you, did you specifically tell Mr. Dean that it would be eighty-five percent?

A. I don't remember the exact words but that was discussed.

App. 79, l. 20 – 80, l. 12. Plea counsel's testimony corroborates petitioner's testimony at the PCR hearing:

Q. All right, I understand that at the time in the plea of thirty years you were under the impression that that was eighty-five percent; is that correct?

A. Yes, sir.

Q. And how old were you at the time that this happened?

A. Forty-eight, sir.

Q. All right, so if you took the thirty years, you'd be what, seventy-eight?

A. Yes, sir.

Q. All right, if you went to trial and even got a life sentence that's about, I don't know what's a life expectancy is in prison but I don't think you live to be ninety, but in any event you felt that if you knew

this you obviously would have taken your chance and gone to trial; is that right?

A. Correctly, sir.

App. 57, ll. 5 – 21.

The PCR court used this testimony to find that plea counsel “never testified that he expressly assured the Applicant that a thirty-year sentence was in fact an 85% sentence.” App. 118. This finding misinterprets plea counsel’s testimony. The PCR court made no adverse credibility finding with respect to plea counsel or petitioner’s testimony on this issue. Respectfully, the only way to interpret their testimony is that plea counsel misinformed petitioner regarding the day-for-day nature of his sentence.

The PCR court also misconstrued petitioner’s testimony regarding where petitioner learned that his sentence would be an eighty-five percent sentence. The PCR court repeatedly stated that petitioner “received information regarding the 85% sentence from people he spoke with in county rather than from his attorney.” App. 119. This erroneous finding was based upon the following testimony from petitioner on cross-examination:

Q. Okay, what do you think eighty-five percent met?

A. It would be like instead of a hundred percent you done eighty-five percent of your time.

Q. In other words you get out after eighty-five percent?

A. Yes, ma'am, **and your work credits would knock it down even lower.**

Q. **And where did you get that understanding from?**

A. **From people I spoke with in the county.**

App. 70, ll. 9 – 19 (emphasis added). As the emphasized text shows, petitioner received information about work credits from other inmates, not information regarding an eighty-five percent sentence. The PCR court took petitioner's answer out of context. The PCR court's interpretation of this answer is inconsistent with petitioner and plea counsel's testimony.

### Discussion

The PCR court erred in holding petitioner could not prove deficient performance or prejudice under the two-pronged approach of Strickland v. Washington, 466 U.S. 668 (1984). Petitioner's guilty plea was unknowing and unintelligent because he relied on the erroneous advice of his attorney. "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 474 U.S. 52, 56 (1985). "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). "Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel." Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted). The Supreme Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under Strickland." Id. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

The South Carolina Supreme Court has found deficient performance where attorneys provided erroneous advice that induced a guilty plea. In Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989), the defendant's trial attorney told him he would be eligible for parole after serving ten years when, in reality, defendant would have to serve twenty years. Id. at 457-58, 377 S.E.2d at 339. Hinson found such advice deficient and reversed the PCR court. Id.; see also Alexander v.

State, 303 S.C. 539, 402 S.E.2d 484 (1991) (reversing guilty plea on PCR where attorney misadvised defendant on maximum exposure at sentencing).

This case is analogous to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). In Jordan, the defendant pled guilty based upon the expectation that the solicitor would neither recommend nor oppose a sentence of probation. Id. at 53, 374 S.E.2d at 684. At the plea, a different solicitor represented the State and vigorously opposed probation. Id. The Supreme Court found plea counsel's failure to move to withdraw the sentence constituted ineffective assistance of counsel and reversed. Id. at 54-55, 374 S.E.2d at 684-85.

As in Jordan, petitioner entered the plea hearing expecting an eighty-five percent sentence. Plea counsel did not hear the judge state that the sentence would be day-for-day until after the plea had been accepted. App. 95, ll. 2 – 17. Both plea counsel and Dean's testimony about the immediate reaction by Dean to learning the sentence would be 100% and not 85% shows this is not a case of "buyer's remorse." App. 95, ll. 2 – 17.

The PCR court did not find that either Dean or plea counsel's description of the aftermath of the plea hearing was not credible. This immediate reaction by Dean defeats the State's primary argument: that Dean's willingness to plead guilty for a twenty-five year sentence, but not a thirty year sentence, is a recent invention. In its opposition to certiorari, the State argued that it was not believable that Dean's decision to plead guilty rested on a five-year difference. However, both Dean and plea counsel's testimony show that five years, in fact, made all the difference to Dean.

Petitioner also can demonstrate that he was prejudiced by counsel's error. In order to prove prejudice under Strickland in a plea context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S.Ct. at 1384. "[A]

petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” Padilla, 130 S.Ct. at 1485. However, the primary focus remains on whether petitioner’s plea was involuntary and that he would not have otherwise pled guilty. Lockhart, 474 U.S. at 56-57. In Lockhart, the Court noted that prejudice could be shown if it would have caused plea counsel to change his recommendation. Id. at 59. Plea counsel testified that he made a mistake not taking Dean’s case to trial. App. 86, ll. 3 – 8.

Under questioning from the court, plea counsel unambiguously testified that petitioner would not have pled guilty had he known he would have to serve thirty years instead of twenty-five. App. 95, l. 18 – 96, l. 10. Petitioner also emphatically testified that he would not have pled guilty had he known he would have to serve the full thirty years. App. 65, ll. 20 – 22. Therefore, the only evidence before the PCR court is that petitioner would not have pled guilty. See Alexander, at 543, 402 S.E.2d at 485 (“In fact, the only evidence in the record on [the prejudice] point is petitioner’s own testimony that had plea counsel not misinformed him . . . he would not have pled guilty. Thus the second part of the test has been met.”); see also Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999) (finding prejudice based on defendant’s testimony that he would not have pled guilty despite plea counsel’s assertion that even if he had understood defendant’s potential sentence, he still would have advised defendant to plead guilty). The admitted erroneous advice by trial counsel shows that petitioner’s plea was involuntary.

Petitioner and plea counsel’s testimony regarding the facts of the case demonstrate not only that petitioner had nothing to lose by going to trial, he actually had a chance of success at receiving either a not guilty verdict or a guilty verdict on a lesser-included offense. Plea counsel substantiated petitioner’s version of events. App. 74, ll. 17 – 18. Plea counsel testified that he was confident that had they gone to trial, the trial judge would have charged the jury on manslaughter and self-defense.

App. 76, l. 16 – 79, l. 7. Plea counsel admitted that his performance was deficient and prejudiced petitioner, stating, “I mean there’s no doubt in my mind that, that we should have tried the case and that’s it in a nutshell we should have tried it. We were here, we were ready to go and he pled.”

App. 81, ll. 4 – 7. Dr. Frierson was present and ready to testify regarding petitioner’s brain injury.

As plea counsel pointed out, given petitioner’s age (48), thirty years was effectively a life sentence so petitioner had nothing to lose by going to trial. App. 86, ll. 3 – 14. Pleading guilty was not “rational under the circumstances.” Padilla, 130 S.Ct. at 1485. Combined with plea counsel and petitioner’s unequivocal testimony that petitioner would not have pled guilty but for the erroneous advice regarding sentencing, these facts demonstrate that petitioner was prejudiced. See Rolen v. State, 384 S.C. 409, 414, 683 S.E.2d 471, 474 (2009) (finding prejudice from attorney’s failure to move to withdraw a guilty plea even though it was likely the judge would not have allowed withdrawal because “the plea judge was not able to exercise his discretion”); Crabbe v. State, 546 S.E.2d 65, 66 (Ga. Ct. App. 2001) (reversing guilty plea because attorney told defendant that he would be eligible for parole within ten years when the actual number was twenty years); Moore v. Bryant, 237 F.Supp.2d 955, 960 (C.D. Ill. 2002) (reversing defendant’s guilty plea because of attorney’s advice that defendant would serve 50% of his sentence instead of 85%).

Furthermore, the PCR court’s holding on the prejudice prong uses reasoning that has been discredited by the Supreme Court. The PCR court held that since petitioner knew he was facing a potential life sentence, that it “would strain credulity that if the Applicant had been told that the thirty-year minimum sentence was to be served day for day, that he would not have pled guilty.” App. 120. The Supreme Court rejected such a rationale in Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991). In Ray, plea counsel was ineffective for erroneously advising the defendant that he faced a sentence of life without parole. Id. at 375, 401 S.E.2d at 152. The

State argued that since the defendant faced a possible seventy-five year sentence, he could not have been prejudiced by the erroneous advice. Id. at 376, 401 S.E.2d at 152-53. The Ray Court dismissed the State's reliance on a "possible" maximum sentence because had the defendant proceeded to trial, he could have faced a much shorter sentence. Id. Just as in Ray, had petitioner proceeded to trial, he could have received a shorter sentence on a lesser-included offense or been acquitted. Therefore, the PCR court's prejudice finding is not based on any finding of fact, but on speculation and discredited reasoning. This Court should reverse and grant petitioner a new trial.<sup>1</sup>

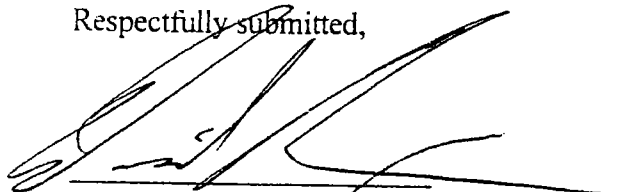
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<sup>1</sup> Should the Court find that a new trial is not the appropriate remedy, it should remand the case to allow the circuit court to consider whether to allow petitioner to withdraw his guilty plea as was done in Rolen. Rolen at 414, 683 S.E.2d at 474.

CONCLUSION

For the foregoing reasons, this Court should reverse the PCR court and grant petitioner a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of July, 2014

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Horry County

George C. James, Jr., Circuit Court Judge

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CHARLES RAY DEAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

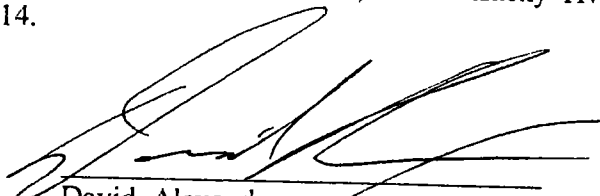
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the brief of petitioner, in this case has been served on Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Charles Ray Dean #342070, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 11th day of July, 2014.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day  
of July, 2014.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Certiorari to Horry County Court of Common Pleas  
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2012-212092

---

CHARLES RAY DEAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

**BRIEF OF RESPONDENT**

---

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**ATTORNEYS FOR RESPONDENT**

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**ISSUE PRESENTED**

**The denial of post-conviction relief must be upheld where Petitioner failed to credibly meet his burden of proof.**

**STATEMENT OF THE CASE**

Petitioner was indicted in January 2008 for the murder of his wife, Jill Dean. On August 2, 2010, Petitioner pled "guilty but mentally ill" before the Honorable Larry B. Hyman, Jr. Judge Hyman imposed a sentence of thirty years. No direct appeal was filed. Petitioner filed an Application for post-conviction relief on June 16, 2011. The State made a Return on July 21, 2011. An evidentiary hearing was convened before the Honorable George C. James, Jr., on January 23, 2012.<sup>1</sup> On May 1, 2012, Judge James issued an order denying post-conviction relief. A timely notice of appeal was served and filed, and, subsequently, a Petition for Writ of Certiorari was submitted. The State's Return followed on April 4, 2013. On July 29, 2013, this case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. This Court granted certiorari on April 11, 2014, and Petitioner submitted his Brief on July 11, 2014. This Brief of Respondent follows.

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<sup>1</sup> The PCR hearing transcript erroneously states that the PCR hearing took place in 2011. (App. p. 54). Petitioner agrees with the State that the PCR hearing took place January 23, 2012. (Brief of Petitioner, p. 4).

## ARGUMENT

**The denial of post-conviction relief must be upheld where Petitioner failed to credibly meet his burden of proof.**

### Background Facts

On or about October 17, 2007, Petitioner's wife, daughter, and daughter's boyfriend arrived at home between 5:30 and 6:00 am. (App. p. 29, lines 2-5). Petitioner entered the house from the backyard and subsequently engaged in an argument with his wife. (App. p. 29, lines 5-8). During the argument, Petitioner's daughter stabbed Petitioner in the back with a knife in an attempt to get Petitioner to stop fighting her mother. (App. p. 29, lines 8-10). Petitioner ended up stabbing his wife multiple times and slitting her throat. (App. p. 29, lines 19-20). At some point, Petitioner's daughter and her boyfriend left the home and went across the street to call 911. (App. p. 29, lines 10-16). When police arrived, Petitioner was sitting on the front porch and he was taken into custody. (App. p. 29, lines 16-18). Petitioner's wife died on the scene, and Petitioner was charged with murder. (App. p. 125-26).

Counsel was thereafter appointed to represent Petitioner. (App. p. 72; p. 126). On August 2, 2010, a hearing was held regarding Petitioner's competency. (App. p. 1-18). At this hearing, Dr. Richard Frierson testified that, because of a previous car accident and resulting frontal lobe brain injury, Petitioner had difficulty controlling his anger. (App. p. 12-17). Dr. Frierson concluded that Petitioner's condition substantially impaired his capacity to conform his conduct to the requirements of law. (App. p. 14, lines 14-21). After the competency hearing, Petitioner pled guilty but mentally ill without recommendations or negotiations. (App. p. 20-40). The judge sentenced Petitioner to the mandatory minimum sentence of thirty years. (App. p. 40, lines 8-10).

Petitioner subsequently filed a PCR application. (App. p. 42-50). At his PCR hearing, Petitioner claimed his guilty plea was involuntary. (See App. p. 56-109). Specifically, Petitioner claimed that there "may have been some confusion" regarding whether a thirty-year murder sentence was an 85% sentence or a day-for-day sentence. (App. p. 97, lines 1-2). He also claimed that he would not have pled guilty had counsel properly advised him regarding manslaughter and self-defense. (App. p. 96-103). On May 1, 2012, the PCR judge issued an order denying post-conviction relief. (App. p. 111-122). Regarding Petitioner's 85% claim, the PCR judge concluded that Petitioner failed to meet his burden to show ineffective assistance of counsel and failed to credibly meet his burden to show prejudice. (App. p. 119-120).

#### Applicable Law and Standard of Review

In a PCR proceeding, Petitioner bears the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citations omitted). Strickland v. Washington established a two-prong test for evaluating claims of ineffective assistance of counsel. Strickland, 466 U.S. 668 (1984). The first prong of the test requires that a defendant prove his counsel's deficiency by demonstrating counsel's performance fell below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006).

The second part of the test requires a defendant to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. *Id.* In a case involving a guilty plea, the “prejudice” requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, a defendant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber, 371 S.C. at 558, 640 S.E.2d at 886. Critically, failure to establish prejudice is fatal to a PCR applicant's claim. Taylor v. State, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013). “To satisfy the prejudice prong, Petitioner must prove, *through the presentation of probative and credible evidence*, that he would have gone to trial instead of pleading guilty but for counsel's deficient advice.” *Id.* (emphasis added) (citation omitted).

On certiorari in a PCR action, the appellate court applies an “any evidence” standard of review. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). Significantly, if matters of credibility are involved, the appellate court gives deference to the PCR court's findings because the appellate court lacked the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994); see Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (“The PCR court's findings on matters of credibility are given *great deference* by this Court.”) (emphasis added).

Discussion

In Petitioner's case, the denial of post-conviction relief must be upheld because there is no basis upon which to overturn the PCR judge's findings. First, regarding the deficiency prong, the PCR judge was not "convinced by a preponderance of the evidence" that counsel provided any actual misadvice upon which Petitioner relied; in other words, Petitioner did not credibly meet his burden. (App. p. 119). See Suber v. State, 371 S.C. at 558, 640 S.E.2d at 886 (the *petitioner* in a PCR case bears the burden of establishing that he is entitled to relief). This finding has support in the record since Petitioner never testified that counsel misadvised him and plea counsel failed to provide any details regarding what he specifically told Petitioner about a thirty-year sentence being an 85% sentence. (See App. p. 79-80). It is not clear that plea counsel actually made an incorrect statement to Petitioner, since plea counsel testified only that "towards the end of our trial preparations another lawyer who I trust had made the comment that it would be only eighty-five percent under the new law so we did talk about that." (App. p. 80, lines 5-8). Counsel declined to testify that he actually told Petitioner a thirty-year sentence would be an 85% sentence. In fact, when asked if he specifically told Petitioner that a thirty-year sentence would be an 85% sentence, he stated, "I don't remember the exact words but that was discussed." (App. p. 80, lines 9-12). Thus, while counsel testified that he and Petitioner discussed *something* about an 85% sentence, it is not clear that counsel told Petitioner that he *necessarily could expect that*, assuming he received a thirty-year sentence, it would automatically be an 85% sentence.<sup>2</sup>

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<sup>2</sup> For example, counsel's testimony on this issue could be interpreted as stating that he merely related the trusted attorney's comment about a thirty-year sentence being an 85% sentence, but did not adopt the statement or tell Petitioner that he should rely on it. (See App. p. 80, lines 5-12). Note that at the plea, when counsel was speaking to the judge regarding an appropriate sentence, counsel stated as follows:

Moreover, Petitioner himself never testified he received any erroneous information regarding a thirty-year sentence from his lawyer; instead Petitioner merely claimed counsel *failed to advise him* that a thirty-year sentence had to be served day-for-day. (See App. p. 56-70; p. 65, line 23 – p. 66, line 10). Further, Petitioner's testimony at least suggested that he might have received incorrect information regarding an 85% sentence, and information about work credits, from talking with other inmates in the county jail.<sup>3</sup> (See App. p. 70, lines 17-19). Notably, even Petitioner's PCR counsel did not argue that Petitioner actually received misadvice from his plea counsel; instead, he merely asserted that "there may have been some confusion" regarding the sentence and that Petitioner "thought he was going to get less time." (App. p. 97, lines 1-4). Significantly, any misinformation Petitioner might have had prior to the plea was cured when the plea judge informed Petitioner twice on the record that a thirty-year sentence would have to be served day-for-day. (App. p. 37, line 16; p. 40, lines 8-15). See Wolfe v. State, 326 S.C. 158, 164-65, 485 S.E.2d 367, 370 (1997). Petitioner acknowledged that he heard the plea judge when he advised Petitioner regarding the day-for-day nature of the sentence. (App. p. 65, line 20 – p. 66, line 10).

As to the prejudice prong, it is clear that Petitioner pled guilty with a full awareness of the sentence range, i.e., thirty years to life without parole, and with knowledge that the solicitor was making no recommendation as to the sentence. (See App. p. 32, lines 3-17; p. 79, lines 18-19). Petitioner never testified that counsel or

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"We'd ask that you sentence him to the minimum sentence. He's forty-eight years old. **Thirty years is thirty years as I understand it** and I believe that would be appropriate. . . ." (App. p. 37, lines 12-15) (emphasis added). Immediately thereafter the judge agreed that a thirty-year sentence was "day for day." (App. p. 37, line 16). This statement by counsel at the plea suggests that counsel was aware that Petitioner would have to serve the full thirty years if he received a thirty-year sentence.

<sup>3</sup> Plea counsel denied telling Petitioner anything about work credits or parole. (App. p. 80, lines 16-19).

anyone else promised him that he would necessarily receive a thirty-year sentence if he pled guilty. In fact, Petitioner never even stated he believed a thirty-year sentence was likely or that he had been hoping for or expecting to receive a thirty-year sentence. (See App. p. 56-70). In short, Petitioner provided no evidence he was counting on receiving a thirty-year sentence, much less a thirty-year sentence at 85%. If Petitioner was satisfied with receiving a life without parole sentence (or something *between* thirty years and life) as a result of his plea, then it is not believable that whether a thirty-year sentence was 85% or day-for-day was a critical factor in his decision to plead guilty, especially where he was pleading guilty, without pressure or coercion, for other reasons; specifically, because he wanted to accept responsibility, did not want to go through a trial or put his family through a trial, and just wanted "closure." (See App. p. 37, lines 8-12; p. 87, line 14 – p. 88, line 7).

Since Petitioner did not know in advance that he would be receiving a thirty-year sentence, his claim that he was relying on the fact that a thirty-year sentence would be an 85% sentence was less than credible. (See App. p. 119-120). In that vein, Petitioner presented no testimony or evidence to explain to the PCR judge why the difference between 85% of thirty years and 100% of thirty years would have been so significant to him at the time he was making his decision to plead guilty. See Taylor v. State, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) (the defendant failed to credibly establish prejudice where he failed to "provide[] specific reasons why knowledge of the recidivist statute would have caused [him] to change his plea"); see also Hammond v. U. S., 528 F.2d 15, 18 (4<sup>th</sup> Cir. 1975) (in a case where a guilty plea defendant had been misadvised about his sentence exposure, the Fourth Circuit noted that "[a] mistake of a few years in advice

about the length of what would otherwise be a long term would not constitute ineffectiveness of counsel.”).

Contrary to Petitioner’s assertions on appeal, the PCR judge was not required to accept the PCR hearing testimony at face value. See Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (“The fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation.”) (citation omitted). Instead, the PCR judge could properly take into account whether Petitioner’s and plea counsel’s PCR hearing testimony made sense in light of the posture of the case and considering their apparent “buyer’s remorse” and desire to conduct “Monday morning quarterbacking” regarding Petitioner’s decision to plead guilty.<sup>4</sup> (See App. p. 107, lines 1-3 & 8-10). See Solomon v. State, 313 S.C. at 529, 443 S.E.2d at 542; Goins v. State, 397 S.C. at 573, 726 S.E.2d at 3 (both holding that the PCR court’s findings on matters of credibility must be given great deference by the appellate court).

Petitioner asserts that the PCR judge’s order is based on “speculation” and “discredited reasoning.” (See Brief of Petitioner, p. 16). First, the State would point out that “[s]peculation is a necessary component of most PCR cases” since prejudice is determined under a “reasonable probability” standard. Rolen v. State, 384 S.C. 409, 416, 683 S.E.2d 471, 475 (2009) (Pleicones, J., dissenting). Second, the case upon which Petitioner relies for his contention that the PCR judge utilized “discredited reasoning” is distinguishable. In Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991), the defendant was

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<sup>4</sup> The PCR judge also pointed out that it appeared plea counsel might have “fallen on his sword.” (See App. p. 97, lines 9-11).

charged with grand larceny, second degree burglary, and two counts of armed robbery. Counsel erroneously advised him that he would face a *mandatory* life without parole sentence if he went to trial and was convicted on the two armed robbery charges. Ray at 375, 401 S.E.2d at 152. The defendant pled guilty to reduced charges because he was afraid of receiving a life without parole sentence at trial. Id. at 375-76, 401 S.E.2d at 152. Since the defendant pled guilty almost solely for the purpose of avoiding a mandatory life without parole sentence at trial, and since he was, in fact, facing only a term of years (as little as ten years but up to seventy-five years), he established sufficient prejudice to warrant relief. See id. at 376, 401 S.E.2d at 152-53. This Court found that the "real distinction" between the lowest possible sentence the defendant *could* receive at trial - ten years - and the sentence he was told he *would* receive at trial - life without parole - was sufficient to satisfy the prejudice prong of Strickland. See id. at 376, 401 S.E.2d at 153.

In Ray, the defendant believed he was facing life without parole if he went to trial, when, in fact, he was facing a *range* of ten to seventy-five years. Because there were four separate charges, his total sentence would be impacted by whether the trial judge decided to run the sentences concurrently or consecutively. In other words, there was a very large discrepancy between the sentence the defendant was advised he necessarily *would* receive after a trial - mandatory life without parole - and the reality that, although he was facing the possibility of a total of seventy-five years, he *could* receive as little as ten years with concurrent sentencing. The State's prejudice argument in Ray failed to take this aspect of the case into account and was therefore rejected by our Supreme Court. See Ray at 376, 401 S.E.2d at 152-53.

In Petitioner's case, the reasoning employed by the PCR judge is not the same as the reasoning rejected in Ray. Here, the PCR simply found that, since Petitioner was prepared to accept receiving up to a life sentence, it was not sufficiently believable that the difference between an 85% thirty-year sentence and a day-for-day thirty-year sentence - a difference of only four-and-a-half years - would have affected his decision to plead guilty, considering the other facts and circumstances in the case. See supra, p. 7-8. (See App. p. 119-120). Accordingly, the Ray case is distinguishable, and, contrary to Petitioner's argument, the reasoning employed by the PCR judge in this case is not "discredited."

The other cases cited by Petitioner are also distinguishable because they all involved much larger discrepancies between the sentence described in the attorney's erroneous advice and the actual sentence. See Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); Turner v. State, 335 S.C. 382, 517 S.E.2d 442 (1999). Further, the case of Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988), is distinguishable because it involved a solicitor reneging on a plea bargain and specifically involved the issue of whether plea counsel was ineffective for failing to move to withdraw the defendant's guilty plea - an issue not raised or ruled upon in Petitioner's case. (See App. p. 113; p. 118-21). The case of Rolen v. State, 384 S.C. 409, 683 S.E.2d 471 (2009), is similarly distinguishable because the defendant in that case specifically raised the issue of counsel's failure to move to withdraw his guilty plea. Because this issue was not raised in Petitioner's case, a remand pursuant to Rolen, as Petitioner suggests, would not be appropriate. (See Brief of Petitioner, p. 16, footnote 1).

There are high societal costs to awarding a retrial to a defendant several years after the crime took place. See Calderon v. Coleman, 525 U.S. 141, 146 (1998) (“The social costs of retrial or resentencing are significant . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced. . . .”); see also Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (“Retrying defendants whose convictions are set aside also imposes significant ‘social costs,’ including the expenditure of additional time and resources for all the parties involved, the ‘erosion of memory’ and ‘dispersion of witnesses’ that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of ‘society’s interest in the prompt administration of justice.’”) (citation omitted). It is for this reason that PCR applicants bear the burden to establish their claims. Here, Petitioner bore the burden to credibly establish, by a preponderance of the evidence, that, but for some misadvice of counsel, he would not have pled guilty but would have elected to go to trial. Here, the most Petitioner established was that both he and plea counsel, in hindsight, regretted Petitioner’s decision to plead guilty and wanted another chance at a trial. Since Petitioner failed to establish, to the PCR judge’s satisfaction, that he suffered prejudice from deficient performance by counsel, this Court must affirm the denial of relief. See Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2009) (great deference must be given to the PCR court’s findings of fact and conclusions of law, and the appellate court is only concerned with whether “any evidence” of probative value exists to support the PCR court’s decision).

**CONCLUSION**

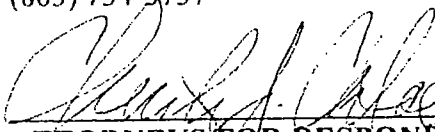
For the reasons discussed above, this Court should affirm the denial of post-conviction relief.

Respectfully submitted,

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(803) 734-3737

  
**ATTORNEYS FOR RESPONDENT**

August 11, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Horry County Court of Common Pleas  
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2012-212092

CHARLES RAY DEAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PROOF OF SERVICE**

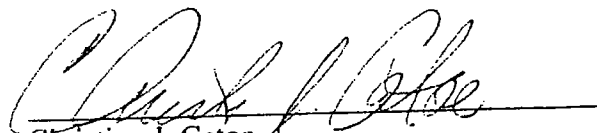
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I hereby certify that I have served the **Brief of Respondent** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**David Alexander, Esquire  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211-1589**

I further certify that all parties required by Rule to be served have been served.

This 11<sup>th</sup> day of August, 2014.

  
Christina J. Catoe  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

**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**

Charles Ray Dean, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-212092

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Appeal From Horry County  
George C. James Jr., Circuit Court Judge

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Unpublished Opinion No. 2015-UP-176  
Heard February 3, 2015 – Filed April 1, 2015

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**REVERSED**

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Appellate Defender David Alexander, of Columbia, for  
Petitioner.

Attorney General Alan McCrory Wilson and Assistant  
Attorney General Christina Catoe Bigelow, both of  
Columbia, for Respondent.

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**PER CURIAM:** In this post-conviction relief (PCR) matter, Petitioner Charles Ray Dean argues the PCR court erred in finding his Sixth Amendment right to effective assistance of counsel was not violated. Specifically, Dean argues plea

counsel gave Dean erroneous sentencing advice and Dean would have proceeded to trial but for plea counsel's error. We reverse.

### **FACTS/PROCEDURAL HISTORY**

When Dean appeared before the plea court, he was informed that, for the charge of murder, he was facing a minimum sentence of thirty years' imprisonment and a maximum sentence of life without parole. Dean maintained he still wished to plead guilty and the court accepted his plea as voluntary, knowing, and intelligent. Plea counsel then requested the plea court sentence Dean to the minimum sentence of thirty years' imprisonment, at which point the plea court interrupted counsel to say, "That's day[-]for[-]day." According to plea counsel and Dean, they did not hear this statement at the time. At the end of the colloquy, the plea court sentenced Dean to thirty years' imprisonment and once again stated, "You have to serve it day[-]for[-]day." Both Dean and plea counsel were surprised when they heard the second "day-for-day" clarification.

Dean did not file a direct appeal but later filed an application for PCR, alleging ineffective assistance of plea counsel, which the PCR court denied. A petition for writ of certiorari followed, which was granted by this court.

### **STANDARD OF REVIEW**

"On appeal in a PCR action, this [c]ourt applies an 'any evidence' standard of review." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Under this standard, the PCR court's ruling will be upheld if it is supported in the appendix by any evidence of probative value and not controlled by an error of law. *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008); *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). However, reversal is warranted where no evidence of probative value supports the PCR court's decision. *See Palacio v. State*, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999).

### **ISSUE ON APPEAL**

Did the PCR court err in finding Dean's right to effective assistance of counsel was not violated?

### **LAW/ANALYSIS**

Dean maintains that plea counsel erroneously informed him before his plea that he would be required to serve only 85% of his sentence. Indeed, plea counsel acknowledged he was under the impression—after speaking with a trusted lawyer—that Dean would have to serve only 85% of his sentence under "the new law."<sup>1</sup> Dean further contends that neither the plea court nor plea counsel informed him that he was going to have to serve the thirty-year sentence day-for-day until after the guilty plea was entered. Immediately after sentencing, Dean wanted to "go back in front of the judge" and "pull [his] plea," but plea counsel refused to do so because he did not believe the court was going to let Dean withdraw the plea. In sum, Dean argues that if plea counsel or the court had informed Dean that he was required to serve his sentence day-for-day before he entered his plea, he would have gone to trial instead of pleading guilty. We agree and find Dean has met his burden to prove ineffective assistance of counsel.

"In order to establish a claim for ineffective assistance of counsel, the [petitioner] must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the [petitioner's] case." *Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The *Strickland* test requires a petitioner to make a showing on both prongs in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687.

### 1. Deficiency

Here, the PCR court held that plea counsel's performance was not deficient. We disagree and find Dean's and plea counsel's testimonies reveal Dean received erroneous sentencing advice.

"In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." *Taylor*, 404 S.C. at

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<sup>1</sup> Plea counsel did not clarify the law to which he was referring, but it appears he was referring to the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which was passed shortly before Dean's plea. Act No. 273; 2010 S.C. Acts 1986. As codified under section 24-13-125(A) of the South Carolina Code (Supp. 2014), inmates may be required to serve only 80%—not 85%—of their sentence for certain offenses before they are eligible for work release. However, the 80% provision does not apply to one convicted of murder. *Id.*

360, 745 S.E.2d at 102. With regard to a PCR action, "[s]imply put, the first inquiry is whether trial counsel's advice was deficient." *Alexander v. State*, 303 S.C. 539, 542, 402 S.E.2d 484, 485 (1991). If a petitioner successfully proves his or her guilty plea was based on inaccurate sentencing advice from counsel, the deficiency prong has been satisfied. *Id.* at 542–43, 402 S.E.2d at 485 (finding counsel's sentencing advice was "obviously defective" because it was contrary to the sentencing ranges possible under the indictments and the law). However, "the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea [court] cured any possible error made by counsel." *Burnett v. State*, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003); *id.* at 593–94, 576 S.E.2d at 146 (finding any possible misunderstanding as to the petitioner's sentence was cured by the colloquy during the actual plea hearing).

In this case, plea counsel testified that prior to the plea, he discussed Dean's case with another trusted lawyer, who told him that Dean would be required to serve only 85% of whatever his sentence would be under "the new law." Plea counsel was then asked, "[D]id you specifically tell Mr. Dean that it would be eighty[-]five percent?" Plea counsel responded, "I don't remember the exact words[,] *but that was discussed.*" (emphasis added). In the PCR hearing, plea counsel acknowledged Dean's surprise when he learned that he would have to serve his time day-for-day and not just 85% of the sentence. Counsel testified that after the plea, when they "got to the lock up[,] *Mr. Dean was highly upset with me* because the judge had said [day-for-day] at the end of the plea." (emphasis added). Dean also testified at the PCR hearing. Dean maintained that at the time of the plea, he was under the impression that he was going to have to serve only 85% of his sentence.

We find plea counsel's testimony that "[85%] was discussed," along with Dean's understanding that he would have to serve only 85% of his sentence, reveals that plea counsel's performance was deficient because he offered erroneous sentencing advice to Dean. *See Alexander*, 303 S.C. at 542–43, 402 S.E.2d at 485 (finding counsel's sentencing advice was "obviously defective" because it was contrary to the sentencing ranges possible under the indictments and the law). Moreover, Dean and plea counsel expressed surprise upon hearing the plea court explain to Dean that he would have to serve his sentence "day-for-day." At no time should plea counsel have discussed 85% with Dean because, even under "the new law," Dean would not be eligible for an early release after pleading guilty to murder. *See S.C. Code Ann. § 24-13-125(A)* (Supp. 2014) (finding one convicted of murder is not eligible for work release).

Notwithstanding plea counsel's deficient advice, this court still has to review the transcript of the guilty plea hearing to determine whether information conveyed by the plea court cured any possible error made by counsel. *See Burnett*, 352 S.C. at 592, 576 S.E.2d at 145. "[E]ven where counsel offers misinformation, this deficiency can be cured where the trial court properly informs the defendant about the sentencing range." *Bennett v. State*, 371 S.C. 198, 205 n.6, 638 S.E.2d 673, 676 n.6 (2006).

In this case, the plea court informed Dean that he was facing a sentence of thirty years' to life imprisonment with no recommendation from the solicitor, and Dean stated he still wished to plead guilty. Furthermore, the plea court informed Dean he would not be eligible for parole and twice stated his sentence would be "day-for-day." However, these day-for-day clarifications were not given until *after* Dean's plea was accepted.

We acknowledge that no South Carolina law directly addresses whether information conveyed during a plea hearing—but *after the plea has been accepted*—can cure plea counsel's deficient advice. Under the circumstances of this case, however, we find a clarification from the plea court would need to be given before the plea was accepted to have any curative effect. *See Holden v. State*, 393 S.C. 565, 574–75, 713 S.E.2d 611, 616 (2011) (finding the thorough plea colloquy given *before* the court accepted the plea cured any alleged deficiency in plea counsel's sentencing misadvice); *Bennett*, 371 S.C. at 205 n.6, 638 S.E.2d at 676 n.6 (same); *Moorehead v. State*, 329 S.C. 329, 333, 496 S.E.2d 415, 416–17 (1998) (finding the trial court cured any misconception about sentencing because it accurately informed the defendant of the plea agreement on the record *before* accepting the plea); *see also Burnett*, 352 S.C. at 593, 576 S.E.2d at 146 (finding the plea court "accepted Burnett's guilty pleas *only after* a very thorough questioning of Burnett's understanding of what rights he was waiving by pleading guilty, what his possible sentences were, and that the [court] had not agreed to give him any particular sentence" (emphasis added)); *see generally 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.").

Because we find the timing of the after-the-plea "day-for-day" instruction did not cure plea counsel's misadvice as to sentencing, we reverse the PCR court's finding that counsel's performance was not deficient. *See Palacio*, 333 S.C. at 513, 511

S.E.2d at 66 (finding reversal is warranted when no evidence of probative value supports the PCR court's decision). Accordingly, we proceed to the second prong of the *Strickland* test to determine whether Dean was prejudiced by plea counsel's alleged deficiency.

## 2. Prejudice

Under the second step of the inquiry, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

To meet this burden, the petitioner need only testify that had plea counsel not misinformed him of the potential sentence, he would not have pled guilty. *Alexander*, 303 S.C. at 543, 402 S.E.2d at 485–86 (finding the petitioner's own testimony that he would have proceeded to trial but for counsel's misadvice as to sentencing was "the only evidence in the record on this point" and was sufficient to satisfy the prejudice prong of the *Strickland* test); *Jackson v. State*, 342 S.C. 95, 97–98, 535 S.E.2d 926, 927 (2000) (citing *Alexander* with approval and finding the petitioner satisfied the prejudice prong by simply providing testimony that he would not have pled guilty, but for trial counsel's misadvice); *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) ("The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove that defendant would not have pled guilty." (citing *Jackson*, 342 S.C. at 97–98, 535 S.E.2d at 927; *Alexander*, 303 S.C. at 543, 402 S.E.2d at 485–86)). *But see Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) ("[The] prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial."); *id.* at 562–63, 681 S.E.2d at 594–95 (finding the petitioner's prejudice claim was insufficient because it only alleged that his counsel was so unprepared that he felt coerced to plead guilty, but did not allege that any of counsel's advice affected whether he would have declined or accepted the plea offer).

Here, Dean maintained that, based on plea counsel's misadvice, he did not know he would have to serve his sentence day-for-day, and he testified that had he known that fact, he would not have pled. Dean stated he heard "day-for-day" from the

plea court after his plea, but plea counsel did not inform him of this fact prior to that point. As mentioned previously, plea counsel also confirmed Dean's surprise upon hearing he had to serve his sentence day-for-day. Plea counsel stated that during the plea hearing, he did not hear the plea court's first comment that Dean's sentence would be served day-for-day. Plea counsel stressed, "If the [plea court] would have said that at the beginning of the plea[,] *there is no doubt in my mind that the plea would have never taken place.*" (emphasis added).

The PCR court found Dean failed to prove plea counsel gave incorrect advice upon which Dean relied. It also found that even assuming plea counsel misadvised Dean, such advice did not render Dean's plea involuntary because he pled "straight up" with no recommendation or negotiation, and he knew he was facing a potential life sentence. The PCR court reasoned, "It would strain credulity to suggest that if [Dean] had been told that the thirty-year minimum sentence was to be served day[-]for[-]day, that he would not have pled guilty." We note, however, that the PCR court did not make a credibility finding, but only acknowledged it did not agree with Dean's argument that he would have proceeded to trial but for counsel's misadvice.

Notwithstanding the fact that Dean was facing a potential life sentence, the potential penalty does not negate Dean's right to effective assistance of counsel and his right to proceed to trial. Furthermore, if Dean had proceeded to trial and sought a charge of voluntary manslaughter, as he contends he would have, Dean could have faced a shorter sentencing range of only two to thirty years' imprisonment. See S.C. Code. Ann. § 16-3-50 (2003). Then, with a non-murder conviction under "the new law"—section 24-13-125(A)—Dean could be eligible for work release after serving 80% of his sentence.

In light of Dean's and plea counsel's testimonies that Dean would have proceeded to trial if Dean had been aware that he would have to serve his sentence day-for-day, we find the appendix contains no evidence to support the PCR court's ruling that Dean was not prejudiced by counsel's erroneous advice. *Cf. Speaks*, 377 S.C. at 399, 660 S.E.2d at 514 (stating this court will uphold the PCR court's ruling if any evidence of probative value supports it). Dean's testimony and plea counsel's corroboration of that testimony establishes Dean would have proceeded to trial and could have sought a charge for voluntary manslaughter, but for counsel's misinformation. Therefore, we find Dean has satisfied his burden to prove the prejudice prong of the *Strickland* test.

**CONCLUSION**

Based on the foregoing reasoning, the decision of the PCR court is

**REVERSED.**

**THOMAS, KONDUROS, and GEATHERS, JJ., concur.**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal from Horry County  
George C. James, Jr., Circuit Court Judge

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Opinion No. 2015-UP-176 (S.C. Ct. App. filed April 1, 2015)  
Appellate Case No. 2012-212092

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CHARLES RAY DEAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**PETITION FOR REHEARING**

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On April 1, 2015, this Court reversed the post-conviction relief judge's conclusion that Petitioner was not entitled to post-conviction relief. Specifically, this Court found that Petitioner met his burden to show deficient performance and that there was no evidence in the record supporting the PCR judge's ruling that Petitioner was not prejudiced. Respectfully, the State submits that this Court erred in reversing the PCR judge's prejudice determination because it overlooked that this was not a negotiated plea; that Petitioner did not know in advance what his sentence would be; and that Petitioner was not guaranteed a thirty-year sentence. The State submits that upon proper consideration of these facts, this Court should reverse its opinion and uphold the PCR judge's prejudice finding.

In its opinion, this Court found it significant that both Petitioner and plea counsel testified that the guilty plea would not have taken place had Petitioner realized that "his

sentence" (a term this Court used repeatedly throughout its opinion) had to be served day-for-day. However, it was undisputed below and on appeal that Petitioner pled guilty **without** a negotiated sentence and that he was facing a sentence **range** of anywhere from thirty years up to life. Therefore, at the time Petitioner pled - which is undoubtedly the relevant time period - there **was** no "his sentence." Consistent with the "straight-up" plea, the judge could have sentenced Petitioner to thirty years, forty years, fifty years, seventy-five years, or any sentence up to life in prison. According to the record, however, the **only** misconception Petitioner allegedly had regarding the potential sentence was with respect to a thirty-year sentence - which again, he was **not** guaranteed to receive under the terms of his straight-up plea and had no reason to even expect to receive based on the information contained in the record. If Petitioner, at that time, was fine with receiving a day-for-day thirty-**five**-year sentence as a result of his plea - or again, anywhere up to life - why would it make a difference if a thirty-year sentence was day-for-day or not? Petitioner utterly failed to explain this at the PCR hearing. Petitioner and counsel's testimony that Petitioner would not have pled guilty had he known "his sentence" was day-for-day simply did not make logical sense and was not reasonable. This wholly conclusory testimony was clearly tainted by hindsight and by the fact that Petitioner, ultimately, did receive a thirty-year sentence.

Petitioner sought to prove he was relying on a thirty-year sentence at 85% but totally failed to prove he was ever relying on a thirty-year sentence in the first place.<sup>1</sup> Because this logical fallacy negated Petitioner's prejudice argument, the PCR judge properly rejected the argument and found that Petitioner could not credibly establish prejudice. The PCR judge was not required to accept Petitioner and plea counsel's conclusory testimony regarding prejudice at face value and could instead properly evaluate whether or not this testimony

<sup>1</sup> Significantly, there was no testimony in the record that anyone promised Petitioner a thirty-year sentence or that Petitioner was, for any reason, relying on receipt of a thirty-year sentence. In fact, Petitioner never even testified he was *hoping* to receive a thirty-year sentence.

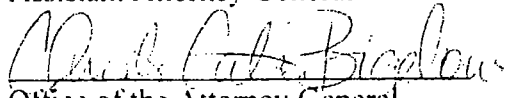
was reasonable considering the non-negotiated nature of Petitioner's plea and considering the obvious taint of hindsight. See Taylor v. State, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) ("To satisfy the prejudice prong, Petitioner must prove, through the presentation of *probative and credible evidence*, that he would have gone to trial instead of pleading guilty but for counsel's deficient advice." (emphasis added & citation omitted)); Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (holding that the "prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial" and adding that a defendant usually needs to explain why and how the particular deficiency would have affected his thought process at the time he entered the plea); see also Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008) (an appellate court gives great deference to the PCR court's findings of fact and conclusions of law).

The portion of this Court's opinion addressing the prejudice prong overlooks the critical facts discussed above. Accordingly, the State requests that this Court reconsider its analysis and issue a new opinion affirming the PCR judge's finding that Petitioner failed to establish prejudice.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

April 5, 2015

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal from Horry County  
George C. James, Jr., Circuit Court Judge

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Opinion No. 2015-UP-176 (S.C. Ct. App. filed April 1, 2015)  
Appellate Case No. 2012-212092

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CHARLES RAY DEAN.

PETITIONER.

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RESPONDENT.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that the State's **Petition for Rehearing** in the above-referenced matter has been served upon **David Alexander**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **8<sup>th</sup>** day of **April, 2015**.

  
CHRISTINA CATOE BIGELOW  
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# The South Carolina Court of Appeals

Charles Ray Dean, Petitioner,

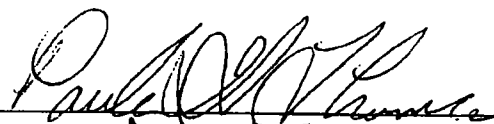
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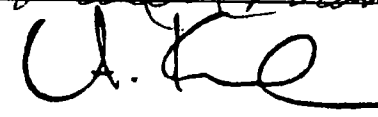
State of South Carolina, Respondent.

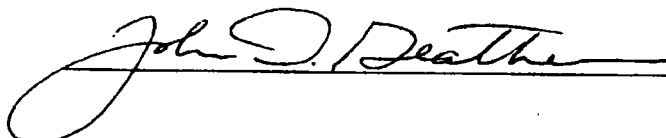
Appellate Case No. 2012-212092

## ORDER

After 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. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

David Alexander, Esquire

Alan McCrory Wilson, Esquire

Christina Catoe Bigelow, Esquire

Melanie Huggins-Ward

**FILED**

May 18, 2015