

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Greenville County  
D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

FREDERICK ALPHONSO IRBY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2011-202767

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APPENDIX

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS

2008-GS-23-2602

2008-GS-23-2701

STATE OF SOUTH CAROLINA,

vs.

TRANSCRIPT OF RECORD

FREDERICK ALPHONSO IRBY,  
DEFENDANT.

**ORIGINAL**

February 9, 2010  
Greenville, South Carolina

B E F O R E:

THE HONORABLE C. VICTOR PYLE, JR., JUDGE.

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

LEIGH B. PAOLETTI, ESQ.  
Assistant Solicitor

H. CHASE HARBIN, ESQ.  
Attorney for the Defendant

HOLLIE M. JENKINS  
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

MS. PAOLETTI: Your Honor, the State calls the case of Frederick A. Irby.

THE CLERK: Step up over here, please.

Your Honor, this is case 2008-GS-23-2701, the State v. Frederick Alphonso Irby. He's indicted and pleading guilty to murder. 2008-GS-23-2602, the State v. Frederick Irby, he's indicted and pleading guilty to armed robbery and possession of a weapon during the commission of a violent crime. He consents to sentencing on this day.

Raise your right hand, please.

WHEREUPON,

FREDERICK ALPHONSO IRBY,

after first having been duly sworn, testified as follows:

THE CLERK: State your full name for the record.

DEFENDANT IRBY: Frederick Alphonso Demetrius Irby.

THE CLERK: Thank you.

THE COURT: You are Frederick Irby?

DEFENDANT IRBY: Yes, sir.

THE COURT: And how old are you, Mr. Irby?

DEFENDANT IRBY: 33.

THE COURT: And how much education do you have?

DEFENDANT IRBY: A little past twelfth grade.

THE COURT: So you know how to read and write?

DEFENDANT IRBY: Correct.

1 THE COURT: And have you ever worked?

2 DEFENDANT IRBY: All my life.

3 THE COURT: And what kind of work do you do, or have  
4 you done?

5 DEFENDANT IRBY: I've done a little bit of  
6 everything, fast-food, warehouse, road construction --

7 THE COURT: Okay. Now, Mr. Harbin is your lawyer?

8 DEFENDANT IRBY: Correct.

9 THE COURT: Have you talked with him as often and for  
10 as long as you feel necessary for him to properly  
11 represent you?

12 DEFENDANT IRBY: Well, we've talked, but not as long  
13 as I think.

14 THE COURT: All right. When you've talked with him,  
15 have you understood your talks with him?

16 DEFENDANT IRBY: A little.

17 THE COURT: Has he done everything for you that you  
18 think he could do for you?

19 DEFENDANT IRBY: I think he could have done a little  
20 more.

21 THE COURT: Well, I need to know if you're satisfied  
22 with his services, or whether you are not satisfied with  
23 his services. You tell me. I mean, are you satisfied  
24 with him?

25 DEFENDANT IRBY: Yes and no. Some parts, he's

1 clarified some things. But like the earlier part, I  
2 didn't think that he really cared about what I was saying  
3 or what I was thinking.

4 THE COURT: All right. Well, are you willing to  
5 plead guilty with him representing you?

6 DEFENDANT IRBY: Only if I'm able to really state my  
7 part of -- well, clear my conscience, so to speak.

8 THE COURT: Well --

9 DEFENDANT IRBY: If I can speak --

10 THE COURT: Oh, yes. Prior to sentencing, I'm going  
11 to give you a right to be heard. Of course, I'll give  
12 that right to you.

13 DEFENDANT IRBY: All right.

14 THE COURT: So, I mean, you want Mr. Harbin to  
15 represent you on this plea; is that correct?

16 DEFENDANT IRBY: Yes, sir.

17 THE COURT: Now, do you understand that the maximum  
18 sentence for murder is life without parole?

19 Do you understand that?

20 DEFENDANT IRBY: Yes.

21 THE COURT: And on the armed robbery, it's 30 years.  
22 And five years on the weapons charge.

23 Do you understand those are the maximum sentences?

24 DEFENDANT IRBY: Correct.

25 THE COURT: Is that correct?

1           DEFENDANT IRBY: (Defendant Irby nodded.)

2           THE COURT: Now, I understand that, although the  
3 State cannot recommend, it has no objection to you  
4 receiving a 30-year sentence in consideration of your  
5 pleading guilty.

6           Do you understand that?

7           DEFENDANT IRBY: Yes, sir.

8           THE COURT: And I further understand that the State  
9 has no objection to running the other sentences concurrent  
10 to the murder sentence.

11          Do you understand that?

12          DEFENDANT IRBY: What do you mean?

13          THE COURT: The sentence for armed robbery and the  
14 sentence for the weapons charge would run concurrent to  
15 the murder charge. It would not be consecutive.

16          Do you understand that?

17          MR. HARBIN: It would not add time. It would go at  
18 the same time.

19          DEFENDANT IRBY: Oh, okay.

20          MR. HARBIN: So it would not effect your max out.

21          DEFENDANT IRBY: Okay.

22          THE COURT: Do you understand that?

23          DEFENDANT IRBY: Yes.

24          THE COURT: And you're still willing to plead guilty?

25          DEFENDANT IRBY: All right.

1 THE COURT: Now, you don't have to plead guilty.  
2 You've got a perfect right to stand trial by jury.

3 Do you know that?

4 DEFENDANT IRBY: Yes, I do.

5 But I don't know. My family thinks differently.  
6 Everybody else seems to think differently.

7 THE COURT: Well, I need for you to understand that  
8 if you stood trial by a jury, your lawyer could  
9 cross-examine all the witnesses who testified against you.  
10 You wouldn't have to take the stand and testify or present  
11 evidence. Because that's your Constitutional right. The  
12 burden would be on the State to prove you guilty beyond a  
13 reasonable doubt.

14 Do you understand that?

15 DEFENDANT IRBY: Yes, sir.

16 THE COURT: And do you understand that you give up  
17 all those rights when you plead guilty?

18 Do you understand that?

19 DEFENDANT IRBY: Would I ever be able to come back to  
20 appeal it or whatnot?

21 THE COURT: That's correct.

22 In other words, what I'm telling you right now, if  
23 you plead guilty, then your plea is going to constitute a  
24 waiver of all non-jurisdictional defects or defenses,  
25 including any claim you might have for a violation of your

1 Constitutional rights. And it's going to dispose of all  
2 issues -- any later claim of depravation of your  
3 Constitutional rights. This is going to end it.

4 Do you understand that?

5 You can appeal. You've got a right to do that. But  
6 your plea is going to waive all those rights.

7 Do you understand that?

8 DEFENDANT IRBY: Okay. I didn't know that.

9 THE COURT: Well, I'm telling you.

10 And so the question is, do you want to plead guilty?

11 DEFENDANT IRBY: No.

12 THE COURT: All right. We'll give you a jury trial.

13 Mr. Harbin, do you have a list of your witnesses?

14 MR. HARBIN: Judge, we do not anticipate calling any  
15 witnesses, perhaps the Defendant.

16 THE COURT: All right. That's fine.

17 Bring the jury panel up and clear the courtroom while  
18 we select the jury.

19 (WHEREUPON, a brief break was taken.)

20 MR. HARBIN: Judge, if it pleases the Court, can I  
21 have a moment to explain the appeal?

22 He does not understand that. And I did not  
23 sufficiently go over that with him, Judge.

24 THE COURT: All right.

25 (Pause.)

1 MR. HARBIN: Judge, with your permission, I think  
2 we're going to try it again.

3 THE COURT: All right. Come around here.

4 Now, Mr. Irby --

5 DEFENDANT IRBY: I apologize about that.

6 THE COURT: Don't worry about that.

7 I understand now that you wish to go ahead and  
8 proceed with pleading guilty to these offenses; is that  
9 correct?

10 DEFENDANT IRBY: Correct.

11 THE COURT: Now, you've told me that, although you  
12 may have some complaints about your lawyer, you want to  
13 keep him for this guilty plea; is that correct?

14 DEFENDANT IRBY: Correct.

15 THE COURT: Now, insofar as this case is concerned,  
16 do you have any complaint to make against the Solicitor's  
17 Office, law enforcement officers, or anyone else?

18 DEFENDANT IRBY: I'll keep to myself, if you don't  
19 mind.

20 THE COURT: Insofar as they're concerned, you don't  
21 have any complaint to make against them; is that correct?

22 DEFENDANT IRBY: I'll keep to myself, if you don't  
23 mind?

24 THE COURT: Sir?

25 DEFENDANT IRBY: I'll keep to myself, if you don't

1 mind.

2 THE COURT: No, sir.

3 I need for you to answer whether you have any  
4 complaint to make against the Solicitor's Office, if you  
5 have any complaint to make against law enforcement  
6 officers insofar as this case is concerned.

7 MR. HARBIN: He's asking about their conduct.

8 Do you think they've done anything illegal or  
9 improper? Do you have specific knowledge that someone has  
10 done something improper?

11 DEFENDANT IRBY: I stand here because I can't go by  
12 hunches. Hunches don't really count.

13 THE COURT: Sir?

14 DEFENDANT IRBY: I said what I said because I can't  
15 go by hunches. Hunches don't really count.

16 A lot of the things I thought were not done properly,  
17 but -- or done within the time frame that they were  
18 supposed to have been done, or even that they may have  
19 held back information that I requested numerous times.

20 THE COURT: All right. With that, are you still  
21 willing to plead guilty?

22 DEFENDANT IRBY: On behalf of my family, I will.

23 THE COURT: Sir?

24 DEFENDANT IRBY: On behalf of my family, I will.

25 THE COURT: I need to know. Are -- you, personally,

1 are you willing to plead guilty to these offenses?

2 DEFENDANT IRBY: I will, sir.

3 THE COURT: Now, has anyone used any force or made  
4 any threats against you in order to get you to plead  
5 guilty?

6 DEFENDANT IRBY: No, sir.

7 THE COURT: Has anybody -- other than what I  
8 discussed with you further concerning sentencing, has  
9 anybody promised you a lighter sentence for pleading  
10 guilty?

11 DEFENDANT IRBY: No, sir.

12 THE COURT: So you are pleading guilty voluntarily,  
13 that is, of your own free will?

14 DEFENDANT IRBY: Yes, sir.

15 THE COURT: Now, are you under the influence of any  
16 alcohol, drug, or any other substance right at this  
17 moment?

18 DEFENDANT IRBY: No, sir.

19 THE COURT: You're sober?

20 DEFENDANT IRBY: Sober.

21 THE COURT: You know what you're doing?

22 DEFENDANT IRBY: Yes, sir.

23 THE COURT: And you want to plead guilty?

24 DEFENDANT IRBY: Yes, sir.

25 THE COURT: All right. Solicitor, tell me what the

1 State would prove, if you went to trial.

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

3 May it please the Court.

4 Rico Carter was shot once in the back of the head on  
5 January 31st, 2006, on Deering Street within Greenville  
6 County. This case was, originally, investigated by Wes  
7 Smith with the Sheriff's Office. His investigation  
8 yielded no leads originally -- or no suspects originally.  
9 And no warrants were obtained at the time of the murder.

10 About a year and a half later, Joe Wood with the cold  
11 case unit of Greenville County got a phone call from one  
12 of the witnesses that we would anticipate testifying  
13 today, Russell Anderson. His mother told Investigator  
14 Wood that he had information about the murder of Rico  
15 Carter and was willing to give that information.

16 Mr. Anderson, eventually, did come to the law  
17 enforcement center and gave a statement to police  
18 indicating that Mr. Irby and a co-defendant, who was,  
19 also, charged after these statements were obtained, a  
20 Vernon Lee Hurst, were at Mr. Anderson's house, left to go  
21 over to the address where Rico Carter was  
22 killed, and then returned back to his house. Mr. Anderson  
23 would, also, testify that in conversations with this  
24 Defendant, he told -- this Defendant told Mr. Anderson  
25 that he had killed Rico Carter.

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1           Additionally, Your Honor, we have a few more -- we  
2           have some letters that this Defendant has written to the  
3           co-defendant while they were both in jail. We've done a  
4           handwriting analysis on those to confirm that they are  
5           Mr. Irby's handwriting. Those are somewhat incriminating.  
6           I know he takes exception to how incriminating they may be  
7           if we had presented them as evidence in this case.

8           And, finally, Your Honor, the evidence is that the  
9           victim was shot with a .38 caliber weapon. There is a  
10          witness who is here and prepared to testify that Mr. Irby  
11          sold him a .38 caliber weapon about a month after Rico  
12          Carter was killed. And that would be the State's case at  
13          trial.

14          THE COURT: Okay. Now, Mr. Irby, you've heard the  
15          facts related to me. Is that what happened?

16          DEFENDANT IRBY: What she said?

17          THE COURT: Sir?

18          DEFENDANT IRBY: Not exactly, but I'll agree with it.

19          MR. HARBIN: Judge, I've had a discussion with him  
20          about the concept of the hand of one is the hand of all.  
21          His details would not match those given by the Solicitor's  
22          Office, although the substance of the facts would lead to  
23          what I would consider a jury verdict of guilty for murder  
24          as a participant, armed robbery, and possession of a  
25          weapon during the commission of a violent crime under the

1 theory of the hand of one is the hand of all. I've  
2 explained that to him, and he's comfortable with that.

3 THE COURT: Mr. Irby, do I understand that but for  
4 the fact that you differ that you were the shooter,  
5 everything else that I've been told is true? I mean, you  
6 were there?

7 DEFENDANT IRBY: Yes, sir.

8 THE COURT: And you were aiding and abetting in  
9 whatever occurred there that night?

10 DEFENDANT IRBY: Yes, sir.

11 THE COURT: Is that correct?

12 DEFENDANT IRBY: Yes, sir.

13 THE COURT: Your only disagreement is that the other  
14 fellow was the shooter and not you. Is that what you're  
15 telling me?

16 DEFENDANT IRBY: Correct.

17 MS. PAOLETTI: And, Your Honor, just for the record,  
18 that is not what the State would anticipate proving at  
19 trial. And we take exception to that. I understand  
20 Mr. Irby's position today. But the State's theory is that  
21 Mr. Irby was the shooter.

22 THE COURT: I understand.

23 I will accept the plea as being voluntarily made and  
24 as having a substantial factual basis.

25 All right. Mr. Harbin.

1 MR. HARBIN: Thank you, Judge.

2 May it please the Court.

3 My client is 33 years old. I've had the opportunity  
4 to meet not only him but his family, who is here. That is  
5 his mother and his uncle, Reverend Irby. And this is his  
6 sister. They're all here in support of him. I believe it  
7 says a lot when you can come to somebody's hearing knowing  
8 that they're going to get a substantial amount of time.  
9 They know that this means that he's not coming home for  
10 Christmas anytime soon.

11 As you can see just from this mornings plea -- or  
12 attempted plea earlier, my client is -- he's emotional.  
13 He knows these folks that he was involved with in this  
14 crime. I think at one time or another, he considered them  
15 friends. I believe he knew of the victim before. I mean,  
16 this wasn't a stranger at all.

17 He understands what the State's case would be. And I  
18 agree with his decision to plead guilty. I appreciate the  
19 Solicitor's Office and their patience with this case. And  
20 they're not objecting to our request for a minimum  
21 sentence in this case. The offer, originally, was  
22 manslaughter sometime ago. It was not taken, and here we  
23 are today.

24 Judge, in my discussions with Mr. Irby -- and his  
25 concern, of course, is that he's already 33. He's doing

1 the math and how old he's going to be when he gets out,  
2 even if he gets a minimum sentence. He's concerned for  
3 his family, that nobody is going to be there to support  
4 his family, take care of his family.

5 I asked him, you know, as you did, what he did for a  
6 living. He said he's been working since he was able to  
7 work. He's always worked. He's always earned money and  
8 paid his own way. And he's concerned that that's not  
9 going to be there for his family when he gets out.  
10 Obviously, he's already missed a couple of years of that  
11 now. He's concerned for their safety as well. Part of  
12 the details, he doesn't agree with. He's kind of  
13 explained that to the Court, but I don't know that we need  
14 to get entirely into that.

15 Judge, I would encourage you to -- I would ask, on  
16 behalf of my client, for you to consider giving him the  
17 minimum sentence. I understand what the State alleges. I  
18 understand that someone is deceased. And there's no  
19 excuse for that ever. However, my client, I believe, has  
20 the ability to make something of himself, even if that is  
21 in the Department of Corrections for sometime. I believe  
22 he has the wherewithal and the will to, actually, make  
23 that happen.

24 I know this is a very, very difficult decision for  
25 him, Judge. And I hope you don't hold that against him

1 too much. It's a very difficult thing to volunteer  
2 yourself into the Department of Corrections. And I told  
3 him that as much as I can imagine that, I understand it.  
4 But he is here today. And he has, ultimately, made that  
5 decision, Judge. I ask you to take that into  
6 consideration. And, of course, he has asked to make a  
7 short statement as well, Judge.

8 THE COURT: Now, Mr. Irby, do you have anything else  
9 you would like to tell me, other than what you've said  
10 earlier, before I sentence you?

11 DEFENDANT IRBY: No. I'm all right.

12 THE COURT: Now, do you understand, Mr. Irby, when I  
13 was trying to explain to you that by pleading guilty, you  
14 give up all your rights. You've got a perfect right to  
15 appeal. Don't misunderstand me. You've got to file a  
16 Notice of Intent to Appeal within 10 days if you want to  
17 appeal your guilty plea.

18 Now, should you, on appeal, get a reversal and come  
19 back for a new trial, then you're starting over from  
20 scratch. There are no deals, nothing. It's going to be a  
21 trial.

22 Do you understand that? You'll be facing a life  
23 sentence.

24 Do you understand that?

25 DEFENDANT IRBY: (Defendant Irby nodded.)

1 THE COURT: Sir?

2 DEFENDANT IRBY: Yes, sir.

3 THE COURT: All right.

4 MS. PAOLETTI: Your Honor, the victim's mother,  
5 Patricia Carter, would like to address you at the  
6 appropriate time.

7 THE COURT: Sure.

8 MS. PAOLETTI: Ms. Carter, if you'll just say your  
9 name for the record.

10 THE COURT: What's your name -- Ms. Carter, you can  
11 come around and stand beside the Solicitor.

12 Give us your name, please, ma'am.

13 MS. PATRICIA CARTER: Patricia E. Carter.

14 THE COURT: Yes, Ms. Carter.

15 MS. PATRICIA CARTER: Yes, sir, Your Honor.

16 I would like to say that, on behalf of me and my  
17 family, that Rico is dearly missed. Now, even though it  
18 was a drug transaction -- I understand that -- that still  
19 does not give him the right to take my son's life.

20 I was telling Lee the other day I can remember my mom  
21 was sick and she died with cancer. And so her request was  
22 to come home to die. And Rico was real fond of his mom --  
23 I mean, of my mom. And every day, he would go by her  
24 bedside and sit down and rub her hand, and rub her hair,  
25 and just make sure that she was okay, that she was in

1        comfort. And that's the type of person that he was.

2                My son has two children. And one of them is his  
3 daughter, which is the oldest. And Rico was so loving and  
4 so caring of his child. I went to visit him one day. And  
5 my son never washed no dishes, you know. He never washed  
6 dishes. But he was in the kitchen washing dishes. When  
7 that baby was sick, he would get up with her in the middle  
8 of the night. She'll never have that anymore. He loved  
9 that baby. Deidre didn't have to really do anything.

10               His son was born shortly after his death. He will  
11 never see his son. And so he'll never know what type of  
12 dad he had.

13               As you can see, I have a room full of people with me,  
14 you know. These are his friends, his family. And we all  
15 miss him.

16               Mr. Irby has never once said that he was sorry, you  
17 know. And even though he's standing here, his mom, she  
18 can hold her son. I can never hold my son again. I miss  
19 him so much.

20               And so, Your Honor, I am asking you, on behalf of me  
21 and my family, that you give him the maximum sentence.  
22 And he is -- I know he's willing to cop a plea. But, you  
23 know, he'll never -- I can never get back what I've lost.  
24 And no mother should ever have to bury her child. And no  
25 kid should ever have to be without their father. And this

1 is what he's done. This is what has happened to me and my  
2 family. And I just want you to hear me and my plea.

3 THE COURT: Thank you very much.

4 MS. PATRICIA CARTER: Thank you.

5 MR. HARBIN: Judge, I neglected to ask permission for  
6 my client's family to address --

7 THE COURT: I don't need to hear from them.

8 Thank you.

9 MR. HARBIN: Yes, sir.

10 Judge, I've advised my client not to say anything  
11 further, but I feel it is my duty to tell you that he  
12 wants to speak.

13 THE COURT: Sure.

14 Go right ahead, sir.

15 DEFENDANT IRBY: May I address Ms. Carter, the woman  
16 that was just standing here?

17 THE COURT: Yes.

18 DEFENDANT IRBY: Ms. Carter --

19 MS. PATRICIA CARTER: Yes.

20 DEFENDANT IRBY: -- you knew me when I was young, me  
21 and my brother. Now, like I just said, I'm only going  
22 along with this because they say I knew something of this.  
23 I am sorry because I withheld information. For that, I'm  
24 very sorry. I can never do anything to make it up.

25 As you know, I lost my brother at an early age, too.

1        So can I feel your pain? Yes, I can. He was not my son,  
2        my brother, but he was closer to me than anybody else,  
3        even my own momma. My brother, he was closer to me than  
4        even my mom.

5                So, out of anything, I apologize because I knew and I  
6        didn't say anything. I was -- as you said, I copped out.  
7        I was fearful because of other circumstances. And for  
8        what it's worth, I do apologize. I know that you will  
9        never forgive me for even knowing and not saying anything.  
10       I know you will never forgive me -- well, won't forgive  
11       me. But I do want you to know that I am very dearly sorry  
12       that I even knew and that I never said anything, that I  
13       didn't -- I mean, if I would have had enough power, I  
14       would have tried to stop it. And I just want you to know  
15       that.

16               He wants me to stop so I'm going to stop. But I just  
17       want you to know that from the deepest of my heart -- just  
18       because I know what it feels like to lose a loved one.  
19       Some of those people sitting behind you right now, they  
20       grew up with my brother, too. They knew how he was. Your  
21       son, I can't say I knew him that good because he and my  
22       brother, they were friends. But I do remember him running  
23       around as a kid with my brother.

24               So, yes, I'm sorry. I know how it feels to lose  
25       somebody close to you. And if you can, maybe one day you

1 can find it in your heart to forgive me just because of  
2 holding back. Anybody else -- the rest of the people -- I  
3 know there's one in your group right now, and I know they  
4 hate me, but it's okay.

5 MR. HARBIN: Thank you, Judge.

6 DEFENDANT IRBY: And I'm sorry, for what it's worth.

7 MR. HARBIN: Thank you, Judge.

8 THE COURT: All right. Now, Mr. Irby, the sentence  
9 that I am now imposing, I'm doing so because of your  
10 pleading guilty. You're admitting that you were there  
11 aiding and abetting in the commission of this crime,  
12 although you deny that you were the shooter. I'm further  
13 taking into consideration that by pleading guilty, you're  
14 saving the victims -- the family of the victim in this  
15 case the ordeal of going through a lengthy trial. You're,  
16 also, hopefully, avoiding the possibility that they may  
17 have to come back years from now and retry this case.

18 So that's the basis on which I am imposing a sentence  
19 of 30 years on the murder, 25 years concurrent on the  
20 armed robbery, and five years concurrent on the weapons  
21 charge. The statute allows you credit for the time that  
22 you've been in jail.

23 And do you know the number of days that I can --

24 MS. PAOLETTI: I don't, Your Honor. The date would  
25 be credit since 10-23-07.

1 THE COURT: 10-23-07?

2 MS. PAOLETTI: Yes, sir.

3 MR. HARBIN: Judge, I have expressed to my client  
4 that I will check the jail records, because he believes it  
5 to be 10-16.

6 DEFENDANT IRBY: It was.

7 MR. HARBIN: But I'll check on it myself to verify --

8 THE COURT: Do what?

9 MR. HARBIN: His admission date, he believes it to be  
10 10-16. So with the Court's permission, I'll check on that  
11 and bring it back to you.

12 THE COURT: Okay. That's fine.

13 DEFENDANT IRBY: May I make one more comment to the  
14 family one more time?

15 THE OFFICER: No. It's time to go.

16 THE COURT: I don't think so, Mr. Irby. I don't  
17 think anything will be gained.

18 DEFENDANT IRBY: I just wanted to speak to his family  
19 one more time.

20 THE COURT: Thank you.

21 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*  
22  
23  
24  
25

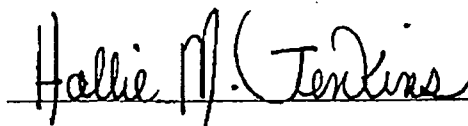
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA           )  
COUNTY OF GREENVILLE           )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 9th day of February, 2010.

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

July 26, 2010



Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

## FORM 5

STATE OF SOUTH CAROLINA )

County of Greenville )

IN THE COURT OF COMMON PLEAS

**RECEIVED**Frederick A.D. Ivy # 339195 )

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

v. )

State of South Carolina )

APR 29 2010

BROOK  
MAILROOM  
APPLICATION FOR

POST-CONVICTION RELIEF

2010-CP-23-

4330

**INSTRUCTIONS B READ CAREFULLY**

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

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

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

1. Place of detention Broad River Correctional Institute
2. Name and location of Court which imposed sentence Greenville County Courthouse
3. Name(s) of co-defendant(s) (if any) Rasool Anderson, Vernon L. Hurst, Darius Davis
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) N/A

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Feb 9, 2010
- (b) N/A
- (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?  
Counsel never explained that I may appeal
8. If you answered Ayes@ 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 Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) No ~~black~~ evidence to connect me to crime
- (b) Ineffective Assistant Counsel
- (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) letter from Cpt J.F. Kellet of Forensic Division 467-5398 <sup>864</sup>
- (b) Counsel failed to do a proper investigation of the facts
- (c) and the law
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 Ayes@ 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? Chase Harbin
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? \_\_\_\_\_
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? \_\_\_\_\_
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Chase Harbin - 103 North Main St Suite 304-B  
Bergamo Building Greenville, SC 29601
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
- i. Plea/Trial
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

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

Reverse and remand for new trial or vacate and set aside judgement of conviction and sentence to 30yrs.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA )

County of Greenville )

VERIFICATION

I, Frederick A.D. Irby, 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.

Frederick A.D. Irby

SWORN to and subscribed before me this 29  
day of April, 2010.

Eugene Beatty (L.S.)  
Notary Public

My Commission Expires April 4, 2018

My Commission Expires: \_\_\_\_\_

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

I, x Frederick A.D. Irby, 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.

Frederick A.D. Irby  
Applicant

SWORN or affirmed to and subscribed before me this  
29 day of April, 2010.

Eugene Keith  
Notary Public  
My Commission Expires April 4, 2016

My Commission Expires: \_\_\_\_\_

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS |
|                          | ) | C.A. No. 2010-CP-23-4330     |
| COUNTY OF GREENVILLE     | ) |                              |
|                          | ) |                              |
| Frederick Alphonso Irby, | ) |                              |
| S.C.D.C. No. 339195,     | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) | <b>RETURN</b>                |
| v.                       | ) |                              |
|                          | ) |                              |
| State of South Carolina, | ) |                              |
|                          | ) |                              |
| Respondent.              | ) |                              |
| _____                    | ) |                              |

In response to the post-conviction relief application filed May 25, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant for armed robbery (2008-GS-23-2602, count 1), possession of a weapon during commission of a violent crime (2008-GS-23-2602, count 2), and murder (2008-GS-23-2701)). H. Chase Harbin, Esquire represented the Applicant.

On February 9, 2010, the Applicant pled guilty.<sup>1</sup> The Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five (25) years for armed robbery, five (5) years for possession of a weapon during commission of a violent crime, and thirty (30) years for murder. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville

---

<sup>1</sup> The State dismissed several pending charges.

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel:
  - a. Failure to investigate.
2. "No evidence to connect me to crime."

III.

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

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

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

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

#### IV.

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

#### V.

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

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Attorney General

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

By: Mary L. Williams for  
Attorneys for Respondent

September 15, 2010

|                                 |   |                              |
|---------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA         | ) |                              |
|                                 | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE            | ) |                              |
|                                 | ) |                              |
|                                 | ) | 2010-CP-23-4330              |
|                                 | ) |                              |
| FREDERICK ALPHONSO IRBY, 339195 | ) |                              |
|                                 | ) |                              |
| Applicant,                      | ) |                              |
|                                 | ) |                              |
| vs                              | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                                 | ) |                              |
| STATE OF SOUTH CAROLINA,        | ) |                              |
|                                 | ) |                              |
| Respondent.                     | ) |                              |
|                                 | ) |                              |

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

Frederick Alphonso Irby, 339195  
 Broad River Correctional Institution  
 4460 Broad River Road  
 Columbia SC 29210

DATED this 15th day of September, 2010.

  
 Judy A. Carey, Legal Assistant  
 For Respondent

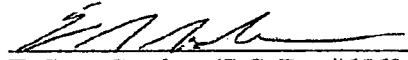
Respondent.

)
)
)
)
)
)
)
)
)

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

(a) The Applicant was provided with deficient representation by his attorney(s), in that the conduct of his attorneys was objectively unreasonable under the circumstances, as required by *Strickland v. Washington*, 466 U.S. 668 (1984). Applicant's representation was deficient in one or more of the following particulars:

- (1) Defense attorney(s) failed to adequately investigate the evidence that would be used against Applicant at Trial;
- (2) Defense attorney(s) failed to gather evidence essential to the defense of Applicant's case;
- (3) Defense attorney(s) failed to adequately advise the Applicant of the strengths and weaknesses of the State's case against him;
- (4) Defense attorney(s) failed to provide Applicant with copies of statements that were made against him;
- (5) Defense attorney(s) failed to keep applicant informed of the status of the defense of his case;
- (6) Defense attorney(s) failed to advise the Applicant of the possible defenses he could make to the State's case;
- (7) Defense attorney(s) failed to make any challenges to evidence that the State planned to use against Applicant;
- (8) Defense attorney(s) failed to negotiate a plea that was consistent with the circumstantial evidence the State had against Applicant and the credibility of the witness who were going to testify against Applicant; and
- (9) Defense attorney(s) failed to adequately explain to Applicant his rights to an Appeal.



---

E. Scott Sanders (S.C. Bar #65634)  
E. SCOTT SANDERS, LLC  
1151 E. Washington Street  
Greenville, SC 29601  
(864) 242-0900  
Attorney for Applicant

Greenville, S.C.  
July 24, 2011

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF GREENVILLE ) C.A. No.: 2010-CP-23-4330

Frederick Alphonso Irby, 339195, )

Applicant, )

v. )

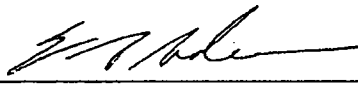
State of South Carolina, )

Respondent. )

**CERTIFICATE OF SERVICE**  
 (Post-Conviction Relief)

This is to certify that on this 24<sup>th</sup> day of July, 2011, I served Applicant's Notice of Motion and Motion to Amend the Pleadings in the above-captioned matter upon attorney for Respondent by depositing a copy of the same in the United States Mail, with sufficient postage attached thereto, addressed as follows:

Karen C. Ratigan  
 Office of the Attorney General  
 P.O. Box 11549  
 Columbia, SC 29211-1549

  
 E. Scott Sanders (#65634)  
 Attorney for Applicant

Greenville, SC

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS  
2010-CP-23-04330

FREDERICK ALPHONSO IRBY,  
APPLICANT,

vs.

TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA,  
RESPONDENT.

**ORIGINAL**

August 2, 2011  
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE.

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

EDWARD S. SANDERS, ESQ.  
Attorney for the Applicant

KAREN C. RATIGAN, ESQ.  
Assistant Attorney General

HOLLIE M. JENKINS  
Circuit Court Reporter

I N D E X

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

Page No.(AW) FREDERICK ALPHONSO IRBY:

Direct Examination by Mr. Sanders.....7  
Cross-Examination by Ms. Ratigan.....31

(AW) HUNTER CHASE HARBIN:

Direct Examination by Mr. Sanders.....35  
Cross-Examination by Ms. Ratigan.....48

INDEX (CONTINUED)E X H I B I T S

| <u>NO.</u> | <u>DESCRIPTION</u>     | <u>ID.</u> | <u>EVD.</u> |
|------------|------------------------|------------|-------------|
|            | (Applicant's Exhibits) |            |             |
| A-1        | Inmate Visits Log..... | 9.....     | 34          |
| A-2        | Undated Letter.....    | 12.....    | 14          |
| A-3        | Statements.....        | 14.....    | 53          |
| A-4        | Various Documents..... | 29.....    | 29          |

All Exhibits were retained by the Clerk of Court for Greenville County.

P R O C E E D I N G S

THE COURT: This is Frederick Irby v. the State of South Carolina, 2010-CP-23-04330. Mr. Irby is here with his lawyer, Mr. Edward Sanders.

Ms. Ratigan.

MS. RATIGAN: Thank you, Your Honor.

May it please the Court.

This is the case of Irby v. State. He was indicted for armed robbery, possession of a weapon during the commission of a violent crime, and murder. He was represented on these charges by Mr. Harbin. On February 9th, 2010, he pled guilty. Several charges were dismissed as a result of that plea. Judge Pyle levied concurrent sentences of 25 years for armed robbery, five years for the weapons charge, and 30 years for murder. He did not file an appeal.

The State is ready to proceed. I would note, for Your Honor's information, we have several members of the victim's family here to observe today.

And I would, also, note that there have been a couple amendments to the application that have been filed since I filed my return. And I don't have an objection to any of those.

THE COURT: Thank you.

Mr. Sanders.

1 MR. SANDERS: May it please the Court.

2 Your Honor, I'm Edward Scott Sanders. I go by Scott  
3 Sanders. And I was appointed to represent Mr. Irby in his  
4 PCR application. We did make a motion to -- basically, he  
5 had already alleged in his application ineffective  
6 assistance. And, you know, after talking to him and  
7 looking at the documentation, we just, basically, wanted  
8 to specify what those specific complaints he had regarding  
9 the representation.

10 So, without objection, we would just like that to be  
11 added to the -- to his original petition.

12 THE COURT: Okay, sir. It's allowed.

13 MR. SANDERS: I'm just going to make just an initial  
14 opening statement --

15 THE COURT: Yes. Go right ahead.

16 MR. SANDERS: -- just to -- basically, under the case  
17 of Kolle v. State, a Supreme Court case that was decided  
18 on February 16th, 2010. It states that a defendant has  
19 the right to effective assistance of counsel under the  
20 Sixth Amendment of the United States Constitution. In a  
21 PCR proceeding, the Applicant bears the burden of  
22 establishing that he or she is entitled to the relief.

23 It goes on to further state that a Defendant who  
24 enters a plea on the advice of counsel may only attack the  
25 voluntary and intelligent character of the plea by showing

1       that counsel's representation fell below an objective  
2       standard of reasonableness, and that there's a reasonable  
3       probability that but for counsel's errors, the Defendant  
4       would not have pled guilty, but would have insisted on  
5       going to trial.

6               Then it goes on to further state, In determining  
7       guilty plea issues, it is proper to consider the guilty  
8       plea transcript, as well as evidence at the PCR hearing.  
9       Specifically, the voluntariness of the guilty plea is not  
10      determined by an examination of a specific inquiry made by  
11      the sentencing judge alone, but it is determined from both  
12      the record made at the time of the entry of the guilty  
13      plea and, also, from the record of the PCR hearing.

14             And then it just says, The long-standing test for  
15      determining the validity of a guilty plea is whether the  
16      plea represents a voluntary and intelligent choice among  
17      the alternative courses of action open to the Defendant.

18             And, basically, what we will be showing today is that  
19      Mr. Irby did not have enough information to make a  
20      voluntary and intelligent decision to plead guilty.

21             The first witness I would like to call is Frederick  
22      Irby.

23             THE CLERK: Mr. Irby, step around here to the stand.

24             Please place your left hand on the Bible and raise  
25      your right hand.

1 WHEREUPON,

2 FREDERICK ALPHONSO IRBY,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 Please be seated.

6 State your full name for the record.

7 THE WITNESS: Frederick Alphonso Demetrius Irby.

8 DIRECT EXAMINATION

9 BY MR. SANDERS:

10 Q Mr. Irby, how old are you?

11 A 35.

12 Q And, prior to your arrest in 2007 for the charges  
13 that you pled guilty for, were you employed at that time?

14 A Yes, I was.

15 Q Were you full-time employed?

16 A Just about. I was going to be full-time as of that  
17 day.

18 Q Okay. How about in January of 2006, when the events  
19 surrounding Rico Carter's death took place, were you  
20 employed at that time?

21 A I was employed.

22 Q In February of 2010, you pled guilty to murder, armed  
23 robbery, and possession of a weapon during a violent  
24 crime; is that correct?

25 A Correct.

1 Q And who represented you at the time of your guilty  
2 plea?

3 A Chase Harbin.

4 Q Okay. And then in -- later in 2010, you filed this  
5 application for PCR alleging that you were denied the  
6 effective assistance of counsel as required by the U.S.  
7 and the South Carolina Constitution; is that right?

8 A Correct.

9 Q Now, Mr. Irby, you understand that if you are  
10 successful in this application, then the State could try  
11 you for murder. Are you aware of that?

12 A I'm aware of it now.

13 Q And they could seek the maximum sentence allowed by  
14 law under that statute, which could include up to life in  
15 prison. Are you aware of that?

16 A I'm aware of it.

17 Q And I guess if the State decided they wanted to seek  
18 the death penalty, that would be a possibility as well?

19 A All right.

20 Q Now, being aware of that, do you still want to  
21 proceed with your application --

22 A I still want to proceed.

23 Q Okay. Now, you were originally represented by Bill  
24 Godfrey; is that correct?

25 A Correct.

1 Q Okay. And I'm going to show you --

2 MR. SANDERS: If I could have this marked as  
3 Applicant's Exhibit No. 1.

4 (WHEREUPON, Applicant's Exhibit No. 1 was marked for  
5 identification only.)

6 BY MR. SANDERS:

7 Q I'm going to show you what is marked as Applicant's  
8 Exhibit No. 1. And do you recognize that document?

9 A Yes, I do.

10 Q And is that a document that you provided to me?

11 A Yes, it is.

12 Q And where did you get that document?

13 A From the Greenville County Detention Center from the  
14 records center.

15 Q And what is that document?

16 A It's a visitation log of all the visits I had while I  
17 was in Greenville County.

18 MR. SANDERS: Okay. And I would like to have  
19 Applicant's Exhibit No. 1 entered into evidence.

20 MS. RATIGAN: We'd object, Your Honor.

21 It does show on the second page -- on the first page,  
22 it says, "Certified Copy." And it's not dated. On the  
23 second page, there appears to be a date. But we would  
24 argue it's not properly admitted under Mr. Irby.

25 THE COURT: May I see the document?

1 THE WITNESS: I do have an original.

2 MR. SANDERS: Mr. Irby does, I think, have the  
3 original copy -- certified copy that he received from the  
4 detention center.

5 MS. RATIGAN: And we would just argue, Your Honor,  
6 that this would properly come in under the -- from the  
7 records custodian of the detention center, and not  
8 Mr. Irby.

9 (Pause.)

10 MS. RATIGAN: Your Honor, in the interest of moving  
11 things along, it's possible that some of this could be  
12 elicited from Mr. Harbin when he testifies. So I don't  
13 know if this would even be relevant to come in as a  
14 document, if this can be developed from Mr. Harbin's  
15 testimony.

16 THE COURT: You say you've got the original?

17 THE WITNESS: Yes, sir.

18 THE COURT: Thank you.

19 All right. Well, I'll reserve ruling on that.

20 You can go ahead.

21 MR. SANDERS: Okay, Your Honor. That's fine.

22 BY MR. SANDERS:

23 Q Mr. Irby, do you remember approximately when you were  
24 arrested for the crimes that you pled guilty to?

25 A The date?

1 Q Yeah, the approximate date that you were arrested..

2 A October 23rd, 2007.

3 Q Okay. And did you -- did -- Mr. Godfrey, your  
4 initial attorney, did he visit you?

5 A One time, November the 9th, I think, of '07.

6 Q Okay. Did he ever visit you after that?

7 A I think they said he came down with like some kind of  
8 a sickness or something, so. And then a few months later  
9 is when I found out that he had been replaced by Chase  
10 Harbin.

11 Q Okay. Did Mr. Godfrey ever provide you with any  
12 discovery material or --

13 A To a certain set of charges, but not to this one.

14 Q Okay. And you testified that you believed that he  
15 got sick and was replaced by Mr. Harbin?

16 A That's what I was told.

17 Q Do you know approximately when this was?

18 A The sickness, I don't know when that took place. But  
19 I heard about the switch over happening sometime during  
20 June of '08.

21 Q Okay. And did Mr. Harbin visit you after June  
22 of '08?

23 A After.

24 Q Okay. Do you remember approximately when the first  
25 time was he visited you?

1       A     My -- the day of my first anniversary in the county  
2       jail, October 23rd, 2008.

3       Q     Okay. So you had, basically, been incarcerated for  
4       about a year before your first meeting with Mr. Harbin?

5       A     Yes, sir.

6       Q     Do you know about approximately how long that meeting  
7       lasted?

8       A     If I'm correct, I think it might have been about 30  
9       minutes.

10      Q     Okay. Do you remember anything that -- the  
11      discussions -- anything about the discussions that took  
12      place between you and Mr. Harbin during that meeting?

13      A     No. It was, basically, just an introduction.

14      Q     Okay. Did you make any requests from him at that  
15      time?

16      A     I had asked for what motions may have already been  
17      done, and if I could get them. And he told me that he  
18      would get on it. And I never heard anything back from  
19      him.

20           MR. SANDERS: And I'd like to have this marked as  
21      Applicant's Exhibit No. 2.

22           (WHEREUPON, Applicant's Exhibit No. 2 was marked for  
23      identification only.)

24           MR. SANDERS: Your Honor, may I approach?

25           THE COURT: Yes, sure.

1 BY MR. SANDERS:

2 Q I'm handing you what's been marked as Applicant's  
3 Exhibit No. 2. Do you recognize that document?

4 A Yes, I do.

5 Q Can you tell me what that document is?

6 A This was the first letter -- well, the first letter  
7 from Chase Harbin when I was writing my own motions.

8 Q Okay. Was a -- is there a date on there?

9 A No, there's not.

10 Q Okay. Is there anything on there to indicate to you  
11 when that might have been?

12 A The third sentence, Thus far, I have not received a  
13 complete accounting of your discovery, so I have not come  
14 to see you again.

15 Q Okay. So it was sometime after the first visit?

16 A After the first visit.

17 Q Okay. And does he mention anything in there about  
18 providing you with a copy of the discovery?

19 A The second sentence.

20 Q And what does that say?

21 A When I receive all of your discovery materials, I  
22 will come visit you to discuss your case.

23 Q Okay. What does the first sentence of the second  
24 paragraph say?

25 A Unfortunately, I will not be able to provide you with

1 your own personal copy of discovery. As I understand, it  
2 is, at least, two volumes of notebook binders.

3 MR. SANDERS: Your Honor, I would like to introduce  
4 Applicant's Exhibit No. 2.

5 MS. RATIGAN: No objection, Judge.

6 THE COURT: All right. It's in evidence.

7 (WHEREUPON, Applicant's Exhibit No. 2 was admitted  
8 into evidence.)

9 BY MR. SANDERS:

10 Q Okay. Do you -- were you ever provided copies of any  
11 of the discovery that Mr. Harbin was able to obtain?

12 A Not until 2009.

13 MR. SANDERS: I would like to have this marked as  
14 Applicant's Exhibit No. 3.

15 (WHEREUPON, Applicant's Exhibit No. 3 was marked for  
16 identification only.)

17 BY MR. SANDERS:

18 Q I'm showing you what's marked as Applicant's Exhibit  
19 No. 3. Would you take a look at those -- I'm sorry about  
20 that. I'll try to do a little bit better job of handing  
21 those to you.

22 Do you recognize these documents that I just handed  
23 you?

24 A Yes, sir.

25 Q Do you have copies of those?

1 A I do now.

2 Q And how did you get copies of those?

3 A I just received them from you.

4 Q Okay. And so your testimony is that these documents  
5 were not provided in the discovery that --

6 A They were not.

7 Q -- was given to you?

8 Now, when did Mr. Harbin come to visit you again  
9 after his initial visit in October of 2008?

10 A I believe it was January 9th of 2009.

11 Q 2009?

12 A No, '10.

13 Q So it was -- was it shortly before your guilty plea  
14 hearing?

15 A Shortly before.

16 Q Okay. And did Mr. Harbin discuss with you the  
17 State's case against you at that time?

18 A Not extensively. All he really spoke of was the plea  
19 that was offered to me.

20 Q Okay. And what was the plea that was offered to you  
21 at that time?

22 A 20 years.

23 Q Now, did Mr. Harbin discuss any of the -- you're,  
24 basically, telling me that this was sometime in January of  
25 2010, he came to you and discussed a possible plea with

1 the State; is that correct?

2 A That's correct.

3 Q Okay. Did he discuss a possible defense -- any  
4 possible defenses that you might have against the State's  
5 case?

6 A No, sir.

7 Q Did he discuss anything about their key witnesses?

8 A No, sir.

9 Q Now, I guess, prior to the hearing, did Mr. Harbin  
10 visit you again?

11 A He visited me like two, three times right before the  
12 hearing, all within like the same week.

13 Q A total of three times before the hearing?

14 A I think that really would include the hearing.

15 Q Okay. Did he discuss with you during any of those  
16 visits the State's case against you?

17 A No. He just wanted me to plea out.

18 Q Did he discuss with you any of the -- the fact that  
19 they were -- had two key witnesses that they were calling  
20 against you, Mr. Shaq Anderson and Mr. Lee Hurst?

21 A He spoke on them one time. He said they were  
22 supposed to be -- have statements against me. But, other  
23 than that, he never told me anything.

24 Q Did he indicate to you whether or not the State's  
25 case was pretty strong against you?

1 A No.

2 Q Did he indicate to you whether or not you should take  
3 the plea?

4 A That's, basically, what he was doing. He just wanted  
5 me to accept the plea.

6 Q Did he discuss your alternatives to taking the plea?

7 A No. He said if I didn't take the plea, I had a  
8 chance of receiving 50, 60, 70, up to natural life. With  
9 this being South Carolina, the majority of the white  
10 people already want justice. And since this happened in a  
11 black neighborhood, they were demanding justice.

12 Q Okay. Now, when you went to the hearing on February  
13 9th of 2010, where you entered your guilty plea, what was  
14 your understanding of what was going to take place at that  
15 hearing?

16 A Truthfully, I didn't know. I didn't want to plea.  
17 That much, I did know. But when he said all those other  
18 years and how I had no chance of stating my case or  
19 remaining free, it was a lose-lose situation for me.

20 MR. SANDERS: I'd like to have the transcript of the  
21 hearing marked as --

22 MS. RATIGAN: That's already a part of the record,  
23 Your Honor.

24 THE COURT: It's already in the record.

25 MR. SANDERS: Okay. Your Honor, may I give a copy of

1 this to Mr. Irby?

2 THE COURT: Sure.

3 BY MR. SANDERS:

4 Q Mr. Irby, if you could turn to Page 8 of the record.  
5 After the questioning by the Court, starting on Line 9, it  
6 says, Well, I'm telling you, and so the question is, do  
7 you want to plead guilty?

8 And your answer to that question on Line 9 was what?

9 A No.

10 Q Okay. And then it looks like the Judge, basically,  
11 stated that they were going to give you a jury trial?

12 A That's correct.

13 Q And Mr. Harbin, I think, states that he did not  
14 anticipate calling any witnesses?

15 A That's correct.

16 Q And then the Judge said, Bring the jury panel up and  
17 clear the courtroom while we select the jury?

18 A Correct.

19 Q And then Mr. Harbin states, Judge, if it pleases the  
20 Court, can I have a moment to explain the appeal?

21 A Correct.

22 Q He does not understand that. And I did not  
23 sufficiently go over that with him?

24 A Correct.

25 Q And then there's a pause. And then beginning on Page

1 9, they come back and ask you again if you want to -- if  
2 you're ready to go ahead and plead guilty. And, on Line  
3 10, you said, Correct.

4 What happened during that pause that made you change  
5 your mind?

6 A That was during the time span where he was telling me  
7 about how everybody was seeking justice and regardless of  
8 what I did or said, I was going to receive time anyway.  
9 If I fought it, I would receive the higher sentence, 50,  
10 60, 70 years, or natural life.

11 When I didn't want to plead, he even, you know --  
12 basically, he told my family trying to get them -- force  
13 them to make me plead. During the whole time, I didn't  
14 want to because I know I didn't --

15 Q Going back to the witness statements, which is  
16 Applicant's Exhibit No. 3. The third page is -- I'm  
17 sorry. I believe I have the second page.

18 It's what appears to be the statement taken by Rasool  
19 Siraaj Rashad Anderson (Shaq). Is that Shaq Anderson?

20 A Yes, it is.

21 Q And you knew who that person was?

22 A I did.

23 Q Okay. And then if you'll flip that over two more  
24 pages, there's another statement of Vernon Lee Hurst?

25 A Yes, sir.

1 Q All right. And I'm just going to just point out a  
2 couple of inconsistencies in these statements. And I just  
3 want you to let me know whether or not you were aware of  
4 these.

5 MS. RATIGAN: Your Honor, I'm going to object at this  
6 point. It seems like a lot of these documents are being  
7 published, rather than just being admitted. We would  
8 argue that this -- Applicant's Exhibit No. 3 hasn't even  
9 been requested to be admitted. It should not be admitted  
10 under Mr. Irby anyway. As he stated, he has just seen  
11 this document.

12 So these questions are probably better directed  
13 towards Mr. Harbin. And Mr. Irby simply stating whether  
14 something is inconsistent in this statement is not  
15 providing any actual testimony. He has yet to articulate  
16 a single issue against Mr. Harbin at this point.

17 In the interest of speeding things along, we would  
18 just ask that these documents not be gone over in this  
19 fashion.

20 MR. SANDERS: Your Honor, I would just like to say  
21 that there's, at least, five major inconsistencies in  
22 these documents. This is, basically, the State's case  
23 against Mr. Irby. We can go through the transcript where,  
24 basically, Ms. Paoletti, the Prosecutor, basically, states  
25 that her case, basically, was primarily relied on by these

1 two witnesses.

2 And we're, basically, just trying to show that there  
3 was a lot of inconsistencies that Mr. Irby was not aware  
4 of. And this goes, basically, to the heart of the --  
5 whether or not he made an intelligent decision to plead  
6 guilty.

7 THE COURT: Okay. I understand.

8 Why don't you ask him just, specifically, what he's  
9 complaining about as far as that. And the transcript, you  
10 know, I've got it. It speaks for itself. The statements  
11 are part of the discovery, and part of the Court's file  
12 already, so.

13 And I'll -- certainly, I'm not trying to cut off your  
14 ability to make any argument --

15 MR. SANDERS: Okay.

16 THE COURT: -- about that. But if you just want to  
17 tell me -- or get Mr. Irby to state why he thinks  
18 Mr. Harbin was ineffective in a succinct way, then that  
19 would be helpful.

20 THE WITNESS: Can I answer that myself then?

21 THE COURT: Well, he's got to ask you.

22 BY MR. SANDERS:

23 Q Well, let me just ask you this. Did he -- did  
24 Mr. Harbin tell you that Mr. Anderson, in his statement,  
25 said that you came by prior to the incident involving the

1 death of Mr. Carter, and you told him that you needed to  
2 do something, whereas Mr. Hurst states, I asked Shaq where  
3 he could get some marijuana. And he said we could call  
4 Fred Irby when he got off work.

5 Around 7:00 p.m., Shaq called Fred, and he came over.  
6 We was outside sitting on the porch when Fred pulled up.  
7 Me and Shaq walked over to the car, and we told Fred we  
8 wanted to get some weed.

9 Were you aware of that -- those two inconsistent  
10 statements?

11 A I was not even aware of these statements at all.

12 Q Okay. And then Mr. Anderson said he didn't go with  
13 him because he had his niece with him. Mr. Hurst said  
14 Mr. Anderson didn't go because of the other people at the  
15 house.

16 Then Mr. Anderson said that Fred had a small chrome  
17 revolver, and Lee had a small automatic with a pearl  
18 handle. And Mr. Hurst did not mention that he had a gun.

19 Were you aware of that statement?

20 A Like I said before, I didn't even know that these  
21 statements existed. I was told, but they were never given  
22 to me, even though I asked time and time again.

23 Q Mr. Anderson said that --

24 THE COURT: He's already said twice he didn't know  
25 about them, so you can ask Mr. Harbin about them.

1 MR. SANDERS: Okay.

2 BY MR. SANDERS:

3 Q Are there any other things Mr. Harbin did or did not  
4 do that you feel denied you the effective assistance of an  
5 attorney in this matter?

6 A Truthfully, I believe there was a lot. These  
7 statements, that was a definite, as they call it, Brady  
8 violation. I had asked for them. I never received them.  
9 I just now got them within the last week and a half time.  
10 I've been wanting them, and never had them.

11 When he was my counsel, I tried to call him. I wrote  
12 him. I tried to have my family call him, set up visits.  
13 He never came. He never saw me. I knew nothing. I went  
14 in there completely blind. A lot of the things that  
15 was -- he said to me, I didn't agree with.

16 I tried my best to do what I thought was right.  
17 There was some things that was said that truthfully -- for  
18 instance, if I may.

19 May I say this?

20 This is for -- if y'all want to hear it, I was told  
21 to say this, but I did not say this. Okay. Two strands  
22 of what are believed to be hair, either human or  
23 synthetic, were collected from the surface of the pool of  
24 blood in which the victim was lying. These appear to be  
25 tinted. The victim's girlfriend has tinted hair. That's

1 something that I was -- kind of was throwed [sic] at me to  
2 say. I did not want to say that.

3 So, for those of y'all that was in there, if y'all  
4 remember me looking at y'all --

5 MS. RATIGAN: I'm going to object, Your Honor. He's  
6 addressing the victim's family at this point.

7 THE COURT: Yes. That's not appropriate.

8 THE WITNESS: I'm sorry. I'm sorry.

9 BY MR. SANDERS:

10 Q Only address the Court.

11 A Okay. Well, to me, I -- it didn't seem right. I  
12 didn't think that for me to either choose like between my  
13 life or destroying someone else's life, I didn't think it  
14 was right. That's definitely -- I mean, I don't know if  
15 it's against the code of law or whatnot. But, to me, that  
16 was a moral issue that my heart couldn't sit there to know  
17 that, okay, I have to give, you know, between my freedom  
18 or destroy somebody else's family who's already going  
19 through something.

20 There was a lot of things that was said that was  
21 just, to me, crazy. And because I didn't want to go  
22 against things, the next thing I know, from the 20 years  
23 jumped up to 30 years all of the sudden. And, if you read  
24 my transcript, you'll see it towards the end. It says,  
25 Mr. Irby is contemplating that the time length -- yeah, we

1 did offer him 20 years, but he declined it. So now it's  
2 30, or something like that. I felt that like that's why I  
3 wound up catching the 30 years, instead of what was  
4 already offered.

5 THE COURT: Okay.

6 THE WITNESS: Then the fact that, as my counsel, if  
7 he had looked and seen when they arrested me -- I was  
8 arrested October 23rd of 2007. My warrant is not printed  
9 until November the 5th of '07. I don't get it into my  
10 hands until November 6. According to South Carolina law,  
11 that's what they -- it's a warrantless arrest. The code  
12 is 23-15-60, I think.

13 I was arrested illegal. There was no kind of proof  
14 to say I even knew or had anything to do with this. But  
15 because two people who did know me, they were my friends,  
16 but because they said I knew this or done it, I got  
17 arrested.

18 And, as my counsel, he did not look -- you know, I  
19 even asked him, Go see if they say the same thing, what  
20 they told the police the first time. He told me  
21 blatantly, I'm not doing it, you know. If you pay me,  
22 then I'll do it. But since you're -- you know, you're  
23 indigent, you're going to get the defense that you  
24 deserve. And, to me, I guess I did. I got no defense.

25 So under what they call -- he himself was a part of

1       that fruit of the poisonous tree. I was the victim on  
2       that. Because I didn't want to see anyone else hurt, I  
3       wound up suffering even more.

4             THE COURT: Okay. I understand.

5             MR. SANDERS: Just a few more questions, Your Honor,  
6       of this witness.

7       BY MR. SANDERS:

8       Q     When you were told about the 30-year sentence at the  
9       hearing or shortly before, what was your understanding  
10      about the 30-year sentence?

11      A     That that was the minimum.

12      Q     Okay. Did -- were you told that the -- that you  
13      would not be eligible for parole or any early release, nor  
14      eligible to receive any work credits, education credits,  
15      good conduct credits --

16      A     No, I wasn't.

17      Q     -- to reduce your mandatory minimum?

18      A     The only other thing that was said about that was 85  
19      percent. But since I've been down the road now, it's --  
20      I've been told it's 30 years day for day now.

21      Q     What was your understanding about that 85 percent?

22      A     That it would have knocked off maybe a year and a  
23      half to two years. And if I had any like good -- if I did  
24      get any good time, that would speed it up. But, like I  
25      said, once I got down there, they tell me that it's day

1 for day now.

2 Q Okay. Do you think if you would have had these  
3 statements that you testified that you were -- did not  
4 have copies of until recently, do you think you would have  
5 pled guilty to the charge of murder and armed robbery?

6 A I wouldn't have pled at all.

7 Q Do you feel if Mr. Harbin had presented you with a  
8 plan for a defense against the State's case that you would  
9 have pled guilty?

10 A If he had helped me, I would have still -- I would  
11 have fought. I wouldn't have pled.

12 Q Are there any other errors or complaints about  
13 Mr. Harbin that you're aware of that had he done things  
14 differently that you believe you would not have pled  
15 guilty?

16 A Yes.

17 I don't know. I guess -- how do you say to make  
18 these exhibits?

19 THE COURT: Yes.

20 THE WITNESS: But these are two entirely different  
21 indictments.. The first one was in my motion. And the  
22 second one I didn't get until I got at Broad River. The  
23 first one, it has complete with it, I guess, what you  
24 would call the body.

25 But it goes on to show that it's a violation of Rule

1 30(c) of the South Carolina Rules of Criminal Procedure,  
2 in which I wrote the Clerk of Court. And he says that  
3 they never gave him a reason for delay or an extension.

4 And going by what Chief Justice Jean Toal says, both  
5 of these indictments would be -- I guess you would say  
6 faulty. One is true billed, but they switched the numbers  
7 around in pen. The second one is clock stamped, but it's  
8 not true billed. And I guess I myself, I would like to  
9 make this part of the exhibit, if this is okay.

10 MR. SANDERS: Your Honor, I have no objection to  
11 that.

12 MS. RATIGAN: I have no idea what he's talking about.  
13 I need to look at it first.

14 THE COURT: Okay.

15 MR. SANDERS: I think they're just copies of the  
16 indictments. They may even be a part of the record.

17 MS. RATIGAN: If they're a part of the record, that's  
18 fine. But I don't -- he's just talking about indictments.  
19 I don't know.

20 THE WITNESS: This is the paper from --

21 MS. RATIGAN: It appears to be the indictment for  
22 murder. That's part of record, Your Honor. I have no  
23 problem with that.

24 MR. SANDERS: There's, also, I think, some article or  
25 something he's got in there.

1 THE WITNESS: And one more thing, Your Honor --

2 MR. SANDERS: Here is --

3 MS. RATIGAN: That's in --

4 THE WITNESS: -- there was a motion I put in  
5 myself --

6 THE COURT: Hold on a second.

7 Go ahead.

8 THE WITNESS: There were, like I said, a lot of  
9 motions that I had put in myself. And for whatever  
10 reasons, he never, I guess, addressed them to whoever he  
11 needed to address them to.

12 THE COURT: Okay.

13 THE WITNESS: Would it be okay if I, also, put those  
14 in the record?

15 THE COURT: Yes. They're in evidence.

16 THE WITNESS: Do you have copies of them?

17 MR. SANDERS: I believe so, yeah.

18 (WHEREUPON, Applicant's Exhibit No. 4 was marked for  
19 identification and admitted into evidence.)

20 BY MR. SANDERS:

21 Q Mr. Irby, is there anything else that you would like  
22 to tell the Court regarding your representation by  
23 Mr. Harbin?

24 A He gave no representations. The few things that he  
25 did tell me, I didn't really want to hear. We bumped

1 heads a couple of times because I didn't want to hear it.  
2 The things that I asked for, I never received. I even  
3 begged for them, because I feel that was -- this is my  
4 life I'm throwing away. The only way he was happy,  
5 finally, was when I wound up taking the plea deal that  
6 was, I guess, as you say, offered to me.

7 And of the so-called evidence that helped -- would  
8 help me, he never would dispute it. It was said that I  
9 robbed this guy. But they found a large -- substantial  
10 amount of money in his pocket. They say that I was in his  
11 house. But forensics themselves says that they can't  
12 prove that I was in his house. My RAP sheet even says  
13 that I have blue eyes. He didn't argue any of these  
14 different things. And, to me, all of those things mean  
15 something as far as me maintaining my freedom.

16 I wasn't -- there's no way that I would even trust a  
17 guy like this to represent me, if he was ever put to it  
18 again.

19 So those who are listening, don't.

20 I put my life on the line for something that I did  
21 not do. People may believe that I did, but I didn't. I  
22 don't know. If anybody wants to get -- hey, I'm trying to  
23 do the best I can. But, like I said, I'm in here because  
24 I didn't say other things that was, basically, pointing  
25 fingers towards other people. I didn't want to do that.

1 Because I felt it would hurt other folks.

2 Q Mr. Irby, address me when you're talking or the  
3 Judge.

4 A Okay.

5 Q Is there anything else?

6 A Other than the fact of the -- like I said, the  
7 warrantless arrest, and the -- which really violated the  
8 most. And then those so-called statements of my own. I  
9 would like to include those up under the fruit of the  
10 poisonous tree, and have them for the record. That's  
11 about it for me.

12 MR. SANDERS: I have nothing further, Your Honor.

13 THE COURT: Thank you, Mr. Sanders.

14 Cross-examination.

15 CROSS-EXAMINATION

16 BY MS. RATIGAN:

17 Q So your testimony is that Mr. Irby [sic] visited you  
18 at the detention center four times?

19 A I never visited myself.

20 Q Oh, I'm sorry. That Mr. Harbin visited you four  
21 times at the jail?

22 A Correct.

23 Q Did you ever have any phone calls with him?

24 A I tried, but I never got through. He always said to  
25 make an appointment.

1 Q And did you ever have any meetings with him at the  
2 courthouse?

3 A Just that one time.

4 Q The day of the plea?

5 A The day of the plea.

6 Q And your testimony is that you never discussed the  
7 State's evidence?

8 A Correct.

9 Q Did you ever discuss the charges you were facing like  
10 what the mandatory maximum -- what the maximum and minimum  
11 would be, the elements, things of that nature?

12 A No.

13 Q Did you tell Mr. Harbin your version of what had  
14 happened, your version of events?

15 A I gave him my version of the story, yes.

16 Q Did you discuss his -- your co-defendant's statements  
17 at all, Mr. Anderson and Mr. Hurst? Y'all never talked  
18 about that?

19 A No. I never knew about the statements.

20 Q And, at some point prior to the day you pled guilty,  
21 did Mr. Harbin ever ask -- come to you with a plea offer  
22 for manslaughter?

23 A That was the 20 years.

24 Q And you turned that down?

25 A Correct.

1 Q And then the day you pled guilty, you knew that there  
2 was not going to be any kind of a recommendation, but that  
3 he would ask for 30. Is that what you're testifying --

4 A I did not really know what was going on.

5 Q And your testimony today is that, basically, you were  
6 pleading guilty to cover for somebody else?

7 A Basically.

8 Q Did you ever tell Mr. Harbin that?

9 A How could I?

10 Q Well, how could you not? You say you were fighting  
11 for your life and that you were covering for somebody  
12 else, why didn't you tell your lawyer, I'm innocent,  
13 somebody else did it?

14 A I tried. But he said he knew that other people was  
15 pointing the finger at me, and they have those statements.  
16 When I asked for the statements again, that's a moot  
17 point or something like that, he said, it doesn't  
18 matter.

19 Q So you told him you were innocent and that you were,  
20 actually, covering for somebody else, and he told you it  
21 didn't matter?

22 A That's what he said.

23 Q And so, basically, what you're saying today is that  
24 Mr. Harbin did not communicate with you enough, did not  
25 perform a more thorough investigation, and prepare the

1 case? Is that, basically, what you're saying?

2 A That's what I'm saying.

3 Q Okay. And if he had done all of these things you  
4 testified about today, you would have gone to trial,  
5 instead of pleading guilty?

6 A I would have gone to trial.

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

8 THE COURT: Redirect?

9 MR. SANDERS: No, Your Honor.

10 THE COURT: Thank you, sir.

11 You may step down, Mr. Irby.

12 Okay. Do you have any further evidence you wish to  
13 present, sir?

14 MR. SANDERS: Your Honor, I'm going to go ahead and  
15 call Mr. Harbin.

16 THE COURT: Okay.

17 (Pause.)

18 THE COURT: While we're waiting on that, I'm going to  
19 allow Applicant's Exhibit No. 1 into evidence under Rule  
20 803(8), a certified copy of a public record. He can have  
21 back his original for his file.

22 (WHEREUPON, Applicant's Exhibit No. 1 was admitted  
23 into evidence.)

24 THE CLERK: Place your left hand on the Bible and  
25 raise your right hand.

1 WHEREUPON,

2 HUNTER CHASE HARBIN,

3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 You may be seated.

6 Please state your full name for the record.

7 THE WITNESS: Hunter Chase Harbin.

8 DIRECT EXAMINATION

9 BY MR. SANDERS:

10 Q Mr. Harbin, I think we discussed earlier, I don't  
11 have a lot of experience in criminal procedures, so just  
12 bear with me. I'm just going to ask you some questions  
13 just to kind of follow-up on some of the things that  
14 Mr. Irby stated.

15 Would you agree that your first visit with Mr. Irby  
16 was probably around October of 2008?

17 A I don't recollect, so I'm going to have to just defer  
18 to whatever documentation you have.

19 Q Okay. The document that's marked as Applicant  
20 Exhibit No. 1, I think the record of inmate visits --

21 MR. SANDERS: May I approach the witness, Your  
22 Honor?

23 THE COURT: Sure.

24 THE WITNESS: I'm assuming this is perfectly  
25 accurate, sir.

1 BY MR. SANDERS:

2 Q And would you agree that the second visit occurred  
3 probably sometime around January of 2010, January 26th?

4 A Jail visit, yes, sir.

5 Q Okay. Were there any other visits in between that?

6 A I don't recall the specific dates. And I can't find  
7 the piece of paper that I jotted down just when he's  
8 called to court. But Ms. Paoletti had brought him to  
9 court for a possible -- for the possibility of a plea  
10 several times. And when I say several, I would mean three  
11 to four. So, in that interim, I believe I met with him at  
12 the courthouse downstairs in the holding cell.

13 Q Okay. And so that second visit was -- at the jail  
14 was about -- on January 26th, 2010, was approximately two  
15 weeks before he, actually, entered his guilty plea?

16 A That's correct.

17 Q And then the -- what we have marked as Applicant's  
18 Exhibit No. 2, the undated letter from you to Mr. Irby.

19 A I know to what you're referring. If you have a  
20 question --

21 Q Do you remember approximately when that letter was  
22 sent?

23 A I really don't. I mean, obviously, it predates my  
24 giving him discovery. And I have the actual date of the  
25 letter that I'm sure you saw in my file when I gave it to

1       you that I believe is May -- well, it's May 15th, 2009.

2       He received a hand-delivered copy.

3               So that letter, obviously, would have predated that.  
4       And I believe that the letter referenced some problem --  
5       or not problem, but the Solicitor's Office and the ongoing  
6       discovery process. And I kind of wanted to give it to him  
7       all at once.

8       Q     Did you get the discovery from Mr. --

9       A     Godfrey.

10      Q     Godfrey or --

11      A     Honestly, I do not recall whether or not I -- his  
12      file was transferred to me. Although I do have some of  
13      his notes. So I assumed that whether or not it came  
14      through the Solicitor's Office or through the Public  
15      Defender's Office, I was able to get some of his original  
16      notes.

17      Q     Now, you talked about in the letter not getting a  
18      complete accounting of the discovery. Do you have any  
19      idea what that was about?

20      A     Essentially, Leigh Paoletti, the Assistant Solicitor  
21      in the case, had told me that there was other discovery  
22      coming. And I wanted to wait and just give it to him all  
23      at one time.

24      Q     Now, is it unusual -- or is it typical not to provide  
25      the client with a copy of the discovery?

1       A     In that case, I would say that's typical.  If I have  
2       a client and I know that there's other materials coming,  
3       I'll tell them, I'll get it to you as soon as I get the  
4       entire file, yes, sir.

5       Q     Okay.  But, in this letter, you said you did not  
6       intend to give him a copy?

7       A     Well, you know what -- and that's exactly right.  I  
8       did not anticipate making a copy of -- you're looking at  
9       how many pages I had here.  Because a lot of it is  
10      pictures of people he already knew that -- I don't know  
11      that -- they were simply pictures of people.  There were,  
12      also, phone logs and things.  And I didn't anticipate  
13      handing him, you know, hundreds of pieces of paper.

14            I really was concerned with getting him Code 5's,  
15      which is the police report, any forensics that they had,  
16      which was lacking severely in this case, and, obviously,  
17      co-defendants statements, and witness statements.

18      Q     Okay.  Did you personally deliver the discovery, too?

19      A     I don't think I did.  I think somebody from my office  
20      did.  In fact, I believe using your inmate visit sheet  
21      here, May 15th, correspondence with a visit from Amanda  
22      Williams, who was my paralegal at the time.

23      Q     Okay.  Is it possible that those witness statements  
24      may have not been included in those documents?

25      A     No, sir.  I don't believe so.

1           And if you would like me to explain, I don't believe  
2           it's possible --

3           Q     Yeah. Go ahead.

4           A     Because we had conversations referencing those folks  
5           and what they said. So Mr. Irby's memory does not match  
6           mine that we discussed in depth exactly what other folks  
7           were saying. Because that is the crux of the entire  
8           State's case as to why I was recommending that he plead  
9           guilty, based on -- based very much on those statements.

10          Q     Did you -- when I was going over the statements with  
11          Mr. Irby, did you hear the inconsistencies that --

12          A     Yes, I --

13          Q     What were your feeling about those inconsistencies?

14          A     Well, you know, honestly, in my experience, everybody  
15          that is giving a statement is going to try to skew the  
16          statement to their favor. For example, you might have  
17          three people involved in a robbery or a crime of some  
18          sort, and there's always -- they always want to be the guy  
19          that stayed behind in the car, or the guy that didn't go  
20          into the house.

21                 So their statements will match up as a whole, but not  
22          in detail so that they kind of -- they think that they're  
23          getting themselves a -- you know, holding out for a better  
24          position that they're not as guilty as the next guy. So,  
25          yeah, I did -- to answer your questions, yes, I did

1 recognize some of the inconsistencies in those statements.

2 Q Did you recognize the fact that in the statement by  
3 Mr. Hurst, he indicated that he had several telephone  
4 conversations with Mr. Anderson between the time  
5 Mr. Anderson gave his statement and the time that  
6 Mr. Hurst gave his statement?

7 A With the -- exactly. And what you're eluding to is,  
8 obviously, the possibility that these two guys are getting  
9 together --

10 Q Right.

11 A -- to kind of fix their stories. And, certainly,  
12 something that we considered, and something that I argued  
13 to Ms. Paoletti to try to get the manslaughter plea that  
14 y'all referenced earlier -- In other words, pointing out  
15 potential weaknesses in her case to try to better the  
16 offer.

17 Q Did you interview any witnesses?

18 A No, sir.

19 Q Now, there's a statement in the file -- let's see if  
20 I have it -- from a Ms. Blakely, who I believe -- it looks  
21 like she gave a statement in October of 2007, before any  
22 of the, I guess, suspects. And I believe it states that  
23 she is Mr. Irby's aunt. Do you remember that statement?

24 A I might have to look at it. But if this is the aunt  
25 that -- I believe he told me a story that this is the aunt

1       that doesn't necessarily get along with himself or his  
2       mother, and that -- and you can correct me if I'm wrong or  
3       your client can. But I think she would go so far as to  
4       occasionally call in a Crime Stoppers tip just to get the  
5       reward money, the \$40, or something like that. So, yeah,  
6       I recollect that statement, if that is the statement that  
7       you're referring to.

8       Q     Now, were you, also, familiar with a -- I think a  
9       cousin of Mr. Anderson's, I think, that was referred to in  
10      one of the statements. Let me check here. I have the  
11      name here. It's a Rasheeda [phonetic] Perkins?

12     A     I don't recollect the name. But if that's the  
13     statement that references, basically, that she overheard  
14     that either somebody said Fred shot somebody, or that Fred  
15     admitted it himself. I don't recollect --

16     Q     I think, in her statement, she had indicated that  
17     Shaq and Fred had gone to rob the guy. That would have  
18     pretty seriously -- that statement would have pretty  
19     seriously damaged the State's case with regard to the  
20     testimony of Mr. Anderson, wouldn't it have?

21     A     If you're making the overarching point that there's  
22     another inconsistency with her statement, then I would  
23     agree, yes. That was a definite weakness in the State's  
24     case.

25     Q     And you did indicate that you negotiated a plea of

1       manslaughter?

2       A     Yes, sir.

3       Q     And you presented that to Mr. Irby?

4       A     Yes, sir.

5       Q     And Mr. Irby did not take that plea?

6       A     That's correct.

7       Q     Did he indicate why he didn't want to take that plea?

8       A     If he did exactly, I don't recollect exactly why.

9       Q     Now, in looking at the testimony from the hearing,  
10       the transcript, it does not mention anything in there  
11       about Mr. Irby being told that the 30-year sentence would  
12       be mandatory, that he would not be eligible for any  
13       parole, or any early release program. Did you discuss  
14       this with him?

15       A     I don't recollect the specifics. It's -- I can't  
16       imagine that I'm not going to tell somebody charged with  
17       murder that 30 means 30, and that -- I know there's often  
18       questions about violent versus non-violent, and what 85  
19       percent is. So I think I recollect a short conversation  
20       about an 85 percent sentence regarding the armed robbery.  
21       Other than that, I couldn't recollect any specifics for  
22       you.

23       Q     Now, when did the State withdraw their offer?

24       A     I don't know the exact date. I know that the offer  
25       was still on the table up until shortly before trial -- or

1 before he, actually, pled. I want to say -- and I can't  
2 promise you this, but I want to say that it was, actually,  
3 on the table up until, you know, days, if not maybe a week  
4 or two before. Ms. Paoletti was still willing to extend  
5 that offer prior to the week of his plea.

6 Q And I think Mr. Irby testified that you made three  
7 visits within the last two weeks before he pled guilty?

8 A That's --

9 Q Does that sound consistent?

10 A That's consistent with my memory, yes, sir.

11 Q Okay. And what was the purpose of those visits?

12 A Well --

13 Q From your recollection?

14 A Well, it would have been discussing the plea.  
15 Outside of discussing a plea, if he had -- and he did  
16 indicate that he didn't want to take the plea. It would  
17 be discussing what would happen at trial, or what  
18 couldn't -- you know, what the State would do, and what we  
19 could do about that. In other words, what evidence is  
20 going to be presented to the jury, and what evidence we  
21 could prevent from being heard, that kind of thing.

22 Q Did you file any pre-trial motions on behalf of  
23 Mr. Irby?

24 A No, sir.

25 Q Now, I think we've kind of briefly talked about all

1 the statements. And you made a generalization that they,  
2 basically, all pretty much had themselves -- I guess what  
3 you might call an accessory after the fact. Would you  
4 agree with that?

5 A Well, I don't know if I would characterize -- limit  
6 it to accessory after the fact. But, certainly, I  
7 understand that the statements tend to try to minimize  
8 their involvement to whatever extent.

9 Q And did Mr. -- was Mr. Irby's -- would you agree that  
10 that would pretty much characterize Mr. Irby's statement?

11 A I would, yes, sir.

12 Q And what would be the maximum sentence for an  
13 accessory after the fact?

14 A Accessory after the fact, as I understand it, is half  
15 of the underlying crime, I believe. I could be wrong  
16 about that --

17 Q So the maximum sentence would be 15 years?

18 A 15 years, I believe.

19 Q I believe that's correct. My research indicated that  
20 as well. And Mr. Irby received a sentence based upon his  
21 guilty plea of 30 years with no chance of any early  
22 release, but I think he did get time served; is that  
23 correct?

24 A I believe he did, yes, sir.

25 Q Okay. Are you aware of what the other suspects

1 received?

2 A You know, I believe they were sentenced -- I want to  
3 say they were sentenced after Mr. Irby. And I am not  
4 aware of what they received.

5 And I should make clear, I believe, according to what  
6 Ms. Paoletti let the Court know that morning that she  
7 expected that they would plea later. So I assume they  
8 pled later and received their sentences afterwards.

9 Q Would it surprise you to learn that Mr. Hurst  
10 received a 12-year sentence for his manslaughter plea?

11 A I'm not sure -- I'm not sure I would be surprised or  
12 unsurprised.

13 Q And that Mr. Anderson, I think, pled guilty as well  
14 to, I think, just common law robbery and received seven  
15 years suspended. And he got credit for time served, and  
16 30 months probation. Does that surprise you?

17 A I have no -- I don't know how to answer that  
18 question, to be honest with you.

19 Q So, basically, based upon statements that were pretty  
20 similar, one got 30 years with no chance of an early  
21 release, another got 12 with the possibility of an early  
22 release, obviously, and then the other person, basically,  
23 just got time served with probation.

24 Were there any other weaknesses in the State's case  
25 that you discussed with Mr. Irby, other than just the

1 inconsistencies that you said --

2 A I apologize. You're kind of asking me a fairly  
3 general question on a case that's a few years out. I can  
4 give you my recollection of the case in general, if you'd  
5 like to hear it. I mean, that's probably the best way for  
6 me to answer your question. Because I don't know that I  
7 can recall, you know, the -- you're asking for weaknesses  
8 that Mr. Irby mentioned that, you know, the only forensics  
9 that they had didn't tie him.

10 So a lack of forensics, obviously, was a weakness in  
11 the case, and, obviously, the inconsistencies in the  
12 story, the fact that they don't have a gun. That's a  
13 weakness as well. All of those calculated into, you know,  
14 trying to get a particular result.

15 And, at that time, I was trying to get an offer.  
16 Honestly, I was trying to get it better than the 20-year  
17 offer that I got, but that's the best I could...

18 MR. SANDERS: Your Honor, if I could have just a  
19 moment.

20 THE COURT: Sure.

21 (Pause.)

22 BY MR. SANDERS:

23 Q Just a couple of other things real quick. Mr. -- did  
24 you get requests from Mr. Irby for additional information  
25 about his case?

1 A I recall that he was asking for information that I  
2 didn't have and couldn't get. But I can't recall the  
3 specific nature. I -- Mr. Irby wrote more than once. And  
4 I remember that he wrote, and his expectations for what  
5 was available to a criminal defendant were not in line  
6 with what my experience tells me you're able to get. I  
7 don't know if I answered your question or not. I'm sorry.

8 Q I think there was some request -- I remember seeing  
9 it -- about a -- some video recordings and photographs of  
10 the scene?

11 A I don't have any.

12 Q Did you ever get copies of those?

13 A I didn't. I'm not aware that I ever got a copy of a  
14 video from the scene. Photographs, if I got them -- and I  
15 don't recollect, to be honest with you. I don't recollect  
16 if I got them. But, obviously, they would have shown the  
17 scene after. So I'm not really sure -- I'm not certain as  
18 to how that helps Mr. Irby, or what --

19 Q So your testimony is that you do remember getting  
20 some, and that you did not have -- were not able to  
21 provide those to him; is that right?

22 A No. My testimony is that I don't remember  
23 photographs of the crime scene that -- and I don't  
24 remember them. I'm certain that they might be in here in  
25 some of this. But I simply don't remember anything about

1       them one way or the other.

2               MR. SANDERS: That's all the questions I have, Your  
3 Honor, at this time. But I'd like to reserve the right to  
4 ask him additional questions if Ms. -- if there's anything  
5 raised by Ms. Ratigan.

6               THE COURT: Okay.

7                               CROSS-EXAMINATION

8 BY MS. RATIGAN:

9       Q     Just very briefly, let me make sure we are all on the  
10 same page. So regardless of whether Mr. Godfrey filed for  
11 discovery or you filed, you did have those discovery  
12 materials?

13       A     Correct.

14       Q     And you reviewed them with Mr. Irby?

15       A     Correct.

16       Q     And that included the statements from his  
17 co-defendants?

18       A     Absolutely.

19       Q     And the statement that he gave to police?

20       A     Yes.

21       Q     Did you review with him the various inconsistencies  
22 when you looked at the statements as a whole?

23       A     Yes. And he, actually, led those discussions.

24       Because, obviously, he was very concerned with what  
25 inconsistencies there were and how far that could take us

1 in trial.

2 Q And would you agree those co-defendants statements  
3 were very damaging to your case?

4 A I agree, yes.

5 Q And did Mr. Irby tell you, you know, kind of his  
6 version of events of what happened?

7 A Yes. His version of events would, essentially, make  
8 him an accessory definitely after, and would endanger --  
9 put him in extreme danger of being an accessory before,  
10 which, obviously, is punishable for the same amount of  
11 time as the murder. That was -- so his defense as  
12 presented was, in fact, a crime.

13 Q In your opinion, did the State have a strong case  
14 against him?

15 A Strong enough to warrant a plea, yes. But not --  
16 certainly, not -- I'm not here to say this is the  
17 strongest murder case I've ever seen.

18 Q And did you explain to Mr. Irby your opinion that  
19 they had enough evidence to warrant pleading guilty under  
20 these facts?

21 A Numerous times.

22 Q And do you recall having any phone conversations with  
23 Mr. Irby while he was at the detention center?

24 A No.

25 Q And do you recall having meetings with him at the

1 courthouse?

2 A Yes.

3 Q And, during your conversations with Mr. Irby, did he  
4 ever tell you that he was covering for somebody?

5 A He did not.

6 Q If he had told you he was covering for somebody,  
7 would you have approached the State with that information  
8 maybe to work out a better agreement?

9 A Absolutely.

10 Q Did you ever tell Mr. Irby that if he did not plead  
11 guilty, he would receive a natural life sentence?

12 A I told him that there was definitely the possibility  
13 that if he was found guilty at trial that he would not get  
14 anywhere near 30 years, that he would get substantially  
15 more, and up to life.

16 Q And, on the day y'all came to the courthouse, was it  
17 already arranged that he was going to plead that day, or  
18 was it something that was decided that day?

19 A It was not. It was something that was decided that  
20 day, as to my recollection. Although, I don't think that  
21 we had worked out anything prior.

22 Q And I believe he pled straight up without a  
23 recommendation?

24 A He did. Although, I think Ms. Paoletti was inclined  
25 to indicate to the Court that she did not oppose my

1 request for a minimum sentence in the case -- in the  
2 murder case.

3 Q And did you explain that to Mr. Irby prior to going  
4 to court that day?

5 A Yes. And part of that explanation, obviously, is  
6 that -- is even if it was a recommendation, it was only a  
7 recommendation, and that the Judge simply could do what he  
8 wanted to do with the case.

9 Q And did you speak to Mr. Irby's family that day?

10 A I did.

11 Q And what was the content of those discussions?

12 A Basically, I explained that I -- that my position was  
13 that I recommended that he go to trial -- I'm sorry, I  
14 apologize -- that he plead guilty. That I was prepared to  
15 go to trial, but I was not optimistic about his chances.

16 I explained in -- at least, in brief detail, if not  
17 in detail, what the major points of the State's case would  
18 be, what the possible outcome of a plea versus the  
19 possible outcome of a trial, including what sentences he  
20 would get if he pled, or if he went to trial and did get  
21 convicted.

22 Q And did they speak to Mr. Irby after y'all had that  
23 discussion?

24 A They did. The family, actually, asked that I -- I,  
25 basically, arranged for them to be able to speak with him.

1 downstairs, which is unusual. Typically, only attorneys  
2 are allowed downstairs in lock up. And I had special  
3 permission for the family to be able to speak to him.  
4 They spoke to him both in my presence and outside of my  
5 presence.

6 Q Okay. Would it be fair to say that Mr. Irby had  
7 filed a number of pro se motions in this case?

8 A Definitely.

9 Q And were there any issues he raised in those pro se  
10 motions that you felt you needed to act upon?

11 A No.

12 Q If he had raised any issue in those pro se motions  
13 that you thought would have been legitimate issues, would  
14 you have raised them?

15 A Yes.

16 Q Now, obviously, hindsight is 20/20. But, in your  
17 opinion, is there anything else you could have done to  
18 prepare the case to plead guilty that day?

19 A I think that based upon what we knew then, and what  
20 we know now, for that matter, that the wise decision was  
21 to plead guilty.

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

23 THE COURT: Any redirect?

24 MR. SANDERS: I don't have anything.

25 THE COURT: All right. Mr. Irby, you've got -- I

1 think you have the exhibits. I believe it's Applicant's  
2 Exhibit Nos. 2 and 3.

3 Did you pick those up, by chance?

4 We just need to get those back in the record.

5 MR. SANDERS: I have Applicant's Exhibit No. 3.

6 Do you have Applicant's Exhibit No. 2?

7 MS. RATIGAN: I don't believe Applicant's Exhibit  
8 No. 3 was ever admitted --

9 MR. SANDERS: Applicant's Exhibit No. 3 was not  
10 introduced.

11 MS. RATIGAN: It was marked, but not admitted, Your  
12 Honor.

13 MR. SANDERS: Well, Your Honor, at this time, I would  
14 like to introduce Applicant's Exhibit No. 3.

15 THE COURT: Okay.

16 MS. RATIGAN: If he wants to introduce it through  
17 Mr. Harbin, I wouldn't have an objection to that, if he  
18 wants to do that on redirect, perhaps.

19 THE COURT: Okay. It's in evidence.

20 (WHEREUPON, Applicant's Exhibit No. 3 was admitted  
21 into evidence.)

22 THE COURT: Have we got everything?

23 MR. SANDERS: I think we're still looking for  
24 Applicant's Exhibit No. 2.

25 THE COURT: What is Applicant's Exhibit No. 2?

1 MS. RATIGAN: Applicant's Exhibit No. 2 is a letter.

2 MR. SANDERS: I've got another copy of it.

3 MS. RATIGAN: That's it. Actually, you're holding  
4 it.

5 MR. SANDERS: I'm sorry.

6 THE COURT: Thank you.

7 All right. Thank you, Mr. Harbin.

8 THE WITNESS: Thank you.

9 THE COURT: Yes, sir, Mr. Sanders.

10 MR. SANDERS: Well, Your Honor, I would just like to  
11 state that, again, Mr. -- the testimony that was presented  
12 today by Mr. Irby would indicate that there were certain  
13 things about the case and the evidence against him that  
14 presented -- prevented him from making a knowing and  
15 intelligent decision to plead guilty in this matter  
16 pursuant to the standard that is set forth by the Supreme  
17 Court. And that had he known the information,  
18 particularly in the statements that were -- that he tried  
19 to obtain copies of and did not get copies of prior to the  
20 plea, had he known that -- had he known the  
21 inconsistencies that he would not have pled guilty. And,  
22 therefore, that his petition be granted, and that the  
23 guilty plea be dismissed.

24 THE COURT: Okay. Thank you.

25 MS. RATIGAN: In the interest of propriety, I would

1 note the State has no case to put up. We'd rely on  
2 Mr. Harbin's testimony and the plea record.

3 We'd argue Mr. Irby hasn't met his burden of proof.  
4 He has to prove both error and prejudice to prevail. The  
5 State had a very strong case against him. He had numerous  
6 conversations about his case with an experienced criminal  
7 defense attorney. He decided to plead guilty that day.  
8 The voluntariness of the plea is supported by the plea  
9 record. And we would argue he has presented nothing today  
10 that would meet the Strickland standard, and that he  
11 should be denied relief.

12 THE COURT: Thank you for your presentations.

13 And I'm going to review the record in light of what  
14 you've told me today, and the testimony I've heard. And  
15 I'll let you know my decision, hopefully, in the next  
16 several weeks.

17 Thank you.

18 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*  
19  
20  
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CERTIFICATE OF REPORTER

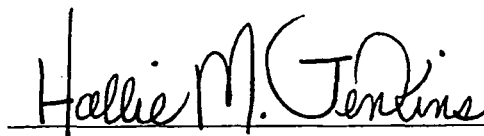
STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 2nd day of August, 2011.

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

April 2, 2012



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS |
|                          | ) | C.A. No. 2010-CP-23-4330     |
| COUNTY OF GREENVILLE     | ) |                              |
|                          | ) |                              |
| Frederick Alphonso Irby, | ) |                              |
| S.C.D.C. No. 339195,     | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) | <b>ORDER OF DISMISSAL</b>    |
| v.                       | ) |                              |
|                          | ) |                              |
| State of South Carolina, | ) |                              |
|                          | ) |                              |
| Respondent.              | ) |                              |
|                          | ) |                              |

2011 AUG 27 PM 2:04

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed May 25, 2010. The Respondent made its return on September 15, 2010. An evidentiary hearing into the matter was convened on August 2, 2011 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by E. Scott Sanders, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, H. Chase Harbin, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

#### **PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant for armed robbery (2008-GS-23-2602, count 1),

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possession of a weapon during commission of a violent crime (2008-GS-23-2602, count 2), and murder (2008-GS-23-2701). H. Chase Harbin, Esquire represented the Applicant.

On February 9, 2010, the Applicant pled guilty.<sup>1</sup> The Honorable C. Victor Pyle, Jr. sentenced the Applicant to concurrent terms of twenty-five (25) years for armed robbery, five (5) years for possession of a weapon during commission of a violent crime, and thirty (30) years for murder. The Applicant did not appeal.

### **ALLEGATIONS**

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

1. Ineffective assistance of counsel:
  - a. Failure to investigate.
2. "No evidence to connect me to crime."

In a document captioned "Notice of Motion and Motion to Amend Pleadings (Post-Conviction Relief" filed by counsel and dated July 24, 2011, the Applicant alleged:

1. Ineffective assistance of counsel:
  - a. Failed to adequately investigate the evidence.
  - b. Failed to gather evidence.
  - c. Failed to adequately advise of the strengths and weaknesses of the State's case.
  - d. Failed to provide copies of the statements made against him.
  - e. Failed to keep informed of the status of the case.
  - f. Failed to advise of possible defenses.
  - g. Failed to make any challenges to the State's evidence.
  - h. Failed to negotiate a plea that was consistent with the circumstantial evidence and credibility of witnesses.
  - i. Failed to adequately explain the right to appeal.

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

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

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<sup>1</sup> The State dismissed several pending charges.

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

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

### **Ineffective Assistance of Counsel**

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

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

The Applicant stated plea counsel visited him four (4) times at the detention center and that each visit was brief. The Applicant stated plea counsel never really communicated with him and that he did not agree with a lot of what counsel said. The Applicant stated he and plea counsel never discussed the charges or possible defenses or witnesses (his co-defendants: Anderson and Hurst). The Applicant stated he and plea counsel never discussed the State's

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evidence or whether counsel believed the State had a strong case. The Applicant stated plea counsel never investigated the inconsistencies in the witnesses' and co-defendants' statements. The Applicant testified plea counsel never looked into the fact that the indictments were not issued within ninety (90) days of the arrest warrants. The Applicant testified he filed numerous pro se motions that plea counsel did not follow up on. The Applicant testified that, one month before the plea hearing, he and plea counsel discussed the State's offer of a twenty (20) year sentence. The Applicant testified he did not want to plead guilty. The Applicant stated he did not understand what was happening on the day he pled guilty but that he did so because plea counsel told him he could receive a "natural life" sentence if he lost at trial. The Applicant stated he pled guilty in order to protect someone else and that when he told plea counsel this, counsel stated it did not matter. The Applicant stated he knew that thirty (30) years was the minimum sentence for murder but thought it was an 85% sentence instead of day-for-day.

Plea counsel testified that, in addition to the detention center visits, he met with the Applicant several times at the courthouse (when the Applicant was brought there to plead guilty). Plea counsel testified he and the Applicant discussed the strength of the State's case against him and his version of events. Plea counsel testified he and the Applicant discussed the co-defendants' statements – which had some inconsistencies but matched each other on the whole. Plea counsel testified that, in his experience, when people give a statement, they skew it in their favor. Plea counsel stated that, regardless, the co-defendants' statements were the crux of the State's case and very damaging to the Applicant. Plea counsel stated the Applicant had made several pro se motions but there was no reason to act on them. Plea counsel stated there was an offer for the Applicant to plead guilty to twenty (20) year sentence for voluntary manslaughter but the Applicant refused it. Plea counsel stated the Applicant decided on the day of the plea

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hearing that he would plead guilty (after discussing the matter with plea counsel and his family). Plea counsel testified he told the Applicant the State would not make a recommendation but would not oppose a thirty (30) year sentence. Plea counsel testified he advised the Applicant that he was facing a life sentence if he lost the case at trial. Plea counsel testified the Applicant never said he was pleading guilty in order to protect someone. Plea counsel testified he told the Applicant that the armed robbery charge was an 85% offense but that – for the murder charge – “thirty means thirty.” Plea counsel testified there was nothing more he could have done to prepare the case and that, based on the facts, it was wise for the Applicant to plead guilty.

Regarding the Applicant’s claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant’s testimony is not credible, while also finding plea counsel’s testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

The Applicant admitted to the plea judge that the facts recited by the solicitor were true. (Plea transcript, pp.14-15). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty and that he had not been coerced in any way. (Plea transcript, pp.7-8; p.11).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly investigate the case. Plea counsel testified he and the Applicant had numerous meetings in which they discussed: the charges, the potential sentences, the State’s evidence, the co-defendants’ statements, and the Applicant’s version of events. This Court finds plea counsel’s testimony is credible. This Court notes plea counsel’s testimony that he and the Applicant reviewed the inconsistencies in the co-defendants’ statements but that he believed these

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statements still painted an overall consistent story that was very harmful to the Applicant's case. This Court finds plea counsel relied upon his experience in recommending the Applicant plead guilty based, in large part, upon the co-defendants' statements. This Court finds the Applicant failed to prove plea counsel should have acted upon his various pro se motions because he failed to specify the contents of these motions or demonstrate how – if they had been argued – it would have changed the outcome of his case. This Court finds the Applicant has failed to show plea counsel did not properly investigate or prepare his case. See Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have challenged the delay between when the warrants were served and the indictments issued. See Rule 3(c), SCRCrimP. This Court notes that pre-indictment delay in excess of ninety (90) days does not render the prosecution of a case invalid. See State v. Culbreath, 282 S.C. 38, 40, 316 S.E.2d 681, 681 (1984) (“[T]he failure of the solicitor to act upon a warrant within ninety (90) days . . . does not within itself invalidate a warrant or prevent subsequent prosecution.”). Regardless, this Court finds the Applicant failed to provide evidence of any prejudice that resulted from the delay. See, e.g., State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting one must prove prejudice in order to prevail on an allegation that one's speedy trial rights were violated).

This Court finds the Applicant failed to meet his burden of proving plea counsel

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misadvised him about entering a guilty plea. Plea counsel testified he advised the Applicant that he could receive a life sentence on the murder charge if he lost the case at trial. Plea counsel testified he explained to the Applicant that he was pleading guilty to the charges without a recommendation, but that the State would not oppose thirty (30) year sentence. Plea counsel testified the Applicant never told him that he was pleading guilty to protect someone else. This Court finds plea counsel's testimony is credible. This Court finds there was no error in plea counsel advising the Applicant of the maximum sentence he could receive on the charges. See Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (finding that, before a defendant can enter a guilty plea, he "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived"). This Court finds the Applicant's testimony that he did not understand the plea proceedings and was pleading guilty to protect someone else is not credible. The Applicant had multiple opportunities to make these points during the plea hearing and chose not to do so. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). Based upon the plea transcript alone, it is clear the Applicant entered knowing and voluntary guilty pleas to these charges. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007).

This Court finds the Applicant failed to meet his burden of proving plea counsel misadvised him about parole eligibility. Plea counsel testified he advised the Applicant that the armed robbery charge would be an 85% offense but that the murder charge would be a thirty (30) year sentence that would be served day-for-day. This Court finds plea counsel's testimony is credible. This Court finds the Applicant was properly informed of his future parole eligibility (or

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ineligibility) on the charges. Regardless, this Court notes that parole eligibility is a collateral consequence of sentencing of which a defendant need not be specifically advised before entering a guilty plea. Randall v. State, 356 S.C. 639, 641, 591 S.E.2d 608, 609 (2004).

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

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

#### All Other Allegations

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

#### CONCLUSION

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

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

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 29<sup>th</sup> day of August, 2011.

*D. Garrison Hill*

D. Garrison Hill  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

A Certified Copy  
Paul B. Wislizenus  
Clerk of Court C.P. & G.S.  
Greenville County, SC  
Dated 8/29/11

|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) |                              |
| COUNTY OF GREENVILLE    | ) | C.A. No.: 2010-CP-23-4330    |

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| Frederick Alphonso Irby, 339195, | ) |                             |
|                                  | ) |                             |
| Applicant,                       | ) |                             |
|                                  | ) |                             |
| v.                               | ) | NOTICE OF MOTION AND MOTION |
|                                  | ) | TO ALTER ORDER OF DISMISSAL |
| State of South Carolina,         | ) | (Post-Conviction Relief)    |
|                                  | ) |                             |
| Respondent.                      | ) |                             |
|                                  | ) |                             |

**TO: THE RESPONDENT STATE OF SOUTH CAROLINA, BY AND THROUGH ITS ATTORNEY, KAREN C. RATIGAN**

YOU WILL PLEASE TAKE NOTICE that Applicant, Frederick Alphonso Irby, by and through his undersigned attorney, will move, pursuant to Rule 59(E), South Carolina Rules of Civil Procedure (SCRCP), as soon as counsel can be heard before the Honorable D. Garrison Hill, requesting that he reconsider his Order of Dismissal in this case dated August 29, 2011, and grant the relief sought by the Applicant in his Petition for Post Conviction Relief (PCR). This motion is based upon the Petition of Applicant, as amended, the record of the plea hearing, the record of the PCR hearing, and matters set forth herein.

#### **FACTS OF THE CASE**

On or about January 31, 2006, Rico Carter was found dead with a gunshot wound to the back of his head. He was found with \$2,262.00 cash. After the initial investigation, no arrests were made.

In August of 2007, more than a year and a half after Mr. Carter's death, Greenville County Sheriff's office received an anonymous tip from a person that turned out to be

Applicant's Aunt, Vilora Blakely. On October 12, 2007, Ms. Blakely gave a statement that she was told by her niece, Melinda Johnson, that someone by the name of "Shag" (possibly Shaq Anderson) had told her that Applicant killed Mr. Carter. According to her statement, she talked to Applicant, and he denied killing Mr. Carter. Also, according to her statement, "Shag" told her niece that he and Applicant went to rob Mr. Carter, that he hit Mr. Carter in the mouth, and that Applicant shot Mr. Carter.

On October 23, 2007, Applicant was arrested for armed robbery. Two days later (and more than 1 year and 9 months after Mr. Carter's death), Rasool "Shaq" Anderson came forward and gave his statement to the Greenville County Sheriff's Office. In his statement, he told deputies that on the night of Mr. Carter's death, Applicant told him that Applicant and Lee Hurst went to rob Mr. Carter and that Applicant shot Mr. Carter. He also states that both Applicant and Mr. Hurst were in possession of hand guns that night.

On October 30, 2007, Applicant gave his statement to the Greenville County Sheriff's office. In his statement he said that he drove Mr. Hurst and Mr. Anderson to a house in the Green Avenue area to get "some weed". He stated that Mr. Anderson and Mr. Hurst got out and went into the house for about ten minutes. He heard one shot, he started the car, and Mr. Anderson and Mr. Hurst returned to his car. He drove them both back to Mr. Anderson's sister's house and later asked Mr. Hurst if they "shot the dude". He stated that Mr. Hurst said he did not shoot him but indicated that Mr. Anderson did.

On November 3, 2007, according to a later statement given by Mr. Hurst, Mr. Anderson made the first of several calls to Mr. Hurst. On November 6, 2007, Mr. Hurst turned himself in to Dekalb County authorities. On November 6, 2007, Applicant, while already incarcerated, was

arrested for murder. On November 14, 2007, Mr. Hurst is arrested for manslaughter and on December 17, 2007, Mr. Hurst finally gave his statement stating that Applicant shot Mr. Carter.

On November 9, 2007, Applicant received his only visit from his first attorney, Bill Godfrey, which lasts about 30 minutes. It is not until October 23, 2008 that Applicant gets his first visit from Chase Harbin, his plea counsel ("Plea Counsel"). This visit was recorded as lasting 32 minutes. Applicant is not indicted for the murder of Mr. Carter until December 12, 2009, more than two years after his arrest. Prior to his indictment, he was repeatedly denied requests for information concerning his case. In addition, Applicant received an undated letter from Plea Counsel (sometime after his first visit to Applicant) stating that that "I will not be able to provide you with your own personal copy of discovery". At the PCR hearing, Applicant testified that he did not see copies of the written statements made by his accusers until he received copies of them from his PCR attorney. Between January 26, 2010 and February 8, 2010, Plea Counsel made 3 visits to Applicant in an attempt to get him to plead guilty to manslaughter and accept a sentencing offer of 20 years. Applicant refused this offer.

On February 9, 2010, Applicant plead guilty to murder, after initially refusing to do so. Upon his refusal to plead, Judge Pyle asked Plea Counsel for a list of his witnesses whereupon he stated that he did not anticipate calling any witnesses. After a pause in the hearing and further discussion with Plea counsel, Applicant eventually agreed to plead guilty to murder.

At the hearing, Assistant Solicitor, Leigh Paoletti, made the following statements regarding the case against Applicant:

"About a year and half later [after the death of Mr. Carter], Joe Wood with the cold case unit of Greenville County got a phone call from one of the witnesses that we would anticipate testifying today, Russell Anderson [Rasool "Shaq"

Anderson]. His mother told Investigator Wood that he had information about the murder of Rico Carter and was willing to give that information."

(NOTE: Statements presented at the PCR hearing show that initial tips came from Fred Irby's aunt and cousin, not Shaq's mother. No statement from Shaq's mother was produced by the State.)

Ms. Paletti further stated:

"Mr. Anderson, eventually did come to the law enforcement center and gave a statement to police indicating that Applicant and a co-defendant, who was, also, charged after these statements were obtained, a Vernon Lee Hurst, were at Mr. Anderson's house, left to go over to the Deering Street address where Rico Carter was killed, and then returned back to his house."

(NOTE: Mr. Anderson did not give his statement until two days after Applicant was arrested.

Mr. Anderson received 30 months probation for his willingness to testify against Applicant.)

Ms. Paoletti further stated:

"The co-defendant, Vernon Hurst, was in Atlanta at the time. When he heard that warrants had been issued for his arrest for the murder, he turned himself into Atlanta police, waived extradition, came to Greenville, and gave a statement to Greenville investigators detailing his and Applicant's involvement in the murder of Rico Carter."

(NOTE: Mr. Hurst actually turned himself in after getting several calls from Shaq Anderson who had ample opportunity to tell Mr. Hurst that he had pinned the shooting on Applicant. Also, Applicant did not give a statement until well over a month after he was arrested. Mr. Hurst plead guilty to voluntary manslaughter and was sentenced to twelve years for his willingness to testify against Applicant.)

Finally, Ms. Paoletti stated that Mr. Carter was killed with a .38 caliber weapon and that there was a witness who would testify that Applicant had sold him a .38 caliber weapon about a month after Rico Carter was killed. Ms. Paoletti, however, did not mention Mr. Anderson's statement wherein he stated that Mr. Hurst also had a small automatic weapon with a pearl handle which could very well have also been a .38 caliber weapon.

The State was relying almost exclusively on the on the testimony of Mr. Anderson and Mr. Hurst in its case against Applicant. For nearly two years, Mr. Anderson nor Mr. Hurst both remained silent, and neither came forward to give statements until after Applicant was arrested. In addition, the statements made by Mr. Anderson and Mr. Hurst were inconsistent in almost every regard except for the fact that they both stated Mr. Anderson was not at the scene and they both implicated Applicant as the shooter. The following are some of the inconsistencies:

**Anderson:** Me and Lee was at my house on West Ave. It had just gotten dark when Freddie came by. . . . He said that he needed to do something.

**Hurst:** I asked Shaq where we could get some marijuana and he said that we could call Fred Irby when he got off work. Around 7:00 pm, Shaq called Fred and he come over. . . . We was outside sitting on the porch when Fred pulled up. Me and Shaq walked over to the car and we told Fred we wanted to get some weed.

**Anderson:** Fred had a small chrome revolver and Lee had a small automatic with pearl handle.

**Hurst:** No mention of his own gun.

**Anderson:** Lee said he was at the front door as a look-out and then Fred shot the dude in the back of the head.

**Hurst:** We was getting ready to leave and Fred told the dude he wanted to talk to him. I went out to the car with the marijuana I had bought and was going to wait in the car. The car was locked so I turned around to go get the keys from Fred and I hear a pop that sounded like a gunshot.

**Anderson:** Lee said they took some weed and some money. Lee said there was not much of either and Fred kept the money and gave Lee the weed.

**Hurst:** We got back to the car and on the way back to Shaq's, Fred told me to divide the marijuana in half. He told me to take half and he was going to give the other half to his girlfriend.

After Ms. Paoletti presented the State's case against Applicant, Judge Pyle asked Applicant if he agreed with the facts presented by Ms. Paoletti. Applicant, however, maintained that he was not the shooter. He would only admit that he "was there".

### THE LAW

Applicant maintains that he was denied the right to effective assistance of counsel. A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In a PCR hearing the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2<sup>nd</sup> 514, 517 (2000).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the pleas by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009). In determining guilty plea issues, it is proper to consider the guilty plea transcript, as well as evidence at the PCR hearing. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

### ARGUMENT

Applicant respectfully requests that this Court reconsider its Order of Dismissal of his petition for Post Conviction Relief. In his Petition, as amended, and at the PCR hearing applicant claims that his attorney was deficient in several particulars including the following:

- (1) Defense attorney(s) failed to gather evidence essential to the defense of Applicant's case;
- (2) Defense attorney(s) failed to adequately advise the Applicant of the strengths and weaknesses of the State's case against him;
- (3) Defense attorney(s) failed to provide Applicant with copies of statements that were made against him;
- (4) Defense attorney(s) failed to negotiate a plea that was consistent with the circumstantial evidence the State had against Applicant and the credibility of the witness who were going to testify against Applicant; and

At the plea hearing, Applicant showed a clear reluctance to plead guilty. It was only after the trial judge ordered a jury panel to be brought up that Applicant agreed to plead guilty. Even then, after the Assistant Solicitor presented the State's case to the trial judge, Applicant would not agree to the facts as presented by the State, specifically the State's claim that he shot Mr. Carter.

At the PCR hearing, Applicant testified that he received one 30 minute visit from his first appointed counsel on November 9, 2007, approximately 2 weeks after his arrest. Between that visit and January 26, 2010, a period of almost 2 years and 3 months, Applicant received one 32 minute visit and a subsequent letter from Plea Counsel stating that he would not provide copies of discovery to Applicant but that he would go over discovery with him in full. Applicant further testified that he was not given copies of the witness statements that should have been provided to

Plea Counsel, and that the first time he saw the statements was when they were provided to him by his PCR counsel. Applicant further testified that he was unaware of the inconsistencies in the statements of the State's two key witnesses. Applicant further testified that he was not told of the weaknesses in the State's case by Plea Counsel, and that Plea Counsel never really communicated with him. Applicant further testified that Plea Counsel spent most of their meetings together trying to convince him to plead guilty. Applicant further testified that, had Plea Counsel provided him with the above information that was withheld from him, he would not have plead guilty, but would have insisted on going to trial.

Plea Counsel testified at the PCR hearing that it was difficult for him to remember all the details. He further testified that though he might not have given copies of the witness statements to Applicant, he is sure that he would have discussed them with him. (The first opportunity he would have had to do this would have been his second visit on January 26, 2010, more than 2 years and 3 months after Applicant's arrest and only 2 weeks prior to the plea hearing.) Plea Counsel further testified that he did not interview any witnesses, including those mentioned in witness statements that could have contradicted the testimony of State's key witnesses against Applicant. At the plea hearing, Plea Counsel told the Court that he did not intent to call any witnesses in defense of Applicant.

From the time of his arrest in October of 2007 until his case was called for trial in February of 2010, Applicant was given very little, if any, information regarding the State's case against him. During a period of more than two years, he received one visit and one letter from Plea Counsel. Although Applicant denied his guilt, he was led to believe that the State's case against him was strong and that there was nothing he could do other than plead guilty. The facts

presented at the PCR hearing reveal a much different picture than what Applicant was led to believe.

The State's entire case was dependent upon the testimony two co-defendants with prior records that did not come forward until after Applicant was arrested. In order for a jury to believe their testimony, they would have to ask why two persons, allegedly innocent of a crime, would wait almost two years to come forward and be the State's only evidence to support Applicant's guilt. In addition, the statements of the State's two key witnesses were filled with so many inconsistencies that either one or both of them had to be lying. Taking both statements, together with the statement of Applicant, it is difficult to see how the State could have proven anything more than Applicant was an accomplice after the fact, which would have resulted in a sentence no more than half of what Applicant received for his guilty plea.

For the reasons set forth above, Applicant believes that he has met his burden of proof in showing that Plea Counsel was ineffective in gathering and providing Applicant with sufficient information about his case to make a voluntary and intelligent decision whether or not to plead guilty. Accordingly, Applicant requests that this motion be granted and that this Court grant his Application for Post Conviction Relief.

Greenville, S.C.  
September 12, 2011



---

E. Scott Sanders (S.C. Bar #65634)  
E. SCOTT SANDERS, LLC  
1151 E. Washington Street  
Greenville, SC 29601  
(864) 242-0900  
Attorney for Applicant

STATE OF SOUTH CAROLINA

)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

)

C.A. No.: 2010-CP-23-4330

Frederick Alphonso Irby, 339195,

)

Applicant,

)

v.

)

**CERTIFICATE OF SERVICE**

(Post-Conviction Relief)

State of South Carolina,

)

Respondent.

)

)

This is to certify that on this 12<sup>th</sup> day of September, 2011, I served Applicant's Notice of Motion and Motion to Alter Order of Dismissal in the above-captioned matter upon attorney for Respondent by depositing a copy of the same in the United States Mail, with sufficient postage attached thereto, addressed as follows:

Karen C. Ratigan  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211-1549



E. Scott Sanders (#65634)  
Attorney for Applicant

Greenville, SC

|                          |   |                                     |
|--------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS        |
|                          | ) | C.A. No. 2010-CP-23-4330            |
| COUNTY OF GREENVILLE     | ) |                                     |
|                          | ) |                                     |
| Frederick Alphonso Irby, | ) |                                     |
| S.C.D.C. No. 339195,     | ) |                                     |
|                          | ) |                                     |
| Applicant,               | ) |                                     |
|                          | ) | <b>RETURN TO MOTION TO ALTER OR</b> |
| v.                       | ) | <b>AMEND THE ORDER OF DISMISSAL</b> |
|                          | ) |                                     |
| State of South Carolina, | ) |                                     |
|                          | ) |                                     |
| Respondent.              | ) |                                     |
|                          | ) |                                     |

**TO: E. SCOTT SANDERS, ESQUIRE, ATTORNEY FOR THE APPLICANT**

Respondent, by and through undersigned counsel, making Return to Applicant's Motion to Alter or Amend, would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief action filed May 25, 2010.
2. An evidentiary hearing was convened on August 2, 2011 at the Greenville County Courthouse.
3. Applicant was present at the hearing and was represented by E. Scott Sanders, Esquire. Applicant testified in his own behalf. Also testifying was Applicant's plea counsel, H. Chase Harbin, Esquire.
4. After a full review of the evidence presented at the evidentiary hearing, the post-conviction relief court issued an order dated and filed August 29, 2011 denying the application for post-conviction relief.
5. Applicant – through counsel – filed a Motion to Alter or Amend Judgment dated September 12, 2011 (and which was received by Respondent on September 15, 2011).

Applicant's counsel moves the Court to "reconsider its Order of Dismissal," as he believes Applicant met his burden of proving he is entitled to relief. Applicant recounts some of the facts of the underlying case, trial, and PCR hearing. Applicant, however, does not point to any legal errors or omissions in the final order of dismissal. Applicant also does not make a substantive legal argument about why the final order of dismissal must be altered or amended.

6. Respondent submits Applicant's Motion to Alter or Amend Judgment should be denied. Applicant is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reverse its decision and grant post-conviction relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

7. Respondent submits Applicant's request to revise the final order should be denied, as the post-conviction relief court fully reviewed and properly ruled upon the issues.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

KAREN C. RATIGAN  
Assistant Attorney General

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

By:

  
Attorneys for Respondent

September 15, 2011

## FORM 4

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

## JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-23-4330\_

Frederick Alfonso Irby

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S) 2011 SEP 29 AM 9:54

CHECK ONE:

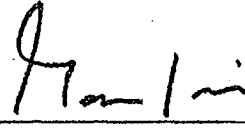
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other  
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**

- ☐ See attached order. (Formal order to follow)  
☒ Statement of Judgment by the Court: **Petitioner's Motion to**

Alter or Amend the Order of Dismissal signed August 29, 2011 is respectfully denied.

Dated at Greenville, South Carolina, this 27 day of September, 2011.

  
 PRESIDING JUDGE

This judgment was entered on the       day of       20       , and a copy mailed first class this  
          day of       , 20       to attorneys of record or to parties (when appearing pro se) as follows:

E. Scott Sanders  
 ATTORNEY(S) FOR PLAINTIFF

Karen C. Ratigan  
 ATTORNEY(S) FOR DEFENDANT

Paul B. Wickensimer

CLERK OF COURT

|                         |   |                                                 |
|-------------------------|---|-------------------------------------------------|
| STATE OF SOUTH CAROLINA | ) | INDICTMENT FOR                                  |
|                         | ) | ARMED ROBBERY AND POSSESSION OF A WEAPON DURING |
| COUNTY OF GREENVILLE    | ) | THE COMMISSION OF A VIOLENT CRIME               |

At a Court of General Sessions, convened on **DEC. 15 2009** the Grand Jurors of Greenville  
County present upon their oath:

**COUNT I**

That FREDERICK ALPHONSO IRBY did in Greenville County, on or about the 1st day of February, 2006, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: U.S. currency and personal items from the person or presence of RICO CARTER. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

**COUNT II – POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME**

That FREDERICK ALPHONSO IRBY did in Greenville County on or about the 1<sup>st</sup> day of February, 2006, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Armed Robbery. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

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

Seip B. Dainetti  
SOLICITOR

WITNESSES

C.T. Miller *[Signature]*

Greenville County Sheriffs Office

11/6/2007

ARREST WARRANT NUMBER

1474169 and 1474170

ACTION OF GRAND JURY

**TRUE BILL**

*[Signature]*  
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-23-

LBP

002602

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

*2/9/10* December

TERM 2008

PLEAD GUILTY

THE STATE

vs.

FREDERICK ALPHONSO IRBY

Indictment for

0139/0549

ARMED ROBBERY AND POSSESSION OF A  
WEAPON DURING THE COMMISSION OF A  
VIOLENT CRIME

VIOLATION § 16-11-0330 and § 16-23-0490

STATE OF SOUTH CAROLINA     )  
                                          )  
COUNTY OF GREENVILLE     )

INDICTMENT FOR  
MURDER

At a Court of General Sessions, convened on **DEC 15 2009** the Grand Jurors of Greenville  
County present upon their oath:

That FREDERICK ALPHONSO IRBY did in Greenville County, on or about the 1st day of February, 2006,  
unlawfully and with malice aforethought kill RICO CARTER by means of a gunshot wound to the head, and that  
RICO CARTER died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of  
Laws (1976) as amended.

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

Shirley D. Smith  
SOLICITOR

002701

DOCKET NO. 2008-GS-23-  
LBP

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

December

TERM 2008

2/9/10

PLEAD GUILTY

THE STATE

vs.

FREDERICK ALPHONSO IRBY

WITNESSES

C.T. Miller

Greenville County Sheriffs Office

11/6/2007

ARREST WARRANT NUMBER

1474168

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

0116

MURDER

VIOLATION § 16-03-0010