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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

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MICHAEL TIM GRAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001605

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A P P E N D I X

---

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STATE OF SOUTH CAROLINA	)	GENERAL SESSIONS
	)	
County of Union	)	2012-GS-44-00022
	)	
	)	
State of South Carolina,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Michael Tim Gray.	)	
	)	
	)	

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August 15th, 2012  
 Union, South Carolina

BEFORE:

THE HONORABLE MICHAEL G. NETTLES, JUDGE.

APPEARANCES:

THOMAS BLAINE PLEMMING, ASSISTANT SOLICITOR  
 Attorney for the State

MELINDA INMAN BUTLER , ESQ.  
 Attorney for the Defendant

AMINAH R. HARDY, RPR  
 Official Court Reporter

EXHIBITS

No.	Description	Page
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(No exhibits were marked.)

P R O C E E D I N G S

1  
2 MR. PLEMING: Your Honor, the next case before the  
3 Court is case number 2012-GS-44-22 and 24, and case  
4 Number 2012-GS-44-724, the State versus Michael Tim Gray.  
5 The defendant is charged with first-degree burglary on  
6 indictment number 724, and he is charged with two counts  
7 of petit larceny, each of which will be a third or  
8 subsequent offense conviction for a property offense, in  
9 which the sentence is contingent upon the value of the  
10 property lost.

11 The defendant has agreed to pleading guilty to the  
12 lesser-included offense of burglary, second-degree, and  
13 the State has agreed to code that offense as nonviolent.  
14 The defendant is pleading guilty as charged on the two  
15 counts of petit larceny, third property offense.

16 Your Honor, the defendant was also charged with an  
17 additional burglary and larceny charge, which the State  
18 has agreed to dismiss as a result of his entering his  
19 pleading guilty today on these charges. Each of these  
20 indictments on which the defendant pleads have been true  
21 billed by the grand jury. The defendant is entering his  
22 pleas of guilt in exchange for a negotiated sentence of 16  
23 years imprisonment.

24 The State is prepared to discuss the facts and  
25 circumstances of this particular case, along with the

1 defendant's prior criminal record at the appropriate time.

2 THE COURT: A negotiated sentence of what?

3 MR. PLEMING: Of 16 years.

4 THE COURT: Yes, ma'am. Do you represent Mr. Gray?

5 MS. BUTLER: That's correct, Your Honor. I was  
6 appointed to Mr. Gray's case in March of this year. At  
7 the time I was appointed, Mr. Gray was actually facing  
8 five charges. Two of the charges have been dismissed as  
9 part of this plea. It's definitely been a struggle for  
10 all of us. We have went back and forth through it.

11 I visited with Mr. Gray at the jail this past Friday  
12 and we talked about it. We've talked on the phone many  
13 times since March 1st of 2012. Mr. Gray didn't come  
14 into my office during that time because there was a  
15 pending bench warrant on him, so -- but we did talk on the  
16 phone numerous times. We actually had e-mail back and  
17 forth with his girlfriend on different things regarding  
18 these charges.

19 Mr. Gray understands that if he goes to trial, that  
20 he's going on a burglary first, and if he's convicted,  
21 he's facing a minimum of 15, violent. He understands what  
22 the violent category puts him into, so he is willing to  
23 accept the sentence of the 16 years for a nonviolent.

24 THE COURT: You explain to him the offense of petit  
25 larceny, the fact he could be -- under these circumstances

1 incarcerated for -- under the enhancement provisions up to  
2 10 years on each?

3 MS. BUTLER: Yes, sir, we have talked about that  
4 petit larceny and the enhancement, and that if he went to  
5 trial that he could possibly even fight whether it was  
6 third offense. There's two on there. There's some  
7 question, but he understands that he could present a  
8 defense as to it. He also understands that if he's  
9 convicted on third offense property on each one, that he's  
10 facing each 10 on each one, and that's 30.

11 THE COURT: So you've explained to him the elements  
12 of each of these three separate and district offenses,  
13 burglary, second-degree; and two -- and two petit  
14 larcenies under the enhancement provisions; the elements  
15 of each of these offenses; potential defense; and his  
16 constitutional rights?

17 MS. BUTLER: That's correct, Your Honor.

18 THE COURT: And how does he wish to plead?

19 MS. BUTLER: It's my understanding he wishes to plead  
20 guilty to the charges as the solicitor announced them.

21 THE COURT: Do you agree with his decision to do so?

22 MS. BUTLER: I do, Your Honor.

23 THE COURT: Do you feel if called upon to do so, the  
24 State could find him guilty beyond a reasonable doubt?

25 MS. BUTLER: I do, Your Honor.

1 THE COURT: Let's place Mr. Gray under oath.

2 MICHAEL T. GRAY, after being duly sworn,  
3 testified as follows:

4 THE COURT: Mr. Gray, are you under the influence of  
5 any drugs or alcohol here today?

6 THE DEFENDANT: No, sir.

7 THE COURT: Are you experiencing any kind of physical  
8 or mental problem that would prevent you from  
9 understanding what's going on here today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Pay very close attention as the State  
12 summarizes the facts that bring us here today.

13 MR. PLEMING: Your Honor, the facts of the case are  
14 as follows: On October 20th, 2011, officers from the  
15 Union County Sheriff's Office were dispatched to [REDACTED] Deep  
16 Water Road in response to a burglary in progress. [REDACTED]  
17 Deep Water Road is the residence of the victim on the  
18 charge to which this defendant is pleading guilty,  
19 Ms. Nicole Rizzo. It's also the residence of her two  
20 children, and it's located in the county of Union, South  
21 Carolina.

22 The victim's next-door neighbor, Ms. Heidi Hodge,  
23 overheard a loud banging noise outside of her home, and  
24 upon looking out the window, she observed a man standing  
25 in front of Ms. Rizzo's home banging on the door. After

1 contacting the victim, who was not at home at the time and  
2 asking if anyone was supposed to be at her house, the  
3 victim asked Ms. Hodge to check on it for her. When she  
4 went outside, there was no longer anyone on the front  
5 porch, and the door of residence was wide open.

6 Ms. Hodge reluctantly entered the victim's home to  
7 check on the home, and almost immediately upon entering  
8 the home, this defendant exited a room near the front door  
9 of the residence, faced Ms. Hodge standing only a few feet  
10 away, and after a brief exchange of shouts and screams,  
11 the defendant fled out the front door. Ms. Hodge observed  
12 the defendant run to a neighbor's house briefly before  
13 fleeing into the woods.

14 When the victim, Ms. Rizzo, returned to her home, she  
15 discovered exactly \$260, which she had set on her table in  
16 her bedroom as a reminder to pay a bill, was missing. In  
17 addition to that, a gold ring that was also sitting on a  
18 piece of furniture in her bedroom.

19 Ms. Hodge provided a description of the defendant to  
20 law enforcement. Officers called a K-9 tracking team and  
21 they soon located the defendant walking on Honeybee Circle  
22 matching the description that Ms. Hodge had given. After  
23 being advised of his Miranda rights, the defendant stated  
24 that he would show the officers where he had hidden the  
25 items reported stolen. After leading them on a wild goose

1 chase, officers actually observed some cash, a wad of cash  
2 sticking out of the defendant's sock. The amount of the  
3 cash was exactly \$260.

4 A burglary had also been reported that very morning  
5 by another neighbor, Ms. Brooke Callahan. Ms. Callahan  
6 had reported that a 65-inch flat screen television had  
7 been taken from her home during the night before. After  
8 speaking with the neighbor with whom this defendant had  
9 been staying, 18-year-old Presley Keasler, Ms. Keasler  
10 admitted that this defendant had persuaded her into  
11 helping him break into the Callahan residence the night  
12 before and taking the television. She showed officers  
13 where they stored the television in a shed behind their  
14 home.

15 And lastly, on the same day of this incident,  
16 Ms. Keasler and this defendant were also observed by  
17 neighbors loading up and carrying away a red S-10 pickup  
18 bed belonging to the landlord and property owner of all of  
19 these residences mentioned in this case, Ms. Carol Sparks.  
20 The truck bed had been stored behind one of the  
21 residences. The defendant took it and sold it without  
22 permission at Lucky Scrap Metal and Recycling before  
23 returning to commit the burglary of Ms. Rizzo's home.

24 Now, Your Honor, I'd like to go over the defendant's  
25 prior criminal history, as well as a couple additional

1 considerations that the State took into account in  
2 reaching this plea offer. This conviction will mark the  
3 defendant's fifth burglary conviction within the last  
4 seven years. This marks his sixth property offense  
5 conviction within the last seven years, according to our  
6 records. In 2009, he was convicted of burglary,  
7 third-degree; two counts of burglary, second-degree; grand  
8 larceny; malicious injury to a courthouse; resisting  
9 arrest. And in 2006, he was convicted of burglary,  
10 third-degree and two counts of simple assault and battery.

11 In 2005, he was convicted of two counts of simple  
12 assault and battery, violating trespass notice, three  
13 counts of financial transaction card fraud, malicious  
14 injury to property, failure to stop for a blue light, and  
15 petit larceny.

16 Your Honor, first of all, I think it's important to  
17 note that the defendant committed these crimes less than  
18 two months after his most recent release from the South  
19 Carolina Department of Corrections. The defendant's plea  
20 offer expired in April of this year. He had been given  
21 notice of that plea offer expiration date. He chose not  
22 to accept the offer. The defendant's case was first  
23 placed on the trial list for the May 2012 term. He failed  
24 to show for court that week, and the presiding judge  
25 issued bench warrants for his arrest. The defendant then

1 took flight, fled the state, getting a job working  
2 construction along the Gulf Coast near Galveston, Texas,  
3 according to the information we had.

4 I personally kept certain tabs on the defendant by  
5 simply logging on to his Facebook account during this  
6 time, which he made available to the public. And during  
7 this time while he was on the run, the defendant  
8 repeatedly essentially defied officers, essentially giving  
9 the middle finger to the criminal justice community by his  
10 public comments that he made on Facebook. His attitude  
11 toward the criminal justice system is also evident by his  
12 record of failure to stop for a blue light, resisting  
13 arrest, and damaging a courthouse.

14 Among the things that he said on Facebook, the  
15 internet social media site, degrading police officers,  
16 bragging about his past crimes, taunting law enforcement  
17 in their efforts to locate him. And, Your Honor, if you  
18 would like, I have copies of all that I could put on the  
19 record. He also posted videos of himself smoking  
20 marijuana, talking about being high. He posted an article  
21 written about a burglary he and his brother had committed  
22 together in 2009, bragging about the past. He made  
23 statements such as "F the police. You can't see me not,  
24 even the 5-0. Have fun trying to get me because you can't  
25 touch Mike G. F the police," and most recently stated, "I

1 found out why I don't care about shit, because I got ice  
2 in my veins, blood in my eyes, and hate in my heart."

3 THE COURT: Are those facts true and accurate,  
4 Mr. Gray?

5 THE DEFENDANT: Somewhat.

6 THE COURT: Are you indeed guilty of petit larceny,  
7 third or subsequent offense?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: On two separate and distinct counts?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you guilty of burglary,  
12 second-degree, nonviolent?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. You're standing before me  
15 pleading guilty, but you don't have to plead guilty to  
16 anything. You could exercise your right to a jury trial.  
17 In that process, the jury would determine whether or not  
18 the State could actually prove you guilty beyond a  
19 reasonable doubt. I would charge the jury as a matter of  
20 law that you're presumed to be innocent. No one could  
21 require you to take the witness stand. However, if you  
22 wanted to, you could, and you could subpoena witnesses on  
23 your own behalf.

24 In addition to that, you and your lawyer could  
25 cross-examine the state witness. You have an opportunity

1 to eyeball them and confront them if they testify against  
2 you. You realize by pleading guilty, you give up all  
3 those rights?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Still wish to plead guilty?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Are you indeed guilty?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: All right. Plea negotiation is a 16-year  
10 sentence. Is that your understanding of the plea  
11 negotiations?

12 MS. BUTLER: That's correct, Your Honor.

13 THE COURT: Is that your understanding, Mr. Gray?

14 THE DEFENDANT: (The witness nods his head.)

15 THE COURT: Do you understand that if I accept this  
16 plea negotiation, that's what you get. Not a day more;  
17 not a day less. Do you understand that?

18 Need to answer up.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Are you satisfied with your  
21 lawyer?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Has anybody promised you anything,  
24 threatened you, pressured you, mistreated you in any way,  
25 shape, or form in an effort to get you to plead guilty

1 here today?

2 THE DEFENDANT: No, sir.

3 THE COURT: Been your decision to plead guilty?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Have you understood all my questions?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Have your answers been truthful?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand you have ten days to  
10 appeal any decision I might render here today?

11 THE DEFENDANT: What now?

12 THE COURT: Do you understand you have ten days to  
13 appeal any decision I might render here today?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Based on your testimony, I find there's a  
16 substantial and factual basis for your plea; that your  
17 decision was freely and voluntarily entered into,  
18 knowingly, and intelligently with the consent of competent  
19 counsel with whom you say you're satisfied. I'll accept  
20 the plea today. Glad to hear from you and your lawyer and  
21 anybody who would like to speak on your behalf.

22 MS. BUTLER: Your Honor if I may, the defendant  
23 advises me he spent two months in jail when he was first  
24 arrested on the charges last year. And since he was  
25 picked up on that bench warrant last Wednesday, he spent

1 another week in jail. So we would ask for him to be given  
2 credit for the time served in jail.

3 THE COURT: How many days would that be?

4 MS. BUTLER: Your Honor, if he -- he tells me two  
5 months. I did not check the prior time that he was in.  
6 So if he actually spent a full two months, it would be 67  
7 days total.

8 THE COURT: All right. What does the State have to  
9 say about that? You have a position about how much time  
10 is to be given credit for?

11 MR. PLEMING: I believe that sounds about right. I  
12 can check his bond paperwork to be certain.

13 MS. BUTLER: While Mr. Fleming checks that, if I may  
14 say to the Court, on Mr. Gray's past criminal record,  
15 Mr. Gray agrees with all of it except for one of the  
16 financial card transactions. He's very questionable about  
17 that one, just to put that to the Court. I don't think it  
18 would make a difference as to whether he's on the third  
19 property offense enhancement or not.

20 Also, Mr. Gray has two children. He has a very new  
21 child, a three month old and a four year old. I will say  
22 to the Court that Mr. Gray has been straightforward with me  
23 the entire time. He's -- you know, he's admitted to what  
24 he's done. He had some drug issues going on. He admits  
25 to that. The stuff that Mr. Fleming read out on Facebook,

1 the disrespect, he's never been disrespectful to me in  
2 that way. He's always been respectful and yes, ma'am and  
3 no, ma'am.

4 Understand this is a negotiated sentence and we  
5 talked about that, that it is negotiated; it's not  
6 changeable. And Mr. Gray understood that he could have  
7 pled straight up here today, but it would be to a burglary  
8 first where he would be facing a minimum of 15 and violent  
9 sentence, and the nonviolent has been very important to  
10 Mr. Gray.

11 So saying all that, I do believe that it's a balance  
12 of justice here. We would ask Your Honor to accept it.

13 MR. PLEMING: Your Honor, he -- according to my  
14 records and assuming that my math is correct, he served 49  
15 days in jail before bonding out. 49 plus seven days, so  
16 56.

17 PROBATION OFFICER: Your Honor, for the Court's  
18 information, he is currently on supervision and --  
19 correction in Laurens County. They do have an active  
20 warrant for him for absconding supervision. They will  
21 handle that violation at a later date.

22 THE COURT: I'm a firm believer in -- somebody ought  
23 to -- they ought to give a license before people can  
24 operate one of those computers and get on that Facebook,  
25 which I think is going to be the ruination of the entire

1 world. But you did not use best judgment in doing that.

2 What were you thinking when you were doing all that?

3 THE DEFENDANT: Nothing really.

4 THE COURT: Apparently not. Anything else?

5 THE DEFENDANT: No, sir.

6 THE COURT: All right. On indictment

7 2012-GS-44-0022, property offense third or greater,  
8 sentence of the Court is you be committed to the state  
9 Department of Corrections for a period of ten years. That  
10 is to run consecutive with indictment 2012-GS-44-0724,  
11 arrest warrant on the M676291 credit for 56 days.

12 With regard to indictment 2012-GS-44-0025, petit  
13 larceny, sentence of the Court is you be committed to the  
14 state -- to the county detention center for a period of 56  
15 days. Sentence is to run concurrent to other sentences  
16 here today, and given credit for six days.

17 With regard to indictment 2012-GS-44-0724, burglary  
18 second-degree, sentence of the Court is you be committed  
19 to the state Department of Corrections for a period of six  
20 years, sentence to run consecutive with indictment  
21 2012-44-0022, warrant M676292. Credit for 56 days.

22 Good luck to you.

23 (Whereupon, the proceedings were concluded.)

24

25



2013 -CP-44-00035

FORM 5

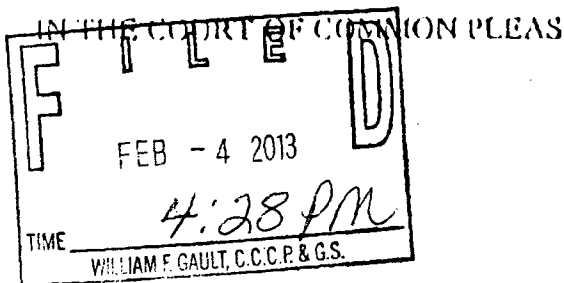
STATE OF SOUTH CAROLINA )

County of UNION )

MICHAEL TIM GRAY, 313935, )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )



APPLICATION FOR  
POST-CONVICTION RELIEF

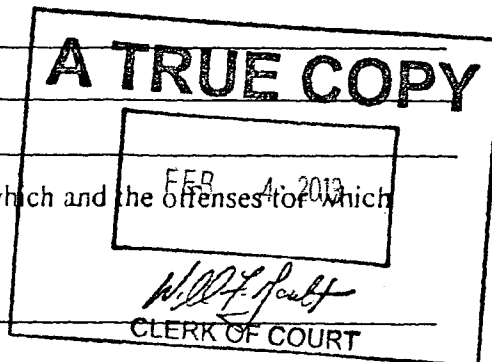
INSTRUCTIONS TO READ CAREFULLY

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 EVANS CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence GENERAL SESSIONS OF UNION COUNTY, SC 29379
3. Name(s) of co-defendant(s) (if any) NO.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) 2012-GS-44-0724



(b) 2012-GS-44-0022

(c) 2012-GS-44-0025

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 8-15-12, 6 YEARS CONSECUTIVE TO 2012-GS-44-0022

(b) 8-15-12, 10 YEARS CONSECUTIVE TO 2012-GS-44-0724

(c) 8-15-12, 56 DAYS CONCURRENT TO OTHER CHARGES

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?  
NO, I TOLD MY COUNSEL TO FILE THE NOTICE OF APPEAL.

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(b) the result in each such Court to which you appealed:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(c) the date of each such result:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) I ASKED MY COUNSEL AFTER RECEIVING 16 YEARS TO FILE THE NOTICE OF APPEAL. SHE FAILED TO FILE SUCH NOTICE AS REQUIRED BY SCRCP 203. 2

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) COUNSEL WAS IMPROPER FOR NOT OBJECTING TO THE ILLEGAL (CONSECUTIVE) SENTENCE.
- (b) \_\_\_\_\_
- (c) COUNSEL FAILED TO INVESTIGATE TO ENSURE THE ACCURACY OF THE STATES CASE.

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

- (a) SOUTH CAROLINA LAW PROHIBITS THE IMPOSITION OF BOTH, AN ILLEGALLY CONSECUTIVE SENTENCE (B) IMPOSITION OF A
- (b) IMPOSITION OF A SENTENCE IN VIOLATION OF DOUBLE JEOPARDY.
- (c) \_\_\_\_\_

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

- (a) any petition in a State Court under South Carolina Law? NO.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO.
- (d) any other petitions, motions or applications in this or any other Court? NO.

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

- (a) the specific nature thereof:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

(c) the disposition thereof:

i. \_\_\_\_\_

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

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

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

(d) the date of each such disposition:

i. \_\_\_\_\_

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

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

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

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

i. \_\_\_\_\_

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

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

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

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

\_\_\_\_\_  
\_\_\_\_\_

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

(a) which grounds have been presented:

i. \_\_\_\_\_

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

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

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

i. \_\_\_\_\_

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

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

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

- (a) AFTER GIVING COUNSEL SPECIFIC INSTRUCTION, COUNSEL  
FAILED TO FILE NOTICE AS REQUIRED BY SCACR 203.
- (b) \_\_\_\_\_
- (c) THIS ~~IS~~ IS ONLY AVENUE AVAILABLE TO THE PETITIONER.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? YES
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? YES.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?  
N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO.

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. THE BUTLER LAW FIRM  
MELINDA I. BUTLER
  - ii. POST OFFICE BOX 248  
UNION, SC 29379
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. PLEA AND SENTENCING
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

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

THE PETITIONER PRAYS THAT THIS COURT CORRECT HIS SENTENCE  
TO RUN CONCURRENT, REVERSE THE TWO PETTY LARCENY CHARGES ON  
DOUBLE JEOPARDY GROUNDS, OR ANY OTHER REMEDY THAT THIS  
COURT DEEMS JUST AND PROPER.

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 UNION )

VERIFICATION

I, MICHAEL TIM GRAY, 313935, 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.

Michael Gray (313935)

SWORN to and subscribed before me this 31  
day of January, 2013.

Don Thomas (L.S.)  
Notary Public

My Commission Expires: September 19, 2015

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

I, MB, 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.

Michael Dwyer  
Applicant

SWORN or affirmed to and subscribed before me this  
31 day of January, 2013.

Janice S. Thomas  
Notary Public

My Commission Expires: September 19, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
	)	
Michael Tim Gray, #313935,	)	2013-CP-44-0035
	)	
Applicant,	)	
	)	
v.	)	<b>RETURN</b>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 4, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted at the January 2012 term of the Union County Grand Jury for two counts of Petit Larceny (2012-GS-44-0022, -0025). He was also indicted at the May 2012 term of the Union County Grand Jury for Burglary, 1<sup>st</sup> degree. Melinda Butler, Esquire, represented him. On August 15, 2012, the Applicant pled guilty before the Honorable Michael G. Nettles to both counts of Petit Larceny, 3<sup>rd</sup> or subsequent offense as indicted and Burglary, 2<sup>nd</sup> degree as a lesser included offense. Judge Nettles sentenced the Applicant, pursuant to negotiations, to confinement for ten (10) years for one count of Petit Larceny, 3<sup>rd</sup> or subsequent offense, ten (10) years, consecutive, for Burglary, 2<sup>nd</sup> degree, and fifty-six (56) days, credit for time served, for the other Petit Larceny Charge. The Applicant did not appeal his conviction and sentence.

Attached herewith and incorporated herein are the records of the Union County Clerk of Court regarding the subject conviction(s) and the Applicant's records from the South Carolina Department of Corrections and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. "Counsel was ineffective for not objecting to the illegal (consecutive) sentence."
  - a. "South Carolina Law prohibits the imposition of both an illegal consecutive sentence (B) imposition of a imposition of a sentence in violation of Double Jeopardy"
2. "Counsel failed to investigate to ensure the accuracy if the State's case"
  - a. "Counsel failed to file the Notice of Appeal"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at evidentiary hearing. All amendments should be made well in advance of hearing and should be filed as required by Rule 11, SCRPC(a).

## III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

#### IV.

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

V.

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

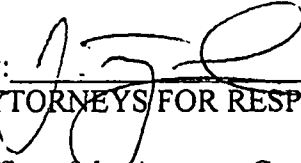
Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General

By:   
~~ATTORNEYS FOR RESPONDENT~~  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

*August 22*, 2013.



State of South Carolina., )  
 )  
 )  
County of York. )

In the Court of Common  
Pleas of York  
Case No.: 2013-CP-44-00035

Michael Tim Gray., )  
 )  
Applicant., )  
 )  
-vs- )  
 )  
State of South Carolina., )  
 )  
Respondent. )  
 )

Transcript of Record  
Post-Conviction Relief

December 10, 2013  
Union, South Carolina

B E F O R E:

The Honorable John C. Hayes, III., judge.

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

Ms. Laura McCall Saunders  
Attorney at Law  
P.O. Box 731  
1800 East Blvd.  
102 Church Street  
Laurens, South Carolina 29360  
For the Applicant

**ORIGINAL**

Mr. J. Rutledge Johnson  
Assistant Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, South Carolina 29211  
For the Respondent

Wanda Nelson, CVR-M  
Official Court Reporter  
To the Honorable John C. Hayes, III

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<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
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Michael Gray	Ms. Saunders . . . . .	P.14-24
	Mr. Johnson. . . . .	P.24-34

I-N-D-E-X

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD.</u>
Appl. 1	6 pages of emails . . . . .		P.36

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Reporter's Note: All Exhibits were filed with the Union  
County Clerk of Court's Office.

1 (COURT IN SESSION DECEMBER 10, 2013 11:36 A.M..)

2 THE COURT: All right.

3 MR. JOHNSON: May it please the court, your Honor.

4 The case of Michael Gray versus State of South  
5 Carolina. It's case Number 2013-CP-44-0035. Mr. Gray was  
6 indicted at the January 12, term of the York - the Union  
7 County Grand Jury for two counts of petit larceny. He was  
8 also indicted at the May 2012 term of the Union County  
9 Grand Jury for burglary in the first degree.

10 On August 15th, 2012, he pled guilty before the  
11 Honorable Michael G. Nettles to both counts of petit  
12 larceny third or subsequent offense as indicted and to  
13 burglary second degree as a lesser included offense of  
14 burglary first.

15 He was sentenced consecutively. It was a negotiated  
16 sixteen years. Ten years for one count of the petit  
17 larceny third offense and six years for burglary second  
18 degree. He was also sentenced to fifty-six days, time for  
19 credit served on the other petit larceny.

20 He filed no appeal however he filed a timely PCR  
21 application on February 4, 2013. The State filed it's  
22 return on August the 27th, 2013, and he is represented here  
23 today by Ms. Laura Saunders.

24 THE COURT: All right, Ms. Saunders.

25 MS. SAUNDERS: Thank you, Your Honor. I was appointed

MELINDA BUTLER: DIRECT BY MS. SAUNDERS

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1 on February 28th of '13 by the Clerk of Court in Union  
2 County Freddie Gault. It's our intention to go forward  
3 today. We have two witnesses.

4 THE COURT: All right. Call your first witness.

5 MS. SAUNDERS: Thank you, your Honor.

6 I'd like to call Melinda Butler to the stand.

7 MADAM CLERK: Ms. Butler, can I get you to stop here  
8 and place your left hand on the Bible and raise your right.

9 ((WHEREUPON, MELINDA BUTLER,  
10 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:))

11 MADAM CLERK: Thank you. You may have a seat.

12 DIRECT EXAMINATION

13 MELINDA BUTLER BY MS. SAUNDERS:

14 Q. Thank you, Ms. Butler. Do you recall when you were  
15 appointed to represent Mr. Gray?

16 A. My notes reflect I was appointed March the 1st of  
17 2012.

18 Q. And at that time you were had - had become a private  
19 attorney in Union County?

20 A. Yes.

21 Q. So you have offices away from the courthouse in Union?

22 A. That's right.

23 Q. Okay. And who was the solicitor on the case at the  
24 time?

25 A. That was Blaine Pleming.

MELINDA BUTLER: DIRECT BY MS. SAUNDERS

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1 Q. And he's still currently employed by the Union County  
2 Solicitor's Office?

3 A. He is.

4 Q. Now it's my understanding that you had several  
5 communications with Mr. Lemming over the spring of 2012  
6 regarding a plea offer and getting Mr. Gray into court to  
7 possibly plea or eventually go to trial; is that correct?

8 A. That's correct, yes.

9 Q. Now the final offer which Mr. Gray plead to on August  
10 15th was what?

11 A. On August - The final offer was to plead to one count  
12 of burglary second degree non-violent and two counts of  
13 petit larceny and that was dropped down from a burglary  
14 first degree and a burglary second degree and three counts  
15 of petit larceny third or subsequent offense.

16 Q. Okay. So two out of those five charges were actually  
17 dismissed as part of the plea?

18 A. That's correct.

19 Q. And he actually pled to a lesser included offense of  
20 burglary second degree non-violent?

21 A. That's correct.

22 Q. And he had recently been indicted by direct indictment  
23 for burglary first degree. Correct?

24 A. That's correct.

25 Q. So was it your understanding that he was looking at

1 going to trial on one or two counts of burglary in the  
2 first degree?

3 A. That's right, yes.

4 Q. One or two counts?

5 A. Oh, I'm sorry. He was going to trial on - He was  
6 direct indicted on a burglary first as a result of his  
7 previous two burglaries seconds so the solicitor direct  
8 indicted him under the statute for burglary first. He was  
9 previously facing another burglary first but in our  
10 conversations with the solicitor I was able to convince him  
11 that that set of facts didn't rise to the level of burglary  
12 first so he was actually gonna only try him on one burglary  
13 first.

14 Q. Okay. And at the time of the plea in August had there  
15 been several series of offers that had been communicated to  
16 you by Mr. Fleming?

17 A. Yes. There were many offers and unfortunately we  
18 - Mr. Gray decided that he didn't want to take the offers  
19 that came from Mr. Fleming, that we were able to discuss  
20 and he ended up - And actually Mr. Fleming offers at one  
21 time said he could plead straight up to everything. So -  
22 But by the time we did make it to court to do the actual  
23 plea we had negotiated to another plea offer instead of a  
24 straight up to everything.

25 Q. Okay. And was it your legal advice to him at the

MELINDA BUTLER: DIRECT BY MS. SAUNDERS

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1 time that you finally got to court in August to plea that  
2 the plea offer was fair in light of that that he was facing  
3 a trial on a burglary first with sufficient facts to  
4 convict?

5 A. Under the circumstances it was a lot of years for him  
6 to plead to but considering the amount of years that he was  
7 facing on all the charges cause he would have actually went  
8 to trial on the burglary first, a burglary second, which  
9 was up to fifteen years cause they were alleging it  
10 occurred at night, and three counts of petit larceny third  
11 or subsequent so he was facing ten on each of those.

12 Q. Did you have several communications with Mr. Gray over  
13 that year 2012 when you all were trying to work his cases  
14 out?

15 A. I did. Mr. Gray actually went on the run for a little  
16 bit where he couldn't be found, but even when he was out of  
17 - I think he ended up even in Texas somewhere - we sent -  
18 we would send letters out to the address that we had for  
19 him in Laurens - and I believe it was his mother's address  
20 - so he contact my office every once in a while and we  
21 would actually set up a phone to meet with him and we would  
22 go through and discuss - I would go through and discuss  
23 everything with him at that phone meeting.

24 Q. Now wait a minute. I think I picked something up in  
25 conversations with Mr. Gray and with you. Did you always

1 have an accurate phone number for Mr. Gray?

2 A. No.

3 Q. How would he call you?

4 A. He would call me from a private number or it would  
5 show up private or restricted. I never had a number for  
6 him directly.

7 Q. Okay.

8 A. Cause he was on the run, you know, he didn't want to  
9 be found.

10 Q. Well let me ask you about the offer of eight years.

11 That occurred around March I believe the 20th of 2012.

12 I think that Mr. Fleming actually communicated this  
13 offer to you in an email that he was willing to resolve the  
14 cases to a plea at a recommendation of a cap of eight years  
15 and concurrent sentencing. But he - He made a limitation  
16 on that offer. Correct?

17 A. He did. He said that Mr. Gray had to accept that  
18 offer by the April 9th term of General Sessions. And even  
19 though we sent a letter out to Mr. Gray in March Mr. Gray  
20 never contacted our office until April 20th. It was after  
21 the April 9th term.

22 Q. Okay. So the offer had essentially expired?

23 A. Before he contacted my office, yes.

24 Q. So at that point did you have to start negotiations  
25 all over again with Mr. Fleming?

MELINDA BUTLER: DIRECT BY MS. SAUNDERS

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1 A. Yes. And Mr. Fleming actually at that point put Mr.  
2 Gray on the trial list for the April term so we were  
3 actually notified for trial. I showed up for trial in the  
4 May term - I'm sorry, he was notified for the May term of  
5 trial; I showed up for trial and actually was ready to do  
6 jury qualifications and they called Mr. Gray's name from  
7 what I recall and then since he wasn't there the solicitor  
8 said that he would just do a bench - a bench warrant for  
9 him at that time.

10 Q. Do you recall what date that was?

11 A. That would have been the May term of trial and - May  
12 14th.

13 Q. At that point had he already been indicated on the  
14 burglary first degree in preparation for trial? Do you  
15 recall?

16 A. I don't recall.

17 Q. But it's your understanding that - or it's your  
18 feeling that you tried to deficiently contact him?

19 A. Oh, absolutely. Yes. I have several letters where  
20 we were contact - we were sending letters out to the  
21 address that we had. And like I said we never had a phone  
22 number for him. He called us restricted or private.

23 Q. Okay. And like you said, you're a private attorney?

24 A. That's correct.

25 Q. Do you have to be present for every roll call?

1 A. No. I don't appear at roll calls.

2 Q. And were you ever contacted by Michael Gray the week  
3 of April the 12th or around that time?

4 A. No. My records don't reflect that I was contacted at  
5 all by him until April 20<sup>th</sup>.

6 Q. Okay.

7 MS. SAUNDERS: I beg the Court's indulgence.

8 Q. Ms. Butler, let me ask you this. By the time you got  
9 in touch with him on April the 20th, it's my understanding  
10 that the offer had been reverted back to ten years on each  
11 count for burglary second violent.

12 A. Yeah. I don't recall specifically what the offer  
13 reverted back to but it definitely wasn't the eight years  
14 anymore. It went up from there and then it continued to  
15 rise even when he wouldn't show up the next term or the  
16 next term. The offer just continued to increase every  
17 time.

18 Q. Okay. And what happened in June, July? Did you have  
19 any contact with him?

20 A. My records reflect that I had a phone call with Mr.  
21 Gray on June 8th and that we reviewed the file over the  
22 phone. My records reflect that I had a phone call with Mr.  
23 Gray June the 12th. My records reflect that I had a phone  
24 call with Mr. Gray June the 19th. And that I had a phone  
25 call with Mr. Gray July the 31st. And then I also went on

MELINDA BUTLER: DIRECT BY MS. SAUNDERS

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1 a jail visit when he finally got picked up on his bench  
2 warrant. I think the bench warrant was pending for three  
3 months or so before he was - or round about before he was  
4 picked up and I went to the jail when he was picked up and  
5 visited with him on August 10th.

6 Q. Okay. And just not to invade attorney client  
7 privileges necessarily on the record, but you were  
8 discussing whether or not you were going to trial.

9 A. Yeah, we were discussing all the options of  
10 everything, you know, his right to present a defense, his  
11 right to the jury trial; what his options were, what he was  
12 facing, what his consequences would be, just everything we  
13 discussed very in-depth.

14 Q. Okay. And so the final negotiations as far as what  
15 he actually pled to on August the 15th that was done the  
16 day of the plea; do you recall?

17 A. Oh, yes. Yes. We - I think prior to that, I'm not  
18 for sure, but I know at one time Mr. Fleming had said he  
19 would plea - that he had no offer, he could plead straight  
20 up on all the charges. And then the day of the plea we  
21 ended up - a few days before the plea it seems like I sent  
22 Mr. Fleming a counter offer with Mr. Gray's permission.  
23 And then the day of and Mr. Fleming out right rejected the  
24 counter offer and then the day of the plea we actually came  
25 up with the - the sentence that we did to where he actually

1 dismissed a couple of the charges and not plead to the  
2 burglary first.

3 Q. Okay. Do you feel in your conversations with Mr. Gray  
4 that he actively and knowingly and intelligently agreed to  
5 that negotiation?

6 A. He did. And he was reluctant on it. You know he  
7 thought well if I go to trial, you know, we discussed going  
8 to trial; what witnesses we would present and what  
9 arguments we could make as to different issues. So I mean  
10 we really, you know, considered trial so he understood, you  
11 know, what he was facing and what he would face if he went  
12 to trial and was convicted.

13 Q. Okay.

14 MS. SAUNDERS: I have no further questions for this  
15 witness.

16 Thank you, Ms. Butler.

17 MS. BUTLER: Thank you.

18 MR. JOHNSON: No questions from the State at this  
19 time. We do ask to reserve her if we need her rebuttal.

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

21 (WITNESS LEAVING WITNESS STAND.)

22 THE COURT: All right. Call your next witness.

23 MS. SAUNDERS: I call Mr. Michael Gray, your Honor.

24 MADAM CLERK: Mr. Gray, can I get you to stop here and  
25 place your left hand on the Bible and raise your right as

MICHAEL GRAY: DIRECT BY MS. SAUNDERS

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1 far as you can.

2 (WHEREUPON, MICHAEL GRAY,  
3 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

4 DIRECT EXAMINATION

5 MICHAEL GRAY BY MS. SAUNDERS:

6 Q. Thank you, Mr. Gray. Would you please state your  
7 name for the record.

8 A. Michael Tim Gray.

9 Q. And where are you currently incarcerated?

10 A. Evans Correctional Institution.

11 Q. And that's where?

12 A. Bennettsville, South Carolina.

13 Q. Okay. And where are you originally from?

14 A. Laurens, South Carolina.

15 Q. And if you would inform the court what you're  
16 currently incarcerated for.

17 A. Currently incarcerated on two counts - I mean - Yeah,  
18 two counts of third or subsequent offenses of petit larceny  
19 and one count of second degree burglary non-violent.

20 Q. Okay. Do you remember who sentenced you?

21 A. Blaine. Solicitor Blaine.

22 Q. He was the Solicitor on your case?

23 A. Yeah. You talking about the judge?

24 Q. The judge.

25 A. I think it was Judge Nettles.

1 Q. I believe that's correct. And your attorney was  
2 Melinda Butler?

3 A. Yes, ma'am.

4 Q. Okay. And do you recall what your understanding was  
5 at the time about whether or not this was a negotiated  
6 plea and what that means?

7 A. Um, yes, ma'am, I was advised that my trial was set  
8 for September the 9th I believe and this was August the  
9 15th when I was in the courtroom and I was told that I had  
10 - I was always told that I had a first degree for a Brook  
11 Callahan and a petit larceny for Brook Callahan and I had a  
12 second degree - It was gonna be - I think it was a second  
13 degree violent which is a total of fifteen from the Nicole  
14 Renzo and two petit larcenies. One was for Nicole Renzo  
15 and one was for Carol Sparks. But I was told that they  
16 would throw the first degree - throw the Brook Callahan  
17 cases out so at that time I thought that the first degree  
18 was gone because I was always told that that was the first  
19 degree cause I assumed the fact that it was a midnight - it  
20 happened after midnight so I was told that that was the  
21 first degree because it was circumstances of the other one  
22 what Melinda Butler said the circumstances under which  
23 that's why there was never two first because the  
24 circumstances of one of the charges was you couldn't make  
25 it a first. She said that while ago. So that's why I was

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1 told I was always considered that the one that I was  
2 pleading to was a second degree which was Nicole Reno  
3 because the other one made it first after midnight but I  
4 plead out to a second degree to a lesser included offense  
5 and come to find out it was after I got down the road and  
6 got in the law library it was a first degree.

7 Q. Okay. And it was gonna be a first degree trial  
8 because of your prior record; is that correct or not?

9 A. I'm not quite sure. I was told that Brooke Callahan's  
10 case was first degree; that I had a first degree on Brook  
11 Callahan and the one from Nicole Renzo was gonna be second  
12 degree violent. That was my understanding.

13 Q. Okay. All right, Mr. Gray, I want you to explain to  
14 the court why you feel that you should be given post-  
15 conviction relief for the confusion that lies in your mind  
16 about what you should have been charged with and ultimately  
17 pled for. Okay?

18 A. Yes, ma'am. Because of the simple fact that if I went  
19 to trial that I was going under the impression that I had a  
20 first degree burglary, a second degree violent, and three  
21 counts of third or subsequent offense of petit larceny.  
22 But my understanding that the first degree was under like I  
23 said Brooke Callahan so when I went in front of the judge -  
24 I mean when I went into the courtroom that day on August  
25 the 15<sup>th</sup> I was told that all cases of Brooke Callahan would

1 be throwed out. So that meant my understanding that the  
2 first degree was gone. So when I pled out to the second  
3 degree and got six years and I pled out to the third  
4 subsequent offense of petit larceny which was I got ten  
5 years on one and fifty-six days on the other one run - the  
6 fifty-six was run concurrent and the ten and the six was  
7 run consecutive. And when I got down the road and I got in  
8 the law library and I started looking up the indictments  
9 and the South Carolina Code for the burglary charges South  
10 Carolina code that I was sentenced under on the burglary -  
11 on the second degree burglary was three - the last three  
12 numbers was 311 which was a first degree burglary. But it  
13 wasn't my knowledge that I had a first degree. I thought  
14 the first degree was on Brooke Callahan.

15 Q. Okay, let me stop you right there and ask you this.

16 In my conversations with you, is it your understanding  
17 at this point that in May of 2012 the Solicitor presented a  
18 direct indictment to the Grand Jury?

19 A. Yes, ma'am.

20 Q. Asking that you be indicted for burglary in the first  
21 degree based on your prior record?

22 A. Yes, ma'am.

23 Q. And that applies to the victim Nicole Rizzo's home.

24 Correct?

25 A. Yes, ma'am.

MICHAEL GRAY: DIRECT BY MS. SAUNDERS

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1 Q. Okay. So at that point in August, notwithstanding  
2 all the stuff that was going on with you not being in  
3 constant contact with your attorney ---

4 A. Yes, ma'am.

5 Q. --- had you come to terms with the fact that it  
6 was either you were gonna be able to take a plea offer if  
7 an offer was on the table or go to trial on burglary first?

8 A. It was stated that I would go to trial on burglary  
9 first on one count of burglary first. And that's - That's  
10 what I was stating that I would go to trial on one count  
11 burglary first but as I was told that it wasn't Nicole  
12 Rizzo at that moment in that courtroom on August the 15<sup>th</sup>.  
13 I was told that it was Brooke Callahan that I had the first  
14 degree on.

15 Q. Okay. Let's just move on from that. Now, you were  
16 informed that the negotiated sentence was sixteen years,  
17 ten on the enhancement property offense and then six on the  
18 burglary second non-violent classification?

19 A. Yes, ma'am.

20 Q. Do you argue the fact that you're currently in a  
21 non-violent classification in SCDC?

22 A. Repeat that.

23 Q. Are you serving eighty-five percent?

24 A. No, ma'am.

25 Q. Okay.

1 A. No, ma'am.

2 Q. So you were originally charged on one victim with  
3 burglary second violent?

4 A. Yeah.

5 Q. And then it was direct indicted to burglary first?

6 A. I'm not sure.

7 Q. Okay.

8 A. I'm not sure if the second degree was violent and it  
9 went to - I don't know. I'm not sure if it was second  
10 degree non-violent that went first or second degree violent  
11 and went to first.. I'm not quite sure about that.

12 Q. Okay.

13 A. I can't answer that.

14 Q. But was it your understanding that if you went to  
15 trial you were gonna be tried on a burglary first charge  
16 where you would face fifteen to life violent?

17 A. Yeah for the charge that was dismissed. That's what  
18 I was told by my lawyer. That's what I was told. Brooke  
19 Callahan is the one - that's what I'm saying, that's the  
20 one that was dismissed. That was the one that I was going  
21 to trial for and it was gonna be a first degree.

22 Q. Okay.

23 A. I was never told that the other one was - At that time  
24 I wasn't told that that one was a first degree. I was told  
25 that it was a second degree violent.

MICHAEL GRAY: DIRECT BY MS. SAUNDERS

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1 Q. Okay. If you would inform the court why you feel  
2 like the consecutive sentencing that you received was  
3 illegal.

4 A. State that - I just feel that the consecutive  
5 sentences since all crimes was committed on the same day  
6 and the same - within the same crime spree at the - and the  
7 charges that I was was the same residence that it shouldn't  
8 be consecutive sentences. I don't - I don't know if there  
9 is an exact law or if there is I don't know the law or the  
10 code for that law that it's a consecutive sentence with me  
11 getting sentenced the same day on the same crimes at the  
12 same residence for the same crime spree.

13 Q. Okay. Is there anything you can tell the court to  
14 make the judge understand that your plea was not knowingly  
15 and voluntarily given on that day?

16 A. Yes, ma'am. Like I - Like I have spoken before that  
17 I thought that I was getting a deal about not pleading out  
18 - I mean as far as my understanding that that day if I plea  
19 out that the - that a burglary first and a petit larceny  
20 would be dropped for me to plea out to a negotiated  
21 sentence of sixteen years non-violent on a burglary second  
22 and two petit larcenies, a burglary second non-violent. So  
23 if the burglary first and a petit larceny was being thrown  
24 out at that day there was never - it was never a first that  
25 was being thrown out. And even if it would a went to the

1 jury - Even if would a been and was stated by Melinda  
2 Butler earlier even if it would a went to trial it never  
3 was gonna be a first it was gonna be a second so therefore  
4 me pleaing out as a plea offer by getting a deal therefore  
5 it really wasn't a deal because they're throwing out - I  
6 was told that a first degree was being throwed out which  
7 there was never - it was never a first degree to be throwed  
8 out so I'm pleaing out to a sentence that I was told that  
9 was second degree violent to a second degree non-violent  
10 which in all nationality it was a first degree. And from  
11 my understanding that Nicole Rizzo - the one that I'm  
12 sentenced on - was a second degree violent and Brooke  
13 Callahan was the first degree but it was the other way  
14 around and that was stated by Melinda Butler here earlier.  
15 And also with the plea offers that I have in emails with  
16 the cap of eight years that she stated that she tried to  
17 get in contact with me and sent me letters and that I  
18 didn't respond back to her until April the 20th she said  
19 which was past the dead line but in my transcript and  
20 everything on March 1st when she became my attorney she  
21 states on record that she had contacted me through multiple  
22 phone conversations and through emails through me and my  
23 girlfriend. She had both of our emails address so when she  
24 did forward these message - these emails of the cap of  
25 eight years she didn't forward these to me until April the

MICHAEL GRAY: DIRECT BY MS. SAUNDERS

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1 12th, 2012 at 03:45 which was after the deadline of the  
2 court term which was for the eight years cap. She didn't  
3 send - she forwarded these emails after that so she can't  
4 contact me or she can't get me on the phone and all the  
5 other options were weighed out. She didn't even try to  
6 email me these until after the deadline. These was  
7 forwarded and it states forward to - forwarded to Michael  
8 Gray April 12th, 2012 at 03:45 p.m., Thursday.

9 Q. Okay. But did you call her the week of April the  
10 9th and tell her that you were in town and gonna even show  
11 up for roll call? Did she tell you to be present for roll  
12 call?

13 A. No. I was present. It states in these same emails  
14 that on April the 12th, 2012 at 03:39 p.m., by Solicitor  
15 Blaine Fleming "I just rechecked my roll call list and  
16 you're right he was present. I stand corrected. Please  
17 advise him that his case would be on trial for May." So it  
18 - I already knew without contacting her that I needed to be  
19 there for that roll call.

20 Q. But why - Excuse me for interrupting. Why didn't you  
21 go see her or call her to tell her that you were in town on  
22 that week?

23 A. For - I mean I'm thinking I have spoke to her within  
24 the March - Within March I have spoken to her on the phone  
25 and I was in town, I wasn't out of town yet. I wasn't out

1 of town. I didn't leave town until after all of this. I  
2 didn't leave town until after all of this. I was still in  
3 town and --

4 Q. Where did you go?

5 A. I went to Texas but it was after all of this. It was  
6 - I didn't go to Texas until probably May.

7 Q. Did you ever call her or go see her before you went  
8 to Texas in May?

9 A. Yes, ma'am.

10 Q. You did?

11 A. Yes, I talked to her before I went to Texas in May.

12 Q. Okay. So you were --

13 A> I didn't see her. I talked to her over the phone.

14 Q. You talked to her over the phone?

15 A. Yes, ma'am.

16 Q. So did you ever discuss with her the eight year offer?

17 A. No, ma'am. We never discussed that. I didn't get them  
18 until the emails. And like I said it's on the record in my  
19 transcript that on March the 1<sup>st</sup> she became my lawyer and  
20 we had multiple phone conversations and contact through  
21 emails.

22 Q. Did you speak with her the week of April the 9<sup>th</sup>?

23 A. I can't recall. I can't recall. I mean I can't say  
24 if I did or if I didn't.

25 Q. Okay.

MICHAEL GRAY: DIRECT BY MS. SAUNDERS  
CROSS BY MR. JOHNSON

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1 A. But I can say I was not aware of the sentencing of the  
2 eight years with the cap. And also I was not aware when I  
3 showed up for roll call by the solicitor of nothing of by  
4 Blaine Fleming when I was at roll call and he called my  
5 name and I stood up for roll call. He did not aware me of  
6 the offer also. I was not aware of the eight years with a  
7 cap all sentences to run concurrent. Never.

8 Q. Okay. Thank you.

9 MS. SAUNDERS: I have no further questions at this  
10 time.

11 MR. JOHNSON: Briefly, your Honor.

12 THE COURT: You can have a seat. You got to answer  
13 questions by the State.

14 MR. GREY: Okay.

15 CROSS-EXAMINATION

16 MICHAEL GRAY BY MR. JOHNSON:

17 Q. After that roll call on April 9<sup>th</sup> you don't have any  
18 records to show that you tried to contact Ms. Butler do  
19 you?

20 A. After the ---

21 Q. Correct.

22 A. --- after that roll call? No. She has records.  
23 April the 20th.

24 Q. But you knew you were supposed to keep in contact with  
25 Ms. Butler. Right?

1 A. I mean - Yeah ---

2 Q. You ever ---

3 A. --- if I want to speak to her yes.

4 Q. --- give her correct emails and give her correct  
5 phone numbers to contact you?

6 A. She had that. She had - She had all the correct  
7 information to contact me through emails. She had that  
8 that's why I got emails forwarded in my hand right now to  
9 me.

10 Q. Did you ever email her back?

11 A. I can't recall. I can't recall.

12 Q. So you just have selected emails from her to you but  
13 none from you to her?

14 A. On - If she emailed me I would call her.

15 Q. Do you have those phone records?

16 A. No. No, sir.

17 Q. Okay. As a guilty plea you were indicted for burglary  
18 first degree. Correct? You had two charges burglary in  
19 first degree. Right? One was dropped down to a burglary  
20 second and one was dismissed.

21 A. Um - You said I had two first degrees?

22 Q. Yes.

23 A. No.

24 Q. You said one.

25 A. No I didn't have two first degrees.

MICHAEL GRAY: CROSS BY MR. JOHNSON

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1 Q. You just had - You were indicted for one burglary  
2 first degree.

3 A. On - Yes.

4 Q. And that's basically from your prior record cause  
5 you have a multitude of prior burglaries; isn't that  
6 correct?

7 A. Um - I - Yeah that ---

8 Q. You have five ---

9 A. --- that --

10 Q. --- burglary convictions in the past seven years is  
11 that not right?

12 A. Yeah that's right. Yeah.

13 Q. Okay. As of 2005 you have simple assault and battery  
14 times two; financial transaction card fraud times three;  
15 malicious injury to property and petit larceny. That's  
16 2005. Right?

17 A. Uh-huh.

18 Q. Okay. 2006 burglary in third degree simple assault  
19 and battery times two; is that correct?

20 A. Yes, sir.

21 Q. 2009 burglary third degree burglary second degree  
22 times two; malicious injury to courthouse and resisting  
23 arrest. Correct?

24 A. Yes, sir.

25 Q. And are you aware that in the burglary statute if you

1 have two or more burglaries in second degree you can be  
2 charged with burglary first degree on the next one?

3 A. Yeah I'm aware of that now but before that no.

4 Q. Right. Ms. Butler never explained that to you?

5 A. I mean - -

6 Q. When you were sent your direct indictment you did not  
7 understand that?

8 A. No. I didn't even receive my indictments until after  
9 I was down the road and sentenced. And with them  
10 indictments that I received when I was down the road I was  
11 only given indictments on second degree burglary. I just  
12 now seen the indictment for the first degree today by Laura  
13 Saunders.

14 Q. But you were aware that you were charged with burglary  
15 first degree; isn't that right? At the guilty plea he  
16 announces that you are charged and you were indicted for  
17 burglary first degree. Correct?

18 A. Yeah in my transcript yeah it says it in my transcript  
19 but I was not aware of that before. I was not aware of  
20 that when I accepted the plea offer. I was not absolutely  
21 aware of that no I was not.

22 Q. Okay. But you never told the judge that at the plea  
23 hearing did you?

24 A. No because I was just taking the plea.

25 Q. And you still realized that if you are successful

MICHAEL GRAY: CROSS BY MR. JOHNSON

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1 here today you go back and face fifteen to life?

2 A. Yeah.

3 Q. And you're willing to take that chance?

4 A. I mean if that's what it's gonna take yeah.

5 Q. All right. During that plea you sworn under oath  
6 that you were not under the influence of drugs or alcohol.  
7 Correct?

8 A. When I sworn under oath?

9 Q. During the plea yes.

10 A. Yeah. Yes. Yes, sir.

11 Q. You sworn under oath that you had no mental issues,  
12 no nervous conditions?

13 A. Yes, sir.

14 Q. And you agreed with the facts of the case as presented  
15 by the solicitor; isn't that right?

16 A. Yes, sir.

17 Q. And that includes the fact that this Brooke Callahan  
18 that you keep speaking of that there was a sixty-five inch  
19 flat screen television taken from her home during the night  
20 before. Correct?

21 A. Yes, sir.

22 Q. That's burglary first degree isn't it?

23 A. Yeah but that was never indicted as a first degree.

24 Q. But that's what was read at the guilty plea. Correct?

25 And that's what you agreed that you did?

1 A. It was read what at the guilty plea?

2 Q. At the guilty plea during the solicitor's recitation  
3 of facts --

4 A. It was read what?

5 Q. At the guilty plea that was read that's what you  
6 agreed that you did.

7 A. I'm saying it read that it was a first degree at the  
8 guilty plea; is that what you're saying?

9 Q. It was read that that TV was taken from her home  
10 during the night time.

11 A. Oh, yeah, that was said, yes.

12 Q. And then you wanted to plead guilty? You testified at  
13 the guilty plea hearing that you wanted to plead guilty.  
14 Correct?

15 A. No not on Brooke Callahan, no. I didn't plead guilty  
16 on Brooke Callahan.

17 Q. You plead to everything that was presented as facts  
18 in that guilty plea. Correct or incorrect?

19 A. You said I pled guilty?

20 Q. Yes, sir, you did.

21 A. I pled --

22 Q. The solicitor presented the facts and you said yes  
23 I agree with those facts. Correct? And then the judge ask  
24 you do you want to plead guilty to these charges and you  
25 said yes.

MICHAEL GRAY: CROSS BY MR. JOHNSON

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1 A. Yeah to plead guilty to the charges that as far as the  
2 Lorenzo case.

3 Q. So you --

4 A. That's - I pled guilty to those charges.

5 Q. You also pled to the charge that was presented about  
6 Ms. Callahan as well.

7 A. The ones that was dismissed? Those are the ones that  
8 was dismissed.

9 Q. Okay. Even if you didn't plead to those you realize  
10 those come back if you get or are successful here today?  
11 You're facing a life time in prison.

12 A. Okay.

13 Q. All right. But you pled because you were indeed  
14 guilty on this - in this case. Correct?

15 A. No. I did not plead because I was indeed guilty.

16 Q. So you lied at the guilty plea then, huh?

17 A. If that's what you want to call it. I pled under - I  
18 pled under oath that knowing that if I didn't plead that I  
19 would be facing life plus forty-five as my understanding so  
20 I did not plead guilty because I was guilty. I pled guilty  
21 so that I could get a better offer.

22 Q. And you still go back and face those charges in the  
23 exact same sentence with life plus forty-five years?

24 A. Okay.

25 Q. And the solicitor doesn't have to present you with an

1 offer. Okay. But under oath you said that you pled guilty  
2 because you were indeed guilty. Correct or incorrect?

3 A. I can't recall.

4 MR. JOHNSON: May I approach, your Honor?

5 THE COURT: You may, yes, sir.

6 MR. JOHNSON: May I refresh his memory?

7 Q. Page 12 will you read lines 5 through 8 out loud to  
8 me please, sir?

9 A. "THE COURT: You still wish to plead guilty?"

10 "THE DEFENDANT: Yes, sir."

11 "THE COURT: Are you indeed guilty?"

12 "THE DEFENDANT: Yes, sir."

13 Q. Thank you. You also testified that you were satisfied  
14 with Ms. Butler's representation. Correct?

15 A. Yes, sir.

16 Q. But now today you're not satisfied with her  
17 representation?

18 A. No, because as I stated before the representation  
19 that she tell me - that she told me which was the whole  
20 time that the charges that I am on that I'm down the road  
21 on now, as far as the burglary, I'm not necessarily  
22 speaking on the petty larceny, I'm speaking about the  
23 burglary, I got six years on it. It's my understanding  
24 through out the whole time she was my lawyer that it was  
25 never a first degree. That's what she told me. It was a

MICHAEL GRAY: CROSS BY MR. JOHNSON

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1 second degree violent.

2 Q. Yet you were directly indicted for a burglary first  
3 degree.

4 A. I - Like I said, I never had them indictments so I did  
5 not know. I just seen that indictment today. The True  
6 Bill and all today my lawyer right there just showed it to  
7 me today.

8 THE COURT: Help me, which indictment are you saying  
9 you never saw --

10 A. On 00724. I never seen that indictment until  
11 today.

12 THE COURT: Well the reason I ask is, I have it in my  
13 hand right now.

14 A. Yes, sir.

15 THE COURT: And it's got what reports to be your  
16 signature where you say you plead to indictment and on that  
17 indictment it says "burglary first degree".

18 A. I can't recall.

19 THE COURT: I didn't think you would be able to recall  
20 but that's what the indictment says ---

21 A. Yes, sir.

22 THE COURT: --- it talks about Ms. Lorenzo.

23 A. Yes, sir.

24 THE COURT: So you signed it but you never seen it?

25 A. Like I said, I can't recall. The indictments that -

1 the indictments that I recall which are the indictments  
2 which I have, which is the indictment for Nicole Lorenzo  
3 that indictment number is 0-0-2-1.

4 THE COURT: Well you just said 0-7-2-4.

5 A. Yes, sir, that's the indictment number that's on my  
6 sentencing sheet.

7 THE COURT: And that's the one you pled to and that's  
8 the original indictment for burglary in the first degree  
9 and you signed right on the same page where that's stated.

10 A. Okay.

11 THE COURT: Yet you're telling us today that you had  
12 no idea you - that there was a first - burglary in the  
13 first degree charge but there's your signature.

14 A. Yeah because I was told - -

15 THE COURT: I presume, is that your signature? Are  
16 you denying that's your signature?

17 A. No, sir.

18 THE COURT: All right. Go ahead.

19 BY MR. JOHNSON:

20 Q. You also testified there were no promises or threats  
21 to get you to plead guilty in this case. Correct?

22 A. Yes, sir.

23 Q. And that it was your decision to plead guilty?

24 A. Yes, sir.

25 Q. And that you had been truthful during the guilty plea.

MICHAEL GRAY: CROSS BY MR. JOHNSON

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1 Correct?

2 A. Yes, sir.

3 Q. But we know that's not the truth don't we because  
4 you've already admitted to lying at the guilty plea?

5 A. Okay.

6 Q. Is that yes, sir?

7 A. Yes, sir.

8 MR. JOHNSON: No further questions, your Honor.

9 MS. SAUNDERS: None, your Honor.

10 THE COURT: All right. You can step down. Thank you.  
11 Appreciate your time.

12 (WITNESS LEAVING WITNESS STAND.)

13 THE COURT: Call your next witness.

14 MS. SAUNDERS: Your Honor, we have no further  
15 witnesses to this case. That is our case today.

16 THE COURT: All right. Does the State have any  
17 witnesses?

18 MR. JOHNSON: Just a moment, your Honor.

19 THE COURT: Okay.

20 (PAUSE.)

21 MR. JOHNSON: The State has no further witnesses,  
22 your Honor.

23 THE COURT: All right. Well I'll take this one under  
24 advisement, unless you have any statements you want to  
25 make, Ms. Saunders.

1 MS. SAUNDERS: Your Honor, I do not. I would ask - I  
2 was just provided these copies by my client today. He  
3 wants to retain them but I would like to submit as a  
4 Petitioner's Exhibit to the PCR file these series of  
5 emails.

6 THE COURT: Have you shown them to Mr. - -

7 MR. JOHNSON: I've not seen 'em.

8 THE COURT: All right. Let him see it.

9 (ASSISTANT ATTORNEY GENERAL JOHNSON REVIEWING EMAILS.)

10 MR. JOHNSON: Your Honor, in light of these emails I  
11 don't mind them coming in. I would like to call Ms. Butler  
12 to the stand.

13 THE COURT: Okay. You want us to just run copies so  
14 you can keep these?

15 MS. SAUNDERS: Your Honor, I apologize I wasn't  
16 provided these until today.

17 THE COURT: All right. We'll run copies. If you'll  
18 just hand 'em up we'll - Well, first you need 'em to -

19 MR. JOHNSON: I don't need 'em to ask. But I can get  
20 copies; I just have a few questions.

21 THE COURT: Okay.

22 MR. JOHNSON: It should be fine.

23 THE COURT: Let's go ahead.

24 MS. SAUNDERS: Use these?

25 MR. JOHNSON: Just go ahead and give them to her and

MELINDA BUTLER: DIRECT BY MR. JOHNSON

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1 make copies.

2 (WHEREUPON, APPLICANT'S EXHIBIT ONE, IDENTIFIED AND  
3 MARKED, RECEIVED INTO THE RECORD.)

4 DIRECT EXAMINATION

5 MELINDA BUTLER BY MR. JOHNSON:

6 Q. Ms. Butler, did you receive emails from the solicitor  
7 in this case?

8 A. I did.

9 Q. And concerning the offer specifically about eight  
10 years, did you receive emails about the eight year offer?

11 A. Yes.

12 Q. And did you relate that to Mr. Gray?

13 A. According to the records I had sent him an email at  
14 the email address that he left with my assistant and  
15 forwarded that email to him.

16 Q. So you used the email address that he provided to  
17 forward that communication?

18 A. That's correct.

19 Q. Did he contact you after that?

20 A. No. The only contact that I had after that was April  
21 20<sup>th</sup> and it was past the April 9th term of court.

22 Q. Did he leave a phone number?

23 A. I never had a phone number for him. I had a phone  
24 number for his mother but never one for him.

25 MR. JOHNSON: That's all the questions I have right

MELINDA BUTLER: CROSS BY MS. SAUNDERS

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1 now, your Honor.

2 MS. SAUNDERS: Your Honor, I have some follow up, ---

3 THE COURT: Okay.

4 MS. SAUNDERS: --- one with Ms. Butler.

5 CROSS-EXAMINATION

6 MELINDA BUTLER BY MS. SAUNDERS:

7 Q. When did you send the email to Mr. Gray in which you  
8 received no response from him until April the 20<sup>th</sup>?

9 A. I believe - I don't have a copy of that email but I  
10 believe that it was April 12<sup>th</sup> on there.

11 Q. Okay.

12 A. I don't have a copy of that. I think that's what  
13 you all said.

14 Q. Thank you.

15 MS. SAUNDERS: No further questions, your Honor.

16 THE COURT: All right. I'll take this one under  
17 advisement. Thank you. You can be excused.

18 MS. BUTLER: Thank you, your Honor.

19 (END OF TRANSCRIPT OF RECORD.)

20

21

22

23

24

25



**YAHOO! MAIL**  
Classic

**Fw: RE: Michael Gray**

Thursday, April 12, 2012 3:45 PM

From: "Melinda Butler" <mbutlerlawfirm@yahoo.com>  
To: "Sally Smith" <sally.butlerlaw@att.net>

please see below and send letter to mr. gray

--  
Melinda Inman Butler  
The Butler Law Firm, LLC  
103 Medical Sciences Drive  
Post Office Box 248  
Union, SC 29379  
864-427-8805  
(fax) 864-427-8815  
www.butlerservingjustice.com

EXHIBIT /  
Applicant's  
12-10-13

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-----THE BUTLER LAW FIRM-----

-- On Thu, 4/12/12, Blaine Fleming [REDACTED] wrote:

From: Blaine Fleming [REDACTED]  
Subject: RE: Michael Gray  
To: "Melinda Butler" <mbutlerlawfirm@yahoo.com>  
Date: Thursday, April 12, 2012, 3:39 PM

I just rechecked my roll call list and you're right, he was present. I stand corrected. Please advise him that his case will be on the trial list for May.

From: Melinda Butler [mailto:mbutlerlawfirm@yahoo.com]  
Sent: Thursday, April 12, 2012 11:44 AM  
To: Blaine Fleming  
Subject: Michael Gray

Blaine:

I believe you had Mr. Gray as attending roll call Monday, although I am not sure. If he attended roll call, I do not agree with you requesting bench warrant to issue. My office is mailing a letter to him today. Although we have called him and left message, we have not sent mail, therefore I prefer to try this

option first since he may very well be unable to access his cell phone voicemail.

I am copying my assistant on this email so that she can place letter in mail today.

Thank you,

Melinda

--

Melinda Inman Butler  
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-----THE BUTLER LAW FIRM-----

**Blaine Pleming**

---

**From:** Blaine Pleming [REDACTED]  
**Sent:** Tuesday, March 20, 2012 5:47 PM  
**To:** Melinda Butler  
**Subject:** Michael Tim Gray

Melinda,  
I'm sending out my plea offer deadlines for the next term. On my list of cases for which I am assigning deadlines is Michael Tim Gray.

I have decided that if he pleads guilty as charged, the State will recommend a cap of 8 years and that all sentences run concurrent.

Please advise Mr. Gray that if he wishes to receive a recommendation from the State then he must plead guilty during the April 9 term of General Sessions. If he does not plead guilty on all his charges during the April 9 term then the State will call his case for trial in May.

T. Blaine Pleming  
Assistant Solicitor  
Union County Solicitor's Office  
864-429-1639 (office)  
803-417-0584 (cell)

**Blaine Pleming**

---

**From:** Blaine Pleming [REDACTED]  
**Sent:** Thursday, April 19, 2012 11:10 AM  
**To:** 'Melinda Butler'; 'Melinda Butler'  
**Subject:** Michael Tim Gray

Melinda,

In preparing his case today, I read Ms. Keisler's statement and was reminded that she and Mr. Gray entered Brooke Callahan's residence at night, making this a 1<sup>st</sup> Degree Burglary. Please be advised that I intend to re-submit Indictment Number 2012-GS-44-0024 to the Grand Jury on a charge of Burglary 1<sup>st</sup> Degree.

T. Blaine Pleming  
Assistant Solicitor  
Union County Solicitor's Office  
864-429-1639 (office)  
803-417-0584 (cell)

**Blaine Pleming**

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**From:** Blaine Pleming [REDACTED]  
**Sent:** Thursday, April 19, 2012 11:59 AM  
**To:** 'Melinda Butler'; 'Melinda Butler'  
**Subject:** One more e-mail re: Michael Gray

Melinda,

Until reading the statute again this morning, I didn't realize that two prior burglary convictions enhances a charge to 1<sup>st</sup> Degree... I always thought it was only sufficient to enhance the charge to 2<sup>nd</sup> degree. *(Violent)*

Anyway, based on this, I am also going to send Indictment 2012-GS-44-0021 to the jury as a 1<sup>st</sup> Degree Burglary Charge. *(Grand)*

Again, I will still allow him to plead guilty on that indictment & indictment # 0024 to Burglary 2<sup>nd</sup> for a negotiated sentence of 10 years on each count. His offer on the larcenies is still expired and he will receive no recommendation with respect to those charges.

T. Blaine Pleming  
Assistant Solicitor  
Union County Solicitor's Office  
864-429-1639 (office)  
803-417-0584 (cell)

**Blaine Pleming**

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**From:** Blaine Pleming [plemingb@bellsouth.net]  
**Sent:** Thursday, April 19, 2012 11:18 AM  
**To:** 'Melinda Butler'  
**Subject:** New offer for Michael Gray

Melinda,

Even though Mr. Gray's original offer had expired, in light of the fact that he is now being charged with Burglary 1<sup>st</sup> Degree, I will still allow him to plead guilty to Burglary 2<sup>nd</sup> Degree Violent for a negotiated sentence of 10 years on that particular charge. He has no offer on the other charges.

T. Blaine Pleming  
Assistant Solicitor  
Union County Solicitor's Office  
864-429-1639 (office)  
803-417-0584 (cell)

INDORSEMENT ROLL NO. 2013 CP 44 00035

STATE OF SOUTH CAROLINA )  
 COUNTY OF UNION )  
 )  
 Michael Gray, #313935 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT


C.A. No.: 2013-CP-44-0035

ORDER

FILED FOR RECORD  
 2013 DEC 17 PM 1 05  
 WILLIAM F. GARDNER  
 CLERK OF COURT  
 UNION, SC

This is a post-conviction relief application filed February 4, 2013. The case was heard by the Honorable John C. Hayes III on December 10, 2013. Applicant was represented by Laura McCall Saunders, Esq., the State by J. Rutledge Johnson, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Union County Clerk of Court's orders of commitment. The applicant was indicted by the January 2012 term of the Union County Grand Jury for two counts of Petit Larceny (2012-GS-44-0022, -0025). He was also indicted at the May 2012 term of the Union County Grand Jury for Burglary, 1<sup>st</sup> degree. The Applicant was represented by Melinda Butler, Esquire. On August 15, 2012, the Applicant pled guilty before the Honorable Michael G. Nettles to both counts of Petit Larceny, 3<sup>rd</sup> or subsequent offense as indicated, as well as Burglary, 2<sup>nd</sup> degree, as a lesser included offense. Judge Nettles sentenced the Applicant, pursuant to negotiations, to confinement for ten (10) years for one count of Petit Larceny, 3<sup>rd</sup> or subsequent offense, ten (10) years, consecutive, for Burglary, 2<sup>nd</sup> degree, and fifty-six (56) days, credit for time served, for the other Petit Larceny charge. The Applicant did not appeal his convictions or sentences.



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

1. "Counsel was ineffective for not objecting to the illegal (consecutive) sentences"
  - i. "South Carolina Law prohibits the imposition of both an illegal consecutive sentence (B) imposition of a sentence in violation of Double Jeopardy."
2. "Counsel failed to investigate to ensure the accuracy of the State's case."
  - i. "Counsel failed to file the Notice of Appeal"

At the evidentiary hearing that took place on December 10, 2013, Applicant failed to mention or raise any issues concerning his counsel's alleged failure to file a notice of appeal. As a result, the Court finds that the applicant has abandoned such argument. The Court now directs its focus to Applicant's remaining argument which is essentially a claim of ineffective counsel based on the failure of counsel to object to what Applicant alleges was an illegal sentence.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

*Je H H z*

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, she would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

Applicant testified that he is currently incarcerated at Evans Correctional Institution in Bennettsville, South Carolina. Applicant testified that he recalls his plea and being represented by Melinda Butler, Esq. Applicant testifies that he believes he should receive post-conviction relief because he feels that consecutive sentences should not be allowed for crimes committed on the same day at the same residence within the same time span. Applicant did not present any law supporting his assertion and testified that he does not know what the law says in regards to consecutive sentences but does not feel that he should have received consecutive sentences for crimes he committed on the same day within the same time period at the same residence.

Applicant's testimony was that he did not know that the Burglary 2<sup>nd</sup> degree non-violent charge he pled to was a lesser offense on an indictment for Burglary in the 1<sup>st</sup> degree. His testimony was substantially that one set of Burglary charges were dropped in exchange for his plea and the charge left extant was factually fatal as it did not charge him with Burglary in the 1<sup>st</sup>

degree. This assertion is on its face incorrect. The indictment to which he pled clearly contained factual allegations which would support a Burglary in the 1<sup>st</sup> degree charge.

Applicant contends that he had never seen an indictment for Burglary in the 1<sup>st</sup> degree, but this is belied by the fact that Applicant himself actually signed the indictment for Burglary in the 1<sup>st</sup> degree. Applicant testified that the signature on the indictment for Burglary in the 1<sup>st</sup> degree was his signature but he could not recall ever signing the indictment. While there appears to have been a scrivener's error in regards to the statute listed on the sentencing sheet<sup>1</sup>, the sentencing sheet clearly states that his plea was to "BURGLARY IN THE SECOND DEGREE (NON-VIOLENT)." Additionally, the sentencing sheet contains the correct CDR Code for Burglary in the 2<sup>nd</sup> degree non-violent, 0079.

Applicant's attorney, Melinda Butler, testified that she believes the plea offer was fair after considering all of the circumstances surrounding the case. Ms. Butler testified that she exchanged a series of offers and counteroffers with the State regarding the Applicant's charges prior to the Applicant entering into the final plea deal. Ms. Butler testified that the State agreed to dismiss two out of the five charges applicant was facing as part of the plea deal. Ms. Butler testified that she believes Applicant actively, knowingly, and intelligently agreed to the plea deal. Ms. Butler testified that the Applicant knew what he was facing and understood the terms of the plea deal.

The Applicant also testified that his counsel never informed him of a plea offer of 8 years from the State. However, the Applicant's attorney, Ms. Butler, testified that the Applicant was "on the run" and "did not want to be found" for a period of time and she had difficulty getting in touch with the Applicant to inform him of the offer. Ms. Butler testified that she did not have a phone number at which to reach the Applicant and used an email address he provided to her to

<sup>1</sup> The Code Section §16-11-311 is the Code Section addressing Burglary in the 1<sup>st</sup> Degree

*JCH/HP*


forward the offer from the State to him. Applicant testified that he cannot recall if he ever called Ms. Butler or followed up with her but was not ever informed of the eight year plea offer from the State.

Based on the record and the testimony at the Post-Conviction Relief hearing, I find Applicant has failed to carry his burden of proof and failed to prove that, when the appropriate standards set forth hereinabove are applied, trial counsel's representation of him was ineffective to any degree.

Wherefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

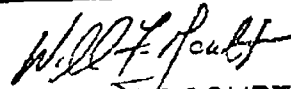
This Court hereby advises Applicant that she must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rule 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

  
 John C. Hayes, III  
 Presiding Judge HCS

December 10<sup>th</sup>, 2013  
 York, South Carolina

JUDGEMENT SIGNED AND  
 ENTERED UP 12-17-13

  
 CLERK OF COURT

DOCKET NO. 2012-GS-44-0022

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

**WITNESSES**

T. Humphries/UCSO

**The State of South Carolina**

County of Union

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

**COURT OF GENERAL SESSIONS**

**JANUARY 09, TERM 2012**

**ARREST WARRANT NUMBER**

M676292

Defendant

Witness:

C.C.C. PLS. AND G.S.

**THE STATE**

vs.

**MICHAEL TIM GRAY**

**ACTION OF GRAND JURY  
TRUE BILL**

*Paula Byers*  
Foreperson of Grand Jury  
Date: JAN - 9 2012

**VERDICT**

**Indictment for**

**PETIT LARCENY**

SC Code: 16-13-30

CDR Code: 3596

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF UNION )

INDICTMENT

At a Court of General Sessions, convened on January 09, 2012, the Grand Jurors of Union County present upon their oath:

PETIT LARCENY

That in Union County, South Carolina, on or about October 20, 2011, Michael Tim Gray did feloniously take and carry away from the residence at [REDACTED] Deepwater Road, Union, goods valued at less than Two Thousand Dollars, belonging to Nicole Lynn Rizzo and described as follows: one (1) ladies ring and a quantity of United States currency, with the intent to deprive the owner permanently of such property. Further, the defendant has two or more prior convictions for Property Offenses in which the penalty was contingent on the value of the property involved, all in violation of Section 16-13-30, Code of Laws of South Carolina (1976, as amended).

FILE FOR RECORD  
2012 AUG 15 PM 5:25  
WILLIAM F. GAUL  
CLERK OF COURT  
UNION COUNTY

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

*Blaine Fleming*  
ASSISTANT SOLICITOR

DOCKET NO. 2012-GS-44-0025

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

The State of South Carolina  
County of Union

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

JANUARY 09, TERM 2012

COURT OF GENERAL SESSIONS

ARREST WARRANT NUMBER

M676294

Defendant

Witness:

vs.

C.C.C. PLS. AND G.S.

MICHAEL TIM GRAY

ACTION OF GRAND JURY  
TRUE BILL

*Randa R. Byrd*  
Foreperson of Grand Jury  
Date: JAN - 9 2012

VERDICT

Indictment for

PETIT LARCENY

SC Code: 16-13-30  
CDR Code: 3596

Foreperson of Petit Jury  
Date:

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF UNION )

INDICTMENT

At a Court of General Sessions, convened on January 09, 2012, the Grand Jurors of Union County present upon their oath:

PETIT LARCENY

That in Union County, South Carolina, on or about October 20, 2011, Michael Tim Gray did act together with others to feloniously take and carry away from the residence at [REDACTED] Deepwater Road, Union, goods valued at less than Two Thousand Dollars, belonging to Carol Sparks and described as follows: one (1) Chevrolet S10 truck body, with the intent to deprive the owner permanently of such property. Further, the defendant has two or more prior convictions for Property Offenses in which the penalty was contingent on the value of the property involved, all in violation of Section 16-13-30, Code of Laws of South Carolina (1976, as amended).

FILE FOR RECORD  
2012 AUG 15 PM 5:25  
WILLIAM F. GAULT  
CLERK OF COURT  
UNION CO

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

  
ASSISTANT SOLICITOR

DOCKET NO. 2012-GS-44-0724  
Direct Indictment

**WITNESSES**

T. Humphries/UCSO

The State of South Carolina

County of Union

COURT OF GENERAL SESSIONS

MAY 14, TERM 2012

THE STATE

vs.

MICHAEL TIM GRAY

ARREST WARRANT NUMBER

Direct Indictment - RE: M676291

ACTION OF GRAND JURY

TRUE BILL

*[Signature]*  
Foreperson of Grand Jury  
MAY 10 2012

VERDICT

Foreperson of Petit Jury

Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

*[Signature]*

hereby appear in my own proper person and plead guilty to the within indictment or to

*[Signature]*

Defendant

Witness: *[Signature]*

C.C.C. PLS. AND G.S.

Indictment for

BURGLARY IN THE FIRST DEGREE

SC Code: 16-11-311

CDR Code: 0079

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF UNION )

INDICTMENT

At a Court of General Sessions, convened on May 10, 2012, the Grand Jurors of Union County present upon their oath:

**BURGLARY IN THE FIRST DEGREE**

That in Union County, South Carolina, on or about October 20, 2011, Michael Tim Gray did willfully and unlawfully enter the dwelling of Nicole Lynn Rizzo, at [REDACTED] Deepwater Road, Union, without consent and with the intent to commit a crime therein, to wit: Larceny and the defendant has two or more prior convictions for burglary or housebreaking, in violation of Section 16-11-311, Code of Laws of South Carolina (1976, as amended).

FILE FOR RECORD  
2012 AUG 15 PM 5:25  
WILLIAM F. CAULI  
CLERK OF COURT  
UNION CO. SC

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

*Blaine Fleming*  
\_\_\_\_\_  
ASSISTANT SOLICITOR