

RECEIVED
MAR 18 2016
SC SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Anderson County
Edgar W. Dickson, Circuit Court Judge

STEVEN MCELRATH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001081

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
GUILTY PLEA TRANSCRIPT DATED MAY 19, 2008	1
INDICTMENTS AND SENTENCING SHEETS	29
APPLICATION FOR POST-CONVICTION RELIEF (2009-CP-04-00012)	35
RETURN (2009-CP-04-00012)	43
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	49
AMENDED APPLICATION FOR POST-CONVICTION RELIEF – SUPPLEMENTAL COMPLAINT	64
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JUNE 15, 2010 (2009-CP-04-00012)	68
ORDER OF DISMISSAL	97
ORDER DISMISSING DIRECT APPEAL	107
RULE 59 (e) MOTION – PRO SE	108
APPLICATION FOR POST-CONVICTION RELIEF (2011-CP-04-2710)	112
RETURN (2011-CP-04-2710)	146
POST-CONVICTION RELIEF TRANSCRIPT DATED JULY 30, 2014 (2011-CP-04-2710)	152
ORDER GRANTING AUSTIN APPEAL	157

State of South Carolina

County of Anderson

In the Court of General Sessions

State of South Carolina,

Plaintiff,

-vs-

Steven McElrath,

Defendant.

2007-GS-04-1896, 1897

May 19, 2008

Transcript of Record

BEFORE:

The Honorable J.C. "Buddy" Nicholson, Judge

APPEARANCES:

Kristin W. Reeves, Esquire
Assistant Solicitor
Attorney for the State

Scott Robinson, Esquire
Attorney for the Defendant

Renee H. Tollison
Circuit Court Reporter

INDEX

Guilty Plea Hearing
Certificate of Reporter

PAGE

3
28

EXHIBITS**No****DESCRIPTION****ID EV**

No Exhibits Were Presented During the Hearing

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

3

1 (WHEREUPON, court convened with all parties present and
2 the following proceedings were had.)

3 THE COURT: Okay, solicitor. If you'll call your
4 case, please, ma'am.

5 MS. REEVES: Thank you, Your Honor. Before you is
6 Steven McElrath. He is pleading guilty to kidnapping on
7 indictment 2007-GS-04-1896 and criminal sexual conduct in
8 the first-degree on indictment number 2007-GS-04-1897.

9 THE COURT: Thank you, ma'am.
10 Mr. McElrath, raise your right hand.

11 STEVEN MCEL RATH,

12 Being first duly sworn, testified as follows:

13 EXAMINATION

14 BY THE COURT:

15 THE COURT: How old are you, Mr. McElrath?

16 THE DEFENDANT: 19.

17 THE COURT: And what's your date of birth?

18 THE DEFENDANT: ---,---.

19 THE COURT: Social Security number?

20 THE DEFENDANT: ---,---.

21 THE COURT: How far did you go in school?

22 THE DEFENDANT: I got my GED.

23 THE COURT: When?

24 THE DEFENDANT: 2005, I believe it was.

25 THE COURT: How far did you go in formal

1 education?

2 THE DEFENDANT: Oh, I dropped out in ninth grade.

3 THE COURT: You dropped out in ninth grade?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: What type of work have you been doing
6 since you dropped out of school?

7 THE DEFENDANT: Construction and fast food.

8 THE COURT: What type of work with construction?
9 What type of construction?

10 THE DEFENDANT: General labor.

11 THE COURT: What?

12 THE DEFENDANT: General labor.

13 THE COURT: General labor?

14 THE DEFENDANT: Yeah.

15 THE COURT: And bridges? Houses? What?

16 THE DEFENDANT: I was working with a grading
17 company, a foster home I was in. And we were laying in
18 septic tanks. And then I was putting in water lines down
19 here.

20 THE COURT: You were putting in water lines?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Okay. All right. Then you worked in
23 the fast food industry? What did you do in fast foods?

24 THE DEFENDANT: I was -- we bounced around. I was
25 a cashier, I cooked and ...

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

5

1 THE COURT: Which fast foods?

2 THE DEFENDANT: Long John Silver's.

3 THE COURT: Was that in North Carolina?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You lived in North Carolina?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Have you had any drugs or
8 alcohol in the last 24 hours?

9 THE DEFENDANT: No, sir.

10 THE COURT: Are you taking any prescription
11 medication?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: What are you taking?

14 THE DEFENDANT: Vistaril and Zantac over-the-
15 counter.

16 THE COURT: What are you taking it for?

17 THE DEFENDANT: I guess he just gave it to me
18 because I was stressing. Blood pressure was going up and
19 stuff.

20 THE COURT: Does it help you?

21 THE DEFENDANT: No, not really.

22 THE COURT: It doesn't help you?

23 THE DEFENDANT: Uh-uh (negative).

24 THE COURT: Does it interfere with your thought
25 process?

1 THE DEFENDANT: No, sir.

2 THE COURT: Do you understand why you're here?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Have you ever been diagnosed with an
5 emotional, nervous or mental condition by a doctor?

6 THE DEFENDANT: Anxiety.

7 THE COURT: Okay. When was that diagnosis made?

8 THE DEFENDANT: All through -- ever since I was 13
9 I've been seeing doctors. And around age 13 is when
10 everything started occurring.

11 THE COURT: All right. Do you take a medication
12 for the anxiety?

13 THE DEFENDANT: I was on Prozac at the time, but I
14 came off of it in here or in jail.

15 THE COURT: How long did you take Prozac?

16 THE DEFENDANT: For about a year.

17 THE COURT: When did you quit taking it?

18 THE DEFENDANT: About December maybe.

19 THE COURT: Are you taking anything now for your
20 anxiety?

21 THE DEFENDANT: Vistaril.

22 THE COURT: Vistaril? That's all?

23 THE DEFENDANT: I heard it aids, yeah, in anxiety.

24 THE COURT: Okay. Do you understand why you are
25 here today?

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Any question in your mind as to why
3 you're here?

4 THE DEFENDANT: No, sir.

5 THE COURT: Do you understand the criminal charges
6 that you are pleading guilty to are non-parolable offenses?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Do you have any question about that?

9 THE DEFENDANT: No, sir.

10 THE COURT: Mr. Robinson, have you explained to
11 the defendant his constitutional rights, the criminal
12 charges and the elements of the charge?

13 MR. ROBINSON: Yes, I have.

14 THE COURT: Have you explained to him the maximum
15 time he could receive?

16 MR. ROBINSON: Yes, sir.

17 THE COURT: And I believe CSC first with a minor
18 is up to 25?

19 MS. REEVES: Up to 30, Your Honor.

20 THE COURT: Up to a maximum of 30? What is the
21 age of the child?

22 MS. REEVES: Yes, sir. Actually this is an adult.

23 THE COURT: Okay. So it's a maximum of 30 years.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

1 THE COURT: Do you agree with that, Mr. Robinson?

2 MR. ROBINSON: Yes, sir.

3 THE COURT: Do you have any question about the CSC
4 criminal charge or the maximum time you could receive?

5 THE DEFENDANT: No, sir.

6 THE COURT: Mr. Robinson, did he appear to
7 understand the conversations you've had with him?

8 MR. ROBINSON: Yes, sir.

9 THE COURT: Have you had any difficulty in
10 communicating with him?

11 MR. ROBINSON: No, sir, Your Honor.

12 THE COURT: Has there been any indication that he
13 is not competent to assist you in preparing for trial?

14 MR. ROBINSON: No, sir, Your Honor.

15 THE COURT: Do you agree with his decision to
16 plead guilty?

17 MR. ROBINSON: Yes, Your Honor.

18 THE COURT: How does he wish to plead?

19 MR. ROBINSON: Guilty, Your Honor.

20 THE COURT: And do you believe the State could
21 find him guilty beyond a reasonable doubt?

22 MR. ROBINSON: Yes, sir.

23 THE COURT: All right. Do you understand on the
24 kidnapping you can receive up to 30 years, Mr. McElrath?

25 THE DEFENDANT: Yes, sir.

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

1 THE COURT: Do you have any question about the
2 kidnapping or the maximum time you could receive?

3 THE DEFENDANT: No, sir.

4 THE COURT: Do you agree with the 30 years, Mr.
5 Robinson?

6 MR. ROBINSON: I do.

7 THE COURT: Solicitor?

8 MS. REEVES: Yes, sir.

9 THE COURT: Mr. McElrath, are you satisfied with
10 the services of your attorney?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Has he done everything you've asked
13 him to do?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Is there anything that he's done that
16 you feel like he should not have done?

17 THE DEFENDANT: No, sir.

18 THE COURT: Do you need more time to talk to your
19 attorney?

20 THE DEFENDANT: No, sir.

21 THE COURT: Have you talked to him as often and as
22 long as you feel necessary?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Is there anything you feel like he has
25 done that he should not have done?

1 THE DEFENDANT: No, sir.

2 THE COURT: Are you completely satisfied with his
3 services?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Mr. McElrath, are you married?

6 THE DEFENDANT: No, sir.

7 THE COURT: Have you ever been married?

8 THE DEFENDANT: No, sir.

9 THE COURT: Do you have any children?

10 THE DEFENDANT: Maybe. I don't know.

11 THE COURT: Pardon?

12 THE DEFENDANT: I might have been expecting one
13 when I got arrested.

14 THE COURT: But you don't know?

15 THE DEFENDANT: I don't know for certain.

16 THE COURT: You don't know?

17 THE DEFENDANT: I mean, I know she was pregnant,
18 but I don't know if it was mine.

19 THE COURT: You don't know if it's yours or not?

20 THE DEFENDANT: Yeah.

21 THE COURT: And you're not paying child support
22 for any children?

23 THE DEFENDANT: No, sir.

24 THE COURT: Is that correct?

25 THE DEFENDANT: That's correct.

1 THE COURT: Have you been through the criminal
2 process before?

3 THE DEFENDANT: I have a pending charge in North
4 Carolina for ---

5 THE COURT: What were those pending charges?

6 THE DEFENDANT: It was armed robbery.

7 THE COURT: What happened to the charge?

8 THE DEFENDANT: They are still pending. I was
9 expecting to go to court February the 8th or 13th, 14th of
10 '07.

11 THE COURT: So those charges are still pending?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Have you been through the
14 criminal process any other time?

15 THE DEFENDANT: No, sir.

16 THE COURT: This will be your second time through?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You haven't completed the first one;
19 is that correct?

20 THE DEFENDANT: Yes, sir, that's correct.

21 THE COURT: All right. Do you understand you have
22 the right to remain silent under the Fifth Amendment of the
23 Constitution?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: No one can make you testify against

1 yourself. Do you understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: When you enter a guilty plea, you're
4 going to acknowledge your guilt. Do you understand?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: When you acknowledge your guilt, you
7 will be testifying against yourself.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Are you willing to give up your Fifth
10 Amendment rights to remain silent and enter your guilty
11 plea?

12 THE DEFENDANT: Yes sir.

13 THE COURT: Do you understand you're entitled to a
14 jury trial?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: You're on the jury trial list for this
17 week. Do you understand?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand in a jury trial you
20 could testify on your own behalf? The State would be
21 required to prove your guilt beyond a reasonable doubt. All
22 twelve jurors would have to vote to find you guilty. Do you
23 understand that about a jury trial?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Knowing that about a jury trial, do

State v. Steven McElrath 2007-GS-04-1896, 1897
Guilty Plea Hearing (May 19, 2008)

1:

1 you want a jury trial?

2 THE DEFENDANT: No, sir.

3 THE COURT: Do you understand you have the right
4 to appeal the guilty plea ten days from today?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Has anybody threatened you?

7 THE DEFENDANT: No, sir.

8 THE COURT: Has anybody coerced you?

9 THE DEFENDANT: No, sir.

10 THE COURT: Anybody intimidated you?

11 THE DEFENDANT: No, sir.

12 THE COURT: Any promises been made to you?

13 THE DEFENDANT: No, sir.

14 THE COURT: Had enough time to make your decision
15 to plead guilty?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Are you pleading guilty of your own
18 free will and accord?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Have you understood all my questions?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you answered the questions
23 truthfully and correctly?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you have any question you want to

1 ask the Court or your attorney?

2 THE DEFENDANT: No, sir.

3 THE COURT: How do you wish to plead?

4 THE DEFENDANT: Guilty.

5 THE COURT: Are you guilty?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. The Solicitor is going to
8 give me the facts in the case. I want you to listen, okay?
9 After she gives me the facts, I'm going to ask if you agree
10 with the facts or disagree. If you disagree, I want to know
11 what facts you specifically disagree with. Can you do that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Solicitor?

14 MS. REEVES: Thank you, Your Honor. May it please
15 the Court.

16 On the evening of February 7th, 2007, and into the
17 early morning hours of -- I'm sorry February 8th, 2007, the
18 victim in this case, Angel Johns, was working third shift at
19 the Days Inn on Clemson Boulevard in Anderson County. The
20 Defendant was a guest at that hotel while he was working
21 with Buckeye Construction in the area.

22 The Defendant had been into the lobby three times that
23 evening speaking with the victim in the case. The third
24 time he came in and told her that he needed his key back and
25 needed to get it reprogrammed. I believe earlier he had had

1 some run-ins with his supervisors and had attempted to leave
2 and turned in his key.

3 He eventually came back to the room -- came back to the
4 lobby to retrieve his room key. When the victim turned --
5 she was behind the desk at the Days Inn in the lobby area,
6 and she turned to reprogram his key. This Defendant jumped
7 the counter and kind of hit her in the throat and pushed her
8 to the ground at the same time. He struck her so hard that
9 her shoes came off and her glasses were knocked off.

10 A struggle began on the floor in that lobby area. The
11 victim broke a nail during that struggle. Eventually -- she
12 was screaming at the top of her lungs. And eventually the
13 Defendant told her that if she didn't shut up he would kill
14 her.

15 He got the victim up. He pushed her and tried to get
16 into a manager's office, which the door was locked. He then
17 walked behind her leading her into the back laundry area of
18 the lobby at the Days Inn.

19 He made her get undressed. The victim was trying to
20 offer the Defendant money in the register, asking him and
21 telling him, don't do this. The Defendant stated to her, I
22 don't want your money; I want your pussy.

23 Once in the washroom -- the victim had removed her
24 clothes -- the Defendant removed his clothes and put on a
25 condom and then forced her to have sexual intercourse with

1 him. The Defendant, through that, made statements such as,
2 I'm raping you, aren't I?

3 The victim was telling him that her night manager was
4 supposed to come at any moment, trying to get him to leave,
5 to get off of her. He was making statements such as, I just
6 want to come.

7 The victim finally heard a delivery truck pull up in
8 front of the hotel. And she told the Defendant that that
9 was her manager and that she needed to get out there and see
10 him or he would know something was wrong.

11 The Defendant let her up. She got dressed, he got
12 dressed and they went out to the front of the hotel. At
13 that time, a newspaper delivery man for the Anderson
14 Independent, John Thompson, pulled up at the scene. The
15 victim came out and retrieved the papers from him and at the
16 same time mouthed, help me, to him.

17 Mr. Thompson was prepared to testify today he saw this
18 Defendant standing in the doorway behind the victim holding
19 both doors open. He left the scene, went behind the hotel
20 and dialed 9-1-1, then pulled around to the front -- to the
21 Exxon in front of the Days Inn and waited on officers to
22 arrive.

23 Meanwhile, the victim was finally able to convince the
24 Defendant to leave, that other people were coming to the
25 hotel, that he needed to get out. The Defendant eventually

1 did leave.

2 Once officers arrived, they found the Defendant in his
3 room. A search incident to arrest found the condom wrapper
4 in his pocket. They could not locate the condom that had
5 been used. The DNA that was found in this case from that
6 condom wrapper was matched to -- it was a combination. It
7 matched the Defendant as well as the victim.

8 And the victim in this case had gone to work at 11 P.M.
9 that evening. And before going to work -- she is married --
10 and had sex with her husband without the use of a condom.
11 The DNA evidence in this case that was found on the
12 Defendant's boxer shorts was actually the victim's husband's
13 semen as well as the Defendant's semen on the Defendant's
14 boxer shorts.

15 While in custody the Defendant did give a statement ---

16 THE COURT: I don't need to get into the
17 statement.

18 All right. Mr. McElrath, do you agree with those
19 facts?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Any of those facts you disagree with?

22 THE COURT: I wasn't aware of the extremity of the
23 situation.

24 THE COURT: You weren't aware of what?

25 THE DEFENDANT: How extreme the situation was. I

1 was, at that time, intoxicated. But I agree with it.

2 THE COURT: You agree with the facts that the
3 State gave to the Court; is that correct?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: All right. I find there's a factual
6 basis for the plea. He's freely, voluntarily, knowingly and
7 intelligently made the decision to plead guilty with the
8 advice of an attorney. All elements of the charge have been
9 met.

10 Go ahead and tell me about the statement. I just
11 wanted to hear what he was going to say at that point in
12 time. Go ahead.

13 MS. REEVES: That's no problem, Your Honor. The
14 Defendant did give a statement admitting at first the victim
15 didn't want to have sex, but then she changed her mind. He
16 later said it was against her will and at first he felt bad.
17 He later expressed remorse for his actions.

18 Detective ---

19 THE COURT: Remorse to who?

20 MS. REEVES: In his statement, remorse toward the
21 victim and her husband.

22 THE COURT: Okay.

23 MS. REEVES: Detective McBride as well as
24 Detective Ashley are both present. McBride would like to
25 address the Court at the appropriate time as well as the

1 victim in this case.

2 THE COURT: Okay.

3 Mr. Robinson, I'll be glad to hear from you.

4 MR. ROBINSON: May it please the Court.

5 Your Honor, this is a very tragic way to begin your
6 adult life. He was 18 when this happened. He was working a
7 job. He was at the hotel. He really had not had very
8 little experience with adult life when this all happened.
9 He was very immature. He's still immature. I haven't
10 really noticed any sort of -- he still has the mentality, I
11 think, of an immature person in a lot of respects. And this
12 has made him grow up a lot in this matter as anything like
13 this would make someone grow up.

14 But Your Honor, we were prepared to go to trial in this
15 case. We had talked about this and so forth. But we made
16 the decision that in order to not put the lady through a
17 trial in this case, it was best to do this. And I think
18 that Steven is one of these individuals who has got the
19 mentality of an 18-year-old which is what he is. And he got
20 mixed ---

21 THE COURT: Has a what?

22 MR. ROBINSON: He was 18 at the time.

23 THE COURT: Okay.

24 MR. ROBINSON: The mentality of an 18-year-old at
25 the time, I think. But he was doing alcohol which he

1 shouldn't have been doing at the time. And he has a problem
2 with alcohol, I believe, based on what I've seen of him and
3 his background.

4 But Your Honor, I would point out in mitigation that
5 there was no -- there were no marks or anything that were
6 found on the victim in this case. The -- he was primarily
7 -- I think he was trying to get the keys to a car so he
8 could leave. I think that was the main purpose of it when
9 he went across the counter in this case. He never meant to
10 hurt anybody or to cause any sort of pain to anybody.

11 But we'd ask the Court to look at the fact that he
12 doesn't really have a criminal record to speak of and that
13 he -- of his age. He is only 18. We'd ask the Court for a
14 -- if the Court sees fit for a suspended sentence or a split
15 sentence in this case. He is only 19 now. But we'd ask for
16 mercy from the Court as far as Mr. McElrath.

17 And he'd like to say something as well, Your Honor.

18 THE COURT: Okay, Mr. McElrath. I'll be glad to
19 hear you.

20 THE DEFENDANT: I was -- I never really planned or
21 thought of actually ever doing anything like that. My plans
22 were to attend seminary. I was in fact ministering in my
23 hometown in North Carolina.

24 THE COURT: You were what?

25 THE DEFENDANT: I was a minister.

1 THE COURT: You were a minister?

2 THE DEFENDANT: Yeah, I was ministering. I just
3 wasn't -- I wasn't registered. I wanted to become ordained.
4 But I didn't get to attend seminary because I had turned
5 back to drinking alcohol from depression and anxiety.
6 Everything went downhill, and I had just -- I had stopped
7 pursuing that way.

8 And then I heard that that girl I had been with at the
9 time was pregnant, so I took the job and come down here to
10 work. And then while intoxicated, I assumed that Angel, the
11 victim, was leading me on at the counter because of the way
12 she was presenting herself and talking and smiling. And she
13 was ---

14 THE COURT: Well, she was just probably being a
15 friendly employee doing her job, and you rape her.

16 THE DEFENDANT: I just ---

17 THE COURT: Now you want to stand there and blame
18 it on the alcohol.

19 THE DEFENDANT: It wasn't just the alcohol. I
20 don't -- I don't know what to say. I just never planned
21 that. And now because of this, I put myself in a situation
22 where my future ---

23 THE COURT: Well, tell me why you're not a danger
24 and a menace to society. You go into a motel, rape the
25 lady, and you also got pending charges for armed robbery in

1 North Carolina.

2 THE DEFENDANT: Those too are alcohol related, and
3 it's not armed robbery. And if there were, it could be
4 reduced to a misdemeanor because it was no weapon involved
5 in that incident.

6 THE COURT: Is that all you got to tell me?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Okay.

9 Be glad to hear from you.

10 I didn't mean to cut you off. If there's something
11 else you want to tell me, I'll be glad to hear anything you
12 want to tell me.

13 THE DEFENDANT: No, sir.

14 THE COURT: Okay.

15 MR. CHAD MCBRIDE: Your Honor, my name is Chad
16 McBride. I'm a detective with the Sheriff's office. I was
17 the lead investigator on this case.

18 And Your Honor, this horrible traumatic incident has
19 had a great impact on the victim and the victim's family.
20 Her husband had recently -- before this incident had
21 occurred, he had recently returned from Iraq serving our
22 country with the United States Army National Guard. So this
23 family had already -- had undergone some serious stress
24 related to that issue. He comes home and then they have to
25 go through this incident.

1 They have two small children. It's caused a great deal
2 of stress and strain on this family and the victim. It was
3 a horrible incident, sir. I mean, it's an incident where
4 she lost a fingernail trying to escape from the suspect --
5 or from the Defendant. Excuse me.

6 Your Honor, he's making these kind of decisions at 18
7 whether he's mature or not. I mean, I can't imagine what
8 kind of decisions he's going to be making at 40. I just --
9 I don't feel like he's accepting responsibility for his
10 actions as much as he is defending himself instead of
11 feeling remorse for the victim and what he has caused to the
12 victim and the victim's family.

13 THE COURT: Thank you very much. Appreciate your
14 being here.

15 MR. CHAD MCBRIDE: Yes, sir.

16 THE COURT: Ms. Johns, have you written out a
17 statement?

18 MS. ANGEL JOHNS: Yes, sir.

19 THE COURT: If you don't feel like reading it,
20 I'll be glad to read it myself unless you feel like reading
21 to me. I mean, whatever you want to do.

22 MS. ANGEL JOHNS: I think you are the lowest form
23 of scum. I hate you with all my heart and soul. I don't
24 know why you had to rape me. I did nothing to you. You
25 just turned around and attacked and raped me.

1 Do you even realize what you've taken from me? You
2 stole a part of me that can never be given back. Every day
3 I still think of your horrible attack on me.

4 You've taken a part of me from my family also. I don't
5 even feel safe in my own home. I have not been able to work
6 since this has occurred. How would you feel if someone
7 raped your daughter, your sister or your mother? Well,
8 that's what you've done. You've raped me. And I'm a wife,
9 I'm a sister, a mother and a daughter. I feel that you do
10 not even care about what you have done to me and my family
11 because when we came to your bond hearing, you would look at
12 me smiling and talking to the friend beside you, then
13 laughing and showing no remorse.

14 You made me feel helpless, and no one should ever have
15 to be in that situation. I told you while you were raping
16 me that I loved my husband and my children, and you still
17 wouldn't stop. I begged you and you would not stop.

18 What really sucks is that you have changed me now, and
19 I don't trust anyone. I can no longer be that nice person
20 who would do anything to help someone because it almost got
21 me killed by you.

22 I hope this Court sees you for who you really are and
23 gives you the proper sentence so that maybe no other woman
24 will be your victim. I believe you are a danger to society
25 because you raped me and told me you were going to kill me.

1 And I believe you would have if the newspaper delivery man
2 had not shown up when he did.

3 I feel that you will do this again, but the next woman
4 may not be a survivor like me. After everything you have
5 put me through, I know I will survive this because you have
6 controlled my life for over a year and I am desperately
7 trying to take control of my life.

8 THE COURT: Ms. Johns, I hope you're able to get
9 your life back under control.

10 MS. ANGEL JOHNS: I'm trying really hard.

11 THE COURT: And it's going to be difficult, I'm
12 sure. I don't know if you're receiving any counseling.

13 MS. ANGEL JOHNS: I am.

14 THE COURT: You might ought to try to get some.

15 MS. ANGEL JOHNS: I've got a big support system.

16 THE COURT: And try to work through this and go on
17 with your life. Okay? He's not going to be bothering you.
18 Okay?

19 MS. ANGEL JOHNS: Thank you, sir.

20 THE COURT: Thank you.

21 Yes, sir, anything else?

22 MR. ROBINSON: He'd like to say one more thing, I
23 think, if the Court would ---

24 THE COURT: Pardon?

25 MR. ROBINSON: If the Court would allow him, he'd

1 like to say something.

2 THE COURT: I'll be glad to hear anything else he
3 wants to tell me.

4 THE DEFENDANT: I am aware of the problems I
5 caused her and her husband. And any situation like that can
6 cause someone you love to decide never even to touch you
7 again. And ...

8 THE COURT: I'm sorry. What?

9 THE DEFENDANT: Could cause your husband not to
10 even want to touch you because of the way another man
11 defiled your body. But I take full responsibility for what
12 happened. And I know whatever you see as a ruling is fit
13 for this. I just -- I know the problems I've caused that
14 family and the emotional damage I brought about to her. And
15 that's just something I never would ever want to do to
16 anyone. I never imagined doing anything such as that to
17 anyone.

18 And I too hope that she can overcome whatever fears and
19 hatred she has. And I'm not asking for forgiveness, but
20 there's not a day that I haven't thought about her and her
21 family and what she's been going through. And it's not like
22 I don't care what happened. I care about everybody, and I
23 pray for that woman just like I pray for my family. That
24 wasn't a planned event.

25 That's all I got to say.

State v. Steven McElrath 2007-GS-04-1896, 1897
Gulity Plea Hearing (May 19, 2008)

2:

1 THE COURT: How many days has he been in jail?

2 MS. REEVES: Your Honor, he's been in jail for 466
3 days.

4 THE COURT: 466 days?

5 MS. REEVES: Yes, sir.

6 THE COURT: Thank you, ma'am.

7 MS. REEVES: Your Honor, if I could add, the State
8 would recommend the maximum sentence in this case. I think
9 it is warranted.

10 THE COURT: All right. Mr. McElrath, indictment
11 number 1896 -- that's the kidnapping -- you're sentenced to
12 the State Department of Corrections for a period of 30
13 years. That's consecutive with indictment number 1897.
14 Give you credit for 466 days.

15 Indictment number 1897 -- that's the CSC -- you're
16 sentenced to the State Department for a period of ten years.
17 So that's consecutive with the other indictment. That means
18 you've got 40 years.

19 Thank you very much.

20 MR. ROBINSON: Thank you, Your Honor.

21 (END OF REQUESTED TRANSCRIPT OF RECORD)

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all the
6 proceedings had and evidence introduced in the trial/hearing
7 of the captioned case, relative to appeal, in the Circuit
8 Court for Anderson County, South Carolina, on the 19th day
9 of May 2008.

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

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

14 June 18, 2009

15 Renee H. Tollison
16

17 Circuit Court Reporter

C. MCBRIDE, ACSO

ARREST WARRANT NO. J423866

ACTION OF GRAND JURY

RUE BILL

JUN 19 2007

Foreman of Grand Jury

Forfeiture

VERDICT

Foreman of Petit Jury

Date:

THE STATE OF SOUTH CAROLINA,
ANDERSON
County of

COURT OF GENERAL SESSIONS

JUN 19 2007 TERM

KWR THE STATE

vs.
STEVEN C. MCEL RATH

Indictment for

KIDNAPPING
16-03-0910 (0095)

COMMITTEE
05/19/08

TRUE COPY

SEP 9 2011

STATE OF SOUTH CAROLINA)
 ANDERSON)
COUNTY OF _____)

INDICTMENT FOR
KIDNAPPING
16-03-0910 [0095]

At a Court of General Sessions, convened on JUN 19 2007
the Grand Jurors of ANDERSON County present upon their oath:

KIDNAPPING

That Steven C. McElrath did in Anderson County on or about February 8, 2007,
unlawfully seize, confine, kidnap, inveigle, decoy, abduct and or carry away Angel
Johns without the authority of law. All in violation of Section 16-03-0910, Code of Laws
of South Carolina, (1976), as amended.

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

K. E. R.
SOLICITOR
A TRUE COPY

SEP - 9 2011

C. MCBRIDE, ACSO

J423885

REST WARRANT NO.

J423865

ACTION OF GRAND JURY

RUE BILL

JUN 19 2007

remain of Grand Jury

VERDICT

remain of Petit Jury

Date:

The State of South Carolina,
ANDERSON

County of

COURT OF GENERAL SESSIONS

JUN 19 2007-

TERM

KMW

THE STATE

vs.

STEVEN C. MCEL RATH

Indictment for

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

16-03-0652[0160]

DRUANNE WHITE, SOLICITOR

05/19/08

A TRUE COPY

SEP - 9 2011

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT
FIRST DEGREE

JUN 19 2003-0652[0160]

At a Court of General Sessions, convened on _____

the Grand Jurors of ANDERSON County present upon their oath:**CRIMINAL SEXUAL CONDUCT - FIRST DEGREE**

That Steven C. McElrath did in Anderson County on or about February 8, 2007, engage in sexual battery with Angel Johns, accompanied by the following circumstance(s): the defendant used aggravated force to accomplish the sexual battery and/or the victim submitted to the sexual battery under circumstances where she was also the victim of forcible confinement or kidnapping, or any other similar offense or act.

All in violation of Section 16-03-0652, Code of Laws of South Carolina, (1976), as amended.

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

A TRUE COPY

SEP - 9 2011

K. R.
SOLICITOR

COUNTY OF Anderson
STATE VS.
Steven McElrath
AKA: _____
Race: W Sex: M Age: 48-19
DOB: _____ SS#: _____
Address: _____
DL#: _____ SID#: _____

INDICTMENT/CASE# 2007-GS-04 ³³
A/W#: J423866
Date of Offense: 02-08-2007
S.C. Code § : 16-03-0910
CDR Code #: 0095

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Kidnapping / Kidnapping (up to 30)

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the

ATTEST: K. R. Solicitor: Steven McElrath Defendant: [Signature] Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or pay of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☒ CONSECUTIVE to sentence on: 1897
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 466 days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 7-25-1.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ set by SCDPPPS _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/monthly payments of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv Surcharge)	\$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$
§ 56-5-2995 (DUI Assessment)	\$12 \$
§ 35.13 (Public Def/Prob)	\$500 \$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25 \$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge)	\$100 \$
§ 50-21-114(BUI Breath Test Fee)	\$50 \$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
3% to County (if paid in installments)	\$
TOTAL	\$ 125.00

☒ Appointed PD or appointed other counsel, §35.1
Requires \$500 be paid to Clerk during probation.

Cathy M. Phillips SEP 2011 PRESIDING JUDGE [Signature]

COUNTY OF Anderson
STATE VS.
Steven McElrath
AKA: _____
Race: W Sex: M Age: 18-19
DOB: _____ SS#: _____
Address: _____
DL#: 38201932 SID#: _____

INDICTMENT/CASE# 2007-GS-04
A/W#: J423865
Date of Offense: 02-08-2007
S.C. Code § : 16-03-0652
CDR Code #: 0160

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS TO: Sex / Criminal sexual conduct - First degree (upto 30)

in violation of § 16-03-0652 of the S.C. Code of Laws, bearing CDR Code # 0160
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-2 w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the

ATTEST: V. J. R. Steven McElrath [Signature]
Solicitor: Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Ce for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or pay of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditio probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 1896
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 466 DAYS
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 7-25-1.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
☐ set by SCDPPPS _____

Recipient: _____
*Fine: \$ _____
§ 14-1-206 (Assessments 107.5 %) \$ _____
§ 14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
§ 56-5-2995 (DUI Assessment) \$12 \$ _____
§ 35.13 (Public Def/Prob) \$500 \$ _____
§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00
§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____
§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____
§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
3% to County (if paid in installments) \$ _____

TOTAL

\$ 125.00 TRUE COPY

PTUP _____
_____ days/hours Public Service Employmen
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol testing _____
Fine may be pd. in equal, consecutive weekly/mon pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel §35.1
Requires \$500 be paid to Clerk during probatio

Cathy N. Phillips PRESIDING JUDGE [Signature]
Clerk of Court/Deputy Clerk T/SEP - 9 2011

STATE OF SOUTH CAROLINA

County of AndersonSteven McElrath, #328413

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2009-CP-04-00012**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Lieber Correctional Institution, Ridgeville, SC
2. Name and location of Court which imposed sentence Anderson County Court of General Sessions, Anderson, SC
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-04-1896, Kidnapping
 - (b) 2007-GS-04-1897, Criminal Sexual Conduct, 1st

A TRUE COPY

JAN 2 2009

JAN -2 P 2

FILED

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 19, 2008 - 30 years for Kidnapping, Consecutive
- (b) May 19, 2008 - 10 years for Criminal Sexual Conduct, 1st, Consecutive
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty 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?
Yes, Direct Appeal
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. September 23, 2008
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

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

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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

No

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

(a) which grounds have been presented:

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

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

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

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) Prejudicial errors of plea counsel only recently discovered
 - (b) Only recently understood terms of sentencing statute and existence of viable defen
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? ~~Yes~~ N/A Yes
 - (b) your trial, if any? N/A
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
N/A
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Plea: Scott D. Robinson; 101 Lavinia Ave.; Greenville, SC 29601
 - ii. Trial: N/A
 - iii. Sentencing: Scott D. Robinson; same as above
Appeal: Scott D. Robinson; same as above
 - (b) the proceedings at which each such attorney represented you:
 - i. Plea: Scott D. Robinson
 - ii. Trial: N/A
 - iii. Sentencing: Scott D. Robinson
Appeal: Scott D. Robinson

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

Vacation of conviction; New Trial

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

No

STATE OF SOUTH CAROLINA)

County of Anderson)

VERIFICATION

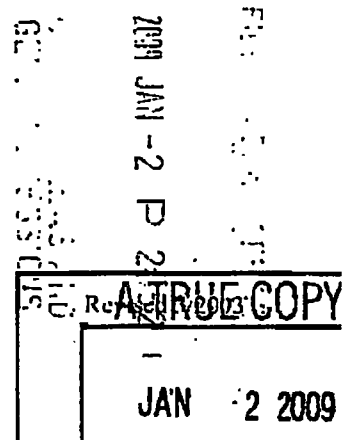
I, Steven McElrath, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that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

Steven McElrath

SWORN to and subscribed before me this 13 day of Nov. 08.

Yvette RBL (L.S.)
Notary Public

My Commission Expires: 2/20/2016



State of South Carolina

)

In the Court of Common Pleas

County of Anderson

)

)

Steven McElrath, #328413,

)

ATTACHMENT TO APPLICATION

Applicant,

)

FOR POST-CONVICTION RELIEF

)

2009-CP-04-00012

v.

)

)

State of South Carolina,

)

Respondent

)

A TRUE COPY

JAN 2 2009

Cathy M. Phillips
CLERK OF COURT

Comes now Steven McElrath, Applicant, and makes this attachment to his application for Post-Conviction Relief.

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

(a) Counsel was ineffective in failing to object to the sentence given to Applicant which was in violation of SC Code §17-25-50; counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing to accept his guilty plea without full knowledge of the consequences of that plea; counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing Applicant to enter into a plea of guilty without full understanding of the nature of the plea.

(1)

2009 JAN -2 P 2:

FILED - 2009 JAN -2 P 2:

(b) Applicant unknowingly accepted an improper sentence which was in violation of SC Code §17-25-50; Applicant unknowingly and without full understanding entered into a guilty plea without knowledge of an existing viable defense that was available to him; Applicant lacked the mental capacity to understand the nature and consequences of his guilty plea sentence.

Thus the applicant sets forth the facts in support of the grounds of his claims for relief.

11-12-08

DATE

Steven McElrath

Steven McElrath, #328413

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 10TH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	Case No.: 2009-CP-04-0012
Steven McElrath, #328413	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN AND REQUEST FOR
	)	APPOINTMENT OF COUNSEL
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post conviction relief (PCR) filed January 2, 2009, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there is an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

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

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

I, Steven McElrath, #328413, 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.

Steven McElrath
Applicant

SWORN or affirmed to and subscribed before me this
12 day of November, 08.

Yvonne Blom
Notary Public

My Commission Expires: 8/20/2016.

FILED
2009 JAN -2 P 2:52
CLERK OF COURT
JAN 2 2009

from the South Carolina Department of Corrections, the appellate records, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel
 - a. Counsel failed to object to the sentence received.
 - b. Counsel failed to discuss viable defenses with Applicant.
 - c. Counsel failed to investigate mental capacity of Applicant.
2. Involuntary Guilty Plea; and

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing* Strickland.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland,

Id. Applicant must overcome this presumption in order to receive relief. Cherry, Id.

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Respondent submits that 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, 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.

Applicant alleges that he did not plead guilty freely and voluntarily. The State submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the

plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The State submits Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, Respondent submits that Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that a hearing be held.

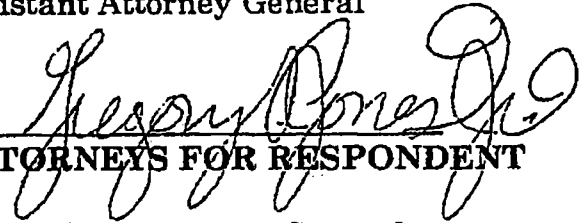
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

GREGORY P. JONES, JR.
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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

April 2, 2009.

IN THE COURT OF COMMON PLEAS

ANDERSON COUNTY

STEVEN MEERATH #328413
APPLICANT -

vs.

STATE OF SOUTH CAROLINA
RESPONDENT -

CA/NO: 2009-CP-04-L

AMENDED PCR

APPLICANT COPY

JAN 29 2010

Cathy M. Phillips
CLERK OF COURT

NOW COMES THE ABOVE NAMED APPLICANT WHO MALES
THIS ATTACHMENT AND AMENDMENT TO HIS PCR APPICA-
TION ADDING CLAIMS AND REQUESTING A WHEAT.
STATE REVIEW. APPLICANT MAKES THIS MOTION PURSUANT
TO S.C.R.CIV.P. RULE 15.

1-26-10

DATE:

FILED-CLERK'S OFFICE
ANDERSON SC
2010 JAN 29 A 10:33
GENERAL SESSIONS

INEFFECTIVENESS OF APPELLATE COUNSEL

A NOTICE OF APPEAL WAS FILED ON APPLICANT'S BEHALF. THE S.C. COURT OF APPEALS DISMISSED THE APPEAL ON SEPT. 23, 2008, FOR LACK OF ANY SHOWING THAT THERE IS AN ISSUE PRESERVED FOR APPELLATE REVIEW. THE REMITTITUR WAS ISSUED ON OCT. 9, 2008.

WAS COUNSEL INEFFECTIVE FOR NOT ARGUING AND ANDERS BRIEF STATING ONE ISSUE ARGUABLE ON APPEAL.

APPLICANT CONTENDS HIS SENTENCE WAS CRUEL AND UNUSUAL AND WAS GIVEN THE MAXIMUM PENALTY FOR KIDNAPPING ON INDICTMENT NO: 2007-GS-04-1896 § 16-03-0910.

APPLICANT PLEA GUILTY FOR MERLY OF THE COURT. APPLICANT WAS A FIRST TIME OFFENDER WITH NO CRIMINAL RECORD, NO VIOLENCE WAS SHOWN, OR NO OTHER AGGRAVATING FACTOR TO WARRANT THE MAXIMUM SENTENCE. IF COUNSEL WOULD HAVE ARGUED THIS ONE ISSUE IT WOULD HAVE PRESENTED AN ARGUMENT AS REQUIRED BY AN ANDERS BRIEF, THAT THE MAXIMUM SENTENCE WAS ONLY SUPPOSED TO BE GIVEN IF FOUND GUILTY AFTER A JURY TRIAL. NO FACTS SUPPORTED THE MAXIMUM ALLOWED BY LAW FOR A PLEA FOR MERLY. APPLICANT MOTIONS THIS COURT FOR A WHITE U. STATE, REVIEW CONCERNING THIS ISSUE.

APPLICANT CONTENDS THAT THE COURT LACKED PERSONAL / SUBJECT-MATTER JURISDICTION TO TRY APPLICANT FOR THE CHARGE OF KIDNAPING (07-GS-04-1896) AND FOR (CSC) 1ST DEGREE (07-GS-04-1897) THAT THE PROCEDURES FOR FILING INDICTMENTS UNDER RULE 3, DISPOSITION OF WARRANTS WAS VIOLATED, APPLICANT WAS NOT ARRAIGNED NOR PROPERLY NOTIFIED HIS CHARGES WERE BEING PRESENTED TO THE GRAND JURY.

PURSUANT TO A MEMORANDUM BY THE S.C. COURT ADMINISTRATION THAT REPRESENTATIVES HAVE BEEN AUDITING COMPLIANCE WITH RULE 3, S.C.R. CREM P. (A)(B)(C) GOVERNING THE TRANSMITTAL OF ARREST WARRANTS BY THE OFFICE OF THE SOLICITOR.

ALL MAGISTRATES AND MUNICIPAL JUDGES HAVE BEEN INSTRUCTED TO PREPARE A CERTIFICATE OF TRANSMITTAL, FORM-SCCA-M3, TO ACCOMPANY ALL UNIFORM NUMBERED ARREST WARRANTS FORWARDED TO THE OFFICE OF THE CLERK OF COURT. NO UNIFORMED NUMBERED ARREST WARRANTS ISSUED BY A MAGISTERIAL OR MUNICIPAL COURT SHOULD BE ACCEPTED BY THE CLERK OF COURT UNLESS ACCOMPANIED BY THE PROPER CERTIFICATE OF TRANSMITTAL. WHEN A UNIFORMED NUMBERED ARREST WARRANT ISSUED BY THE MAGISTERIAL OR MUNICIPAL COURT IS PRESENTED WITHOUT THE NECESSARY CERTIFICATE OF TRANSMITTAL, IT SHOULD BE IMMEDIATELY RETURNED TO THE ISSUING COURT AND NOT ACCEPTED FOR FILING.

WHEN THE INDICTMENT WHICH HAS BEEN PREPARED BUT NOT YET PRESENTED TO THE GRAND JURY IN COMPLIANCE WITH RULE 3, IS PRESENTED TO THE CLERK FOR THE ASSIGNMENT OF A CASE NUMBER, THE PREPARED, BUT UNPRESENTED INDICTMENT SHOULD

BE TAKEN FOR FILING ~~BY~~ BY THE CLERK OF COURT AT THAT TIME, RULE 3(C), THE SOLICITOR MAY RETAIN A COPY OR REQUEST THE CLERK OF COURT TO PROVIDE HIM WITH A COPY OF THE PREFILED INDICTMENT. THE ORIGINAL SHOULD AT ALL TIMES REMAIN IN THE POSSESSION OF THE CLERK OF COURT "UNTIL THE PREPARED, BUT UNPRESENTED INDICTMENT IS FILED WITH THE CLERK OF COURT, RULE 3 HAS NOT BEEN MET." §14-17-570

APPLICANT CONTENDS HIS CONVICTIONS ARE INVALID AND THE COURT DID NOT HAVE PERSONAL SUBJECT MATTER JURISDICTION TO TRY HIM ON THESE CHARGES SINCE THEY WERE NOT PROPERLY FILED AND THE DEFENDANT WAS NOT SENT A SUMMONS FOR ARRAIGNMENT.

THE MAGISTRATE FILED THE ARREST WARRANTS ON FEB 12, 07, NO DATE IS SHOWN WHEN THE CLERK OF COURT FILED IT IN HER OFFICE. IN FACT THERE IS NO FILED STAMPED CLOCKED COPY OF THESE INDICTMENTS. CHARGES WERE SUBMITTED TO THE GRAND JURY ON JUNE 19, 2007 WITHOUT BEING PROPERLY FILED WITH THE CLERK OF COURT DEPRIVING THE COURT OF PERSONAL SUBJECT-MATTER JURISDICTION. DEFENDANT WAS TAKEN TO COURT WHEN HE WAS TRIED ON 5-19-08. THE SOLICITOR COMMITTED MISCONDUCT AND DISREGARDED THE PROPER PROCEDURES IN S.C.R. CRIM., 3, BY NOT NOTING ON THE FACE OF THE WARRANT THE ACTION TAKEN (2) EITHER FORMALLY DISMISSING THE WARRANT; (3) OR MAKING OTHER AFFIRMATIVE DISPOSITION AND FILING SUCH ACTION WITH THE CLERK OF COURT. (D) THE SOLICITOR FAILED TO PETITION THE CIRCUIT COURT FOR AN ORDER

~~FOR SUCCESSION~~ NINETY (90) DAYS PERIODS IF THE CLERK OF COURT SPECIFICALLY FINDS GOOD CAUSE FOR SUCH DELAY FOR EACH SUCCESSIVE NINETY DAY PERIOD. ANY ACTION TAKEN PURSUANT TO PARAGRAPHS (A) (B) (C) SHALL BE ENTERED IN THE RECORDS OF THE CLERK OF COURT.

PURSUANT TO §17-23-120 THE STATUTE STATES WHEN ANY DEFENDANT IS ARRESTED UPON A WARRANT CHARGING A MISDEMEANOR OR WHICH IS NOT WITHIN THE JURISDICTION OF THE MAGISTRATE COURT, OR NOTWITHSTANDING ANY OTHER PROVISION OF LAW, WHEN A DEFENDANT IS ARRESTED UPON A WARRANT CHARGING A FELONY, HE MAY APPLY TO THE CLERK OF COURT OF THE COUNTY HAVING JURISDICTION OF SUCH CASE FOR AN IMMEDIATE DISPOSITION OF THE CASE AND THEREUPON THE CLERK OF COURT SHALL FORWARD THE ARREST WARRANT TO THE SOLICITOR OF THE JUDICIAL CIRCUIT.

§17-23-130 UPON RECEIPT BY THE SOLICITOR OF THE WARRANT FORWARDED TO HIM PURSUANT TO THE PROVISIONS OF §17-23 HE MAY PREPARE A FORMAL INDICTMENT AS NOW PROVIDED BY LAW IN SUCH CASES AND "SHALL" RETURN IT TO THE CLERK OF COURT. THE CLERK OF COURT "SHALL" THEN NOTIFY THE SHERIFF OR ONE OF HIS DULY AUTHORIZED DEPUTIES TO BRING THE DEFENDANT BEFORE THE CLERK AT A TIME AND PLACE TO BE STATED IN THE NOTICE AT WHICH TIME THE CLERK "SHALL" HAVE THE DEFENDANT SIGN A WAIVER OF THE PRESENTMENT BY THE GRAND JURY; PROVIDED, THAT NO PLEA SHALL BE ENTERED OR MADE UNDER THIS SECTION BY AND WITH THE CONSENT OF THE SOLICITOR OF THE CIRCUIT COURT AFTER INVESTIGATION BY SUCH SOLICITOR.

§17-23-140, UPON THE DEFENDANTS SIGNING THE WAIVER PRESENTMENT AND THE PLEA OF GUILTY THE CLERK OF COURT SHALL DELIVER THE INDICTMENT TO THE SHERIFF OR ONE OF HIS AUTHORIZED DEPUTIES, AND WHOSE DUTY IT SHALL BE TO APPEAR BEFORE THE RESIDENT JUDGE OR PRESIDING JUDGE, HAVING WITH HIM THE DEFENDANT. THE JUDGE SHALL SENTENCE THE DEFENDANT AS THOUGH THE INDICTMENT HAS BEEN PRESENTED BY THE GRAND JURY AND THE PLEA OF THE DEFENDANT TAKEN AT THE REGULAR TERM OF THE COURT OF GENERAL SESSIONS.

APPLICANT CONTENDS THAT HIS DUE PROCESS RIGHTS TO A QUICK AND SPEEDY TRIAL WERE VIOLATED BY THE SOLICITOR NOT FOLLOWING RULE 3, APPLICANT WAS HELD 16 MONTHS WITHOUT BEING TOLD HE COULD PETITION THE COURT FOR AN IMMEDIATE DISPOSITION OF HIS CASE. APPLICANT COULD HAVE EITHER DEMANDED TRIAL THROUGH THIS PROCEDURE OR WOULD HAVE KNOWN EXACTLY WHAT RIGHTS HE WAS WAITING AND WOULD HAVE FORCED THE STATE TO DISCLOSE REASONS FOR THE DELAY. RULE 3 PROVIDES THAT THE SOLICITOR IN OPEN COURT MAY PETITION THE CIRCUIT COURT FOR AN ORDER DELAYING THE ACTION ON THE WARRANT FOR SUCCESSIVE (90) DAY PERIODS. BY NOT FOLLOWING RULE 3, APPLICANT WAS DENIED HIS "DUE PROCESS" RIGHTS TO PETITION THE COURT FOR EITHER A TRIAL OR PLEA BEFORE THE 16 MONTH DELAY. 14TH AMENDMENT GUARANTEES EQUAL PROTECTION OF THE LAW AND THESE STATUTES CREATED A "LIBERTY INTEREST" IN APPLICANT BEING HELD FOR OVER 365 DAYS WHICH WAS A "LIBERTY INTEREST" PURSUANT

APPLICANT CONTENDS HE WAS PREJUDICED BY THE DELAY BY NOT BEING ALLOWED TO BE BROUGHT UP FOR BOND REDUCTION EVERY 90 DAYS, FORCING THE SOLICITOR TO EITHER BRING HIM TO TRIAL OR SHOW REASONS WHY THE CHARGES SHOULD NOT BE DISMISSED. APPLICANT WAS DENIED DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT AND WAS DENIED HIS FREEDOM AND A CHANCE FOR A BOND OR A MOTION TO DISMISS FOR LACK OF EVIDENCE FORLEaving THE APPLICANT TO REMAIN IN CUSTODY WITHOUT A WAY TO CHALLENGE HIS CONTINUED CONFINEMENT.

COURT WAS WITHOUT "PERSONAL" SUBJECT MATTER JURISDICTION AND WAS A VIOLATION OF APPLICANT'S 14TH AMENDMENT DUE PROCESS RIGHTS AND A VIOLATION OF A PROTECTED LIBERTY INTEREST MADE BY STATE STATUTE AND COURT RULES. THAT HAD THE STATE FOLLOWED THE LAW YOU EITHER WOULD HAVE BEEN RELEASED OR FORCED THE STATE TO BRING YOU TO TRIAL BEFORE 365 DAYS. APPLICANT WAS PREJUDICED BY DELAY. HE COULD NOT INVESTIGATE HIS CASE, COULD HAVE CHALLENGED HIS STATEMENTS OR TRIED TO FIND ANOTHER ATTORNEY TO REPRESENT HIM. APPLICANT ONLY MET HIS LAWYER TWICE AFTER REARRESTMENT. APPLICANT WAS DENIED A FAIR TRIAL, AND PLEADED GUILTY TO AN UNIFIED INDICTMENT. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE MOTION UNDER §17-23-120 FOR IMMEDIATE DISPOSITION OF CERTAIN MISDEMEANORS OR FELONIES. RULE 3 WAS VIOLATED BY THE STATE AND APPLICANT WAS DENIED HIS RIGHTS UNDER DUE PROCESS OF LAW 14TH AMENDMENT BY STATUTE AND HAD A "LIBERTY INTEREST" IN RULE 3, CONCERNING FORCING THE STATE TO EITHER BRING HIM TO TRIAL WITHIN 90 DAYS.

INVOLUNTARY CONFESSION

APPLICANT PETITIONS THIS COURT FOR A WHEAT U.S. SUPREME COURT REVIEW TO DETERMINE THE VOLUNTARINESS OF HIS CONFESSION. APPLICANT'S PLEA WAS NOT KNOWINGLY AND VOLUNTARILY MADE BECAUSE HE DID NOT KNOW HIS CONFESSION COULD BE CHALLENGED FOR INVOLUNTARINESS IN A JACOB V. DENNO, HEARING. DEFENDANT IN A CRIMINAL CASE IS DEPRIVED OF DUE PROCESS OF LAW IF HIS CONVICTION IS FOUNDED IN WHOLE OR IN PART, UPON AN INVOLUNTARY CONFESSION, WITHOUT REGARD TO TRUTH OR FAISITY OF CONFESSION. U.S. C.A. CONSTITUTIONAL AMENDMENT 14.

DEFENDANT HAD A RIGHT AT SOME STAGE IN PROCEEDINGS TO OBJECT TO THE USE OF CONFESSION AND TO HAVE FAIR HEARING AND RELIABLE DETERMINATION ON ISSUE OF VOLUNTARINESS, DETERMINATION UNINFLUENCED BY TRUTH OR FAISITY OF CONFESSION.

APPLICANT CONTENTS HIS CONFESSION WAS NOT KNOWINGLY AND VOLUNTARILY MADE BECAUSE HE DID NOT KNOW HE WAS SIGNING A WAIVER OF RIGHTS TO HAVE COUNSEL APPOINTED BEFORE HE WAS INTERVIEWED BY POLICE DETECTIVES.

APPLICANT STATES HE SIGNED HE WAS READ HIS MIRANDA RIGHTS AFTER BEING HELD IN A HOLDING CELL FOR 5 HOURS. APPLICANT WAS BROUGHT IN VERY HIGHLY INTOXICATED BY HIS STATEMENT THAT HE DRANK FOUR OR FIVE BEERS ON WEDNESDAY NIGHT AND THEN WENT TO CHARLIE'S AND HAD SOME MORE DRINKS. AFTER APPLICANT WAS ARRESTED AND PLACED IN A CELL, APPLICANT WAS HIGHLY INTOXICATED AT THE TIME AND COULD HARDLY WALK OR STAND. THE NEXT MORNING APPLICANT WAS PULLED OUT OF THE CELL FOR QUESTIONING. APPLICANT WAS STILL HIGHLY

INTOXICATED AT THE TIME OF THE INTERVIEW BY OFFICER ⁵⁷McBRIDE STATED TIME WAS 9:43 A.M. 2-8-07 AT THIS TIME APPLICANT STILL WAS VERY DRUNK AND SLEEPY AND DID NOT KNOW WHAT WAS GOING ON. OFFICER McBRIDE READ HIM HIS RIGHTS UNDER MIRANDA AND HAD APPLICANT SIGN, RIGHT AFTERWARDS OFFICER McBRIDE HAD APPLICANT SIGN THE WAIVER OF RIGHTS WITHOUT EXPLAINING WHAT HE WAS WAIVING, APPLICANT WAS DRUNK AND DISORIENTATED AND COULD BARELY KEEP HIS EYES OPEN. APPLICANT ONLY WANTED TO GO BACK TO SLEEP. APPLICANT WAS NOT TOLD HE HAD A RIGHT TO AN ATTORNEY BEFORE HE WAS QUESTIONED, HE WAS ONLY TOLD HE HAD A RIGHT TO AN ATTORNEY. APPLICANT THOUGHT IT WAS PART OF THE MIRANDA RIGHTS HE WAS SIGNING AND DID NOT KNOW WHAT IT MEANT TO WAIVE THEM. FURTHERMORE, APPLICANT WAS TOO INTOXICATED TO WRITE HIS OWN STATEMENT. NO WRITTEN STATEMENT

cant — WAS SUBMITTED BY INVESTIGATORS AND NONE WAS GIVEN TO APPLICANT. APPLICANT DID ~~ADMIT~~ ^{ADMIT} CONSENSUAL SEX BUT WAS CONFUSED BY INVESTIGATORS FURTHER QUESTIONS WHICH SHOW THAT HE ONLY HAD CONSENSUAL SEX THEN STATED THAT AT FIRST, SHE DID NOT WANT TO HAVE SEX, BUT THEN SHE CHANGED HER MIND. HIS STATEMENT SUPPORTS CONSENSUAL SEX. APPLICANT CONTENDS THEY CONTINUED QUESTIONING HIM AND AND THE ADMITTED THAT HAVING SEX WAS AGAINST HER WILL AND THAT HE FELT BAD. THEN APPLICANT STATED HE TOLD HER THAT HE WOULD HAND AROUND IF THE POLICE SHOWED UP.

APPLICANT CONTENDS THAT INVESTIGATORS STATED WHAT THEY WANTED AND SUPPLEMENTED AND OMITTED FULL STATEMENTS OF ACTUAL EVENTS. APPLICANT CONTENDS HE WAS DRUNK

THE INTERROGATION. FURTHER, APPLICANT WAS UNDERAGE AND WAS NOT GIVEN A BREATHALIZER TO DETERMINE HIS B.A. OR HIS INTOXICATION LEVEL. FURTHER, DETECTIVES FAIL TO PUT THE TIME OF THE WAIVER OF RIGHTS SO IT CANNOT BE VALIDATED SO CLOSE IN PROXIMITY TO THE MIRANDA RIGHTS. APPLICANT CONTENDS THE DETECTIVES USED TRICK AND DECEIT TO GET HIM TO MAKE STATEMENTS WHILE HE WAS UNDER THE INFLUENCE OF ALCOHOL. DETECTIVES KNEW WHAT CONDITION APPLICANT WAS IN AND TOOK ADVANTAGE OF HIM. APPLICANT HAD NO PRIOR RECORD AND NO KNOWLEDGE OF THE LAW AND HAD NO UNDERSTANDING OF WHAT MIRANDA IS AND WHAT RELATION IT HAS TO WAIVER OF RIGHTS. APPLICANT THOUGHT THEY WERE JUST GOING TO ASK QUESTIONS AND LET HIM GO. INVESTIGATE HIS CLAIM OF CONSENSUAL SEX. FURTHER, MEDICAL RECORDS WILL SHOW DISCREPANCIES TO THE VICTIM'S STATEMENT WERE ABRASIONS ON HER KNEES BY MEDICAL RECORDS WILL SUPPORT APPLICANT SHOWING CONSENT WAS GIVEN AND SEX WAS CONSENSUAL BECAUSE SHE GOT ON TOP OF HIM. APPLICANT WAS DENIED HIS RIGHT TO CHALLENGE HIS STATEMENTS THROUGH A JACKSON V. DENNO, HEARING. BASED ON THIS ARGUMENT, APPLICANT MOTIONS THIS COURT PURSUANT TO WHITE U. STATE TO DETERMINE IF HIS CONFESSION WAS VOLUNTARY. IF IT IS RULED INVOLUNTARY, APPLICANT'S CLAIM THAT HE WAS INVOLUNTARY AND NOT KNOWINGLY MADE WILL BE MERITORIOUS.

COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPRESS DEFENDANTS STATEMENT AND MOTION THE COURT FOR A JACOB V. PENNO HEARING TO DETERMINE THE VOLUNTARINESS OF HIS STATEMENTS. BEFORE PLEADING GUILTY.

APPLICANT CONTENDS AFTER A MOTION FOR DISCOVERY WAS FILED AN ANSWER WAS GIVEN TO APPLICANTS COUNSEL ON DEC 3, 07. COUNSEL ONLY SPOKE TO APPLICANT ONCE TO TELL HIM HE WAS APPOINTED AND ONLY TOLD APPLICANT HE WAS REPRESENTING APPLICANT AND HE HAD HIS STATEMENT

DURING THIS DISCUSSION I ASKED MY COUNSEL IF THERE WAS ANYWAY TO GET MY STATEMENT WITHDRAWN. HE GAVE NO RESPONSE AND STATED I WILL TRY TO GET YOUR DISCOVERY

COUNSEL DID NOT COME TO VISIT ME AGAIN UNTIL MAR 16TH, 08 3 DAYS PRIOR TO MY GUILTY PLEA. I SPOKE TO AN INVESTIGATOR ALSO ABOUT MY CONFESSION AND HE STATED IT LOOKED LIKE COERCION. COUNSEL TOLD ME PRIOR TO MY GUILTY PLEA THE SOLICITOR HAD A PLEA AGREEMENT FOR 20 YEARS AND I DIDN'T PULL YOU FOR COURT. IF YOU PLEAD GUILTY TODAY I DON'T THINK THEY WILL GIVE YOU THAT.

APPLICANT THEN PLEAD GUILTY UPON HIS LAWYERS ADVICE. APPLICANT THEN RECEIVED A 40 YEAR SENTENCE. 30 YEARS FOR KIDNAPPING AND 10 CONSECUTIVE FOR (CSC).

APPLICANT CONTENDS COUNSEL DELIBERATELY FAILED TO DISCLOSE TO ME THE PROCEDURE FOR CHALLENGING MY CONFESSION. COUNSEL KNEW THAT I DID NOT KNOW THE LAW, I WAS 19 YEARS OLD AND DID NOT KNOW WHAT TO DO. APPLICANT CONTENDS HE WANTED TO CHALLENGE THE CONFESSION RAISED IN THE PENNO HEARING

Confession

INTOXICATED AND TAKING MEDICATIONS FOR ANXIETY AND AT THE TIME OF THE CONFESSION HE DID NOT KNOWINGLY WAIVE HIS RIGHT TO REMAIN SILENT. THE QUESTION BEFORE THE COURT IS WAS COUNSEL INEFFECTIVE FOR FAILING TO ADVISE APPLICANT OF THE ZACH V. DENNO HEARING.

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE CONSECUTIVE SENTENCES GIVEN BY THE COURT. PURSUANT TO 17-25-50 CONSIDERING CLOSELY COUNSEL OFFENSES IN DETERMINING THE NUMBER OF OFFENSES FOR THE PURPOSE OF SENTENCE, THE COURT SHALL TREAT AS ONE OFFENSE ANY NUMBER OF OFFENSES WHICH HAVE BEEN COMMITTED AT TIMES SO CLOSELY CONNECTED IN POINT OF TIME THAT THEY MAY BE CONSIDERED ONE OFFENSE. COUNSEL SHOULD HAVE OBJECTED AND MOTION THE COURT FOR A CONCURRENT SENTENCE. THE CHARGE AROSE OUT OF ONE EVENT AT THE SAME TIME.

COUNSEL WAS INEFFECTIVE FOR FAILING TO PROVE APPLICANT WITH DISCOVERY AND TO DISCUSS THE DNA FINDINGS, CONTRADICTIONARY STATEMENTS, AND MEDICAL REPORTS THAT WOULD HAVE SUPPORTED APPLICANTS CLAIM OF CONSENSUAL SEX. COUNSEL FAILED TO INFORM APPLICANT THAT CONSENT COULD BE USED AS A DEFENSE AND (CSC) AND COULD ATTACK HER CREDIBILITY WITH THE MEDICAL RECORDS SHOWING "ABRASIONS" ON HER KNEES THAT WAS UNEXPLAINED. COUNSEL FAILED TO DISCUSS THE CASE, ANY DEFENSES AND FAILED TO PROPERLY INVESTIGATE MY DC COUNSEL'S PERFORMANCE FELL BELOW THE REASONABLE STANDARD REQUIRED OF ATTORNEYS UNDER PROFESSIONAL NORMS.

"COUNSEL HAS A DUTY TO MAKE REASONABLE INVESTIGATIONS OR TO MAKE REASONABLE DECISIONS THAT MAKE PARTICULAR INVESTIGATIONS UNNECESSARY. CRIM. LAW 64/13(6), AMENDMENT 6. COUNSEL MADE NO ATTEMPT TO INVESTIGATE MY CASE. COUNSEL'S FAILURE TO DISCLOSE FORENSIC MATERIAL UNTIL AFTER SENTENCING JUNE 3, 2008 SHOWS CALLOWNNESS AND BIAS AND DECEIT.

COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE MY MENTAL STATE AND WHY A BREATHALIZER WAS NOT DONE TO DETERMINE MY BLOOD ALCOHOL LEVEL WHEN I WAS ONLY 18 YEARS OLD AND WHAT WAS MY MENTAL STATE,

COUNSEL'S ACTIONS SHOWED A ACTUAL AND CONSTRUCTIVE DENIAL OF ASSISTANCE OF COUNSEL. COUNSEL'S PERFORMANCE FELL WELL BELOW THE STANDARDS UNDER STRICKLAND, THAT COUNSEL'S CONDUCT SO UNDERMINED THE FUNCTIONING OF THE ADVERSARIAL PROCESS THAT THE TRIAL CANNOT BE RELIED UPON AS HAVING PRODUCED A JUST RESULT. WITH RESPECT TO THE GUILTY PLEA, APPLICANT MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S ERRORS, HE WOULD NOT HAVE PLEADED GUILTY AND WOULD HAVE INSISTED ON GOING TO TRIAL. HELL V. LOCKHART, 106 S. CT. 366 (1985). APPLICANT RESPECTFULLY REQUESTS AN EVIDENTIARY HEARING ON ALL ISSUES. SHARPER V. STATE, 305 S.E.2. 247.

1-26-2010
DATE:

RESPECTFULLY SUBMITTED,
X STEVEN M. McEIRATH
STEVEN M. McEIRATH #32841
McCORMICK C.I.F.-1-B
386 REDEMPTION WAY

CLERK,

1-26-10

WILL YOU PLEASE FILE MY AMENDED SUPPLEMENTAL
PETITION OF MY PDR. WILL YOU SEND ME A STAMPED
CLOCKED COPY AND FORWARD A COPY TO MY ATTORNEY
OF RECORD AND THE ATTORNEY GENERAL.

Thank you C

Sincerely,

STEVEN M. ELRATH.

A TRUE COPY

JAN 29 2010

Cathy M. Phillips
CLERK OF COURT

CERTIFICATE OF SERVICE

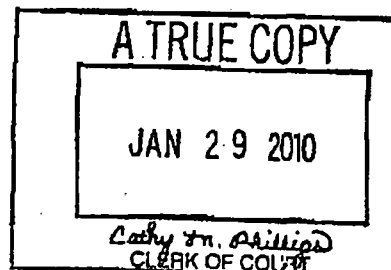
63

THIS IS TO CERTIFY THAT STEVEN M^CEIRATH #32841
DID MAIL TO THE CLERK OF COURT, ANDERSON County, CATHERINE
M. PHILLIPS, P.O. BOX 8002, ANDERSON, S.C. 29622. MAIL
ON THIS 26 DAY OF JAN., 2010 WITH POSTAGE
PREPAID.

X Steven McEirath
STEVEN M^CEIRATH #32841-
M^CCORMICK C.F.F.-1-B-1:
386 REDEMPTION WAY
M^CCORMICK S.C.

1-26-10
DATE:

29899



Sworn to and Subscribed before me this 26 d
Jan, 2010. Jayne L Young (L.S.)
Notary Public

My Commission Expires: 8-28-2011

FILED-CLERK'S OF
ANDERSON SC
2010 JAN 29 A 11
CLERK'S
ANDERSON SC

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

LAST PCRSTEVEN C. McELRATH #328413
APPLICANT.

VS.

STATE OF SOUTH CAROLINA
RESPONDENT.

CA NO: 2009-CP-04-00012

AMENDED PCRSUPPLEMENTAL COMPLAINT

S.C.R. CIV. P. 15(C)

NOW COMES THE ABOVE NAMED APPLICANT WHO MAKES THIS COURT PURSUANT TO THE S.C.R. CIV. P. 15(C) TO SUPPLEMENT (AMEND) HIS PCR ADDING A CLAIM TO CONFORM TO HIS TRANSCRIPTS AND REFLECTS HIS ORIGINAL PCR APPLICATION TO SUPPORT HIS CLAIM OF A DUE PROCESS VIOLATION FOR AN INVOLUNTARY GUILTY PLEA. NO PREJUDICE WILL RESULT FROM THIS AMENDMENT.

AMENDED CLAIM

THE APPLICANT CONTENDS THAT HIS PLEA WAS NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ENTERED AT HIS PLEA BECAUSE HE WAS NOT TOLD WHAT THE NATURE AND CRUCIAL ELEMENTS OF THE CHARGES HE PLED TO.

IN ANDERSON V. STATE, 535 S.E.2d 649 (S.C. CT. 2000) OUR SUPREME COURT STATED:

• "BEFORE A COURT CAN ACCEPT A GUILTY PLEA, A DEFENDANT MUST BE ADVISED OF THE CONSTITUTIONAL RIGHTS HE OR SHE IS WAIVING. IN ADDITION TO THE REQUIREMENTS OF BOYKIN, A DEFENDANT ENTERING A GUILTY PLEA MUST BE AWARE OF THE NATURE AND CRUCIAL ELEMENTS OF THE OFFENSE, EMPHASIS THE COURTS, 535 S.E.2d AT 651"

AS TO THE ELEMENTS OF THE OFFENSE TO WHICH ONE IS ENTER-65
ING A PLEA, THE COURT STATES THE DEFENDANT "MUST BE AWARE
OF THE "CRUCIAL ELEMENTS" OF THE OFFENSE, THE ANDERSON
CASE APPEARS TO BE THE BEDROCK WHICH STATE V. BEKARD
638 S.E.2d 72 (CT. APP 2006) AND BOLLINGSON V. STATE,
552 S.E.2d 290 (SUP. CT. 2001) STAND. THIS LINE OF CASES,
THE COURT BELIEVES, REQUIRE THAT THE TRIAL COURT MUST
BE CERTAIN THAT A PLEADING DEFENDANT UNDERSTANDS THE
CHARGE TO WHICH HE OR SHE IS PLEADING. THE COURT MAY
ESTABLISH THIS THROUGH A COLLOQUY WITH THE DEFENDANT
OR COUNSEL, SEE BEKARD, SUPRA. THIS REQUIREMENT FAILS
UNDER DUE PROCESS.

STATE V. LAMBERT, 225 S.E.2d 340 (SUP. CT. 1976)
REQUIRES THE RECORD TO REFLECT THAT THE TRIAL COURT
"HAS ASSURED ITSELF THAT THE PLEA IS VOLUNTARY AND INTELL-
IGENTLY ENTERED WITH FULL KNOWLEDGE OF THE NATURE OF
THE OFFENSE, LAMBERT, DOES NOT REQUIRE THE TRIAL COURT
TO EXPRESS THE DEFENDANTS RIGHTS WITH "PRECISE LANGUAGE."
HOWEVER, IT IS CLEAR THAT THE NATURE OF THE OFFENSE
MUST BE CONVEYED TO THE DEFENDANT BY THE COURT OR THAT
TRIAL COUNSEL MUST ESTABLISH THAT HE OR SHE HAS CONVEYED
TO THE DEFENDANT INFORMATION AS TO THE NATURE OF THE
OFFENSE TO WHICH HE IS PLEADING TO THE EXTENT THAT THE
DEFENDANT HAS "FULL KNOWLEDGE OF THE NATURE OF THE
OFFENSE", LAMBERT, SUPRA.

APPLICANT PRESENTS HIS TRIAL TRANSCRIPT AS PROOF OF
THE REQUIREMENTS OF DUE PROCESS HAVE NOT BEEN MET BECAUSE
COUNSEL NOR THE COURT DID NOT TELL DEFENDANT WHAT "ELEMENTS"
OF THE CHARGE THE STATE WOULD HAVE TO PROVE.

10) THE COURT: MR. ROBINSON, HAVE YOU EXPLAINED TO THE DEFENDANT HIS CONSTITUTIONAL RIGHTS, THE CRIMINAL CHARGES AND THE ELEMENTS OF THE CHARGE.

13) MR. ROBINSON: YES, I HAVE.

• APPLICANT CONTENDS THAT THIS ASSERTATION IS VAUUE BECAUSE COUNSEL DID NOT TELL THE COURT WHAT "ELEMENTS" HE SUPPOSIDLY TOLD DEFENDANT.

ON pg. 18 TRIAL TRANSCRIPT LINES 8-9, THE COURT ESTABLISHED ON ITS OWN THAT ALL ELEMENTS OF THE CHARGE HAVE BEEN MET. THE RECORD IS COMPLETELY DEVOID OF WHAT "ELEMENTS" IS THE CHARGE CONSIST OF FOR KIDNAPPING AND (CSC). THE COURT ONLY ASKS DEFENDANT DOES HE AGREE WITH THE FACTS. pg. 18, LINES ~~2~~ 2-4.

HOWEVER, AT NO INSTANCE IS APPLICANT APPRAISED OF THE CRUCIAL ELEMENTS OF THE CHARGES TO WHICH HE PLED. THE COLLOQUY BETWEEN THE JUDGE AND APPLICANTS TRIAL COUNSEL DOES NOT ESTABLISH THE APPLICANT WAS INFORMED BY HIM "WHAT" WERE THE CRUCIAL ELEMENTS OF THE CHARGES HE FACED.

THE ASSERTION BY TRIAL COUNSEL WAS NOT SUFFICIENT TO ESTABLISH WHAT THE ACTUAL "ELEMENTS" WERE TOLD TO THE DEFENDANT. BASED ON THIS DUE PROCESS VIOLATION OF THE 14TH AMENDMENT APPLICANTS PLEA SHOULD BE VACATED.

RESPECTFULLY SUBMITTED

X Steven McElrath
STEVEN M^CELRATH # 328413

M^CCORMICK C.I. F-1-B-144

386 REDEMPTION WAY

M^CCORMICK S.C. 29899

CERTIFICATE OF SERVICE

67

THIS IS TO CERTIFY THAT STEVEN MEEIRATH # 328413
DID MAIL HIS SUPPLEMENTAL (AMENDED) PLEA ADDING A CLAIM
FOR A DUE PROCESS VIOLATION THAT HIS PLEA WAS NOT KNOWING
AND VOLUNTARY AND INTELLIGENTLY MADE, PLACED IN THE
MAIL AND MAILED TO THE CLERK OF ANDERSON COUNTY, CATHY
PHILLIPS, P.O. BOX 8002, ANDERSON S.C. 29622. AND
PLACED IN THE MAIL BY THE NOTARY OF M^CCORMICK ON THIS
____ DAY OF _____, 2010 WITH POSTAGE PREPAID

SWORN AND SUBSCRIBED BEFORE ME X
THIS ____ DAY OF _____, 2010 STEVEN MEEIRATH # 328413
M^CCORMICK C.I. F-1-B-144
386 REDEMPTION WAY
M^CCORMICK S.C.
29855

NOTARY PUBLIC SOUTH CAROLINA
MY COMMISSION EXPIRES _____

STATE OF SOUTH CAROLINA	)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	THE COURT OF COMMON PLEAS
	)	2009-CP-04-00012
STEVEN MCELRATH,	)	
	)	
PETITIONER,	)	
	)	
VERSUS	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	DATE: JUNE 15, 2010
RESPONDENT.)	)	ANDERSON, SOUTH CAROLINA

POST-CONVICTION RELIEF HEARING

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

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

GEORGE L. SANDS, JR., ESQUIRE
ATTORNEY FOR THE DEFENDANT

WEST LEE, ESQUIRE
ATTORNEY FOR THE STATE

PROVIDED FOR: SCCID - KIMBERLY MCCALL

FOR COPIES CONTACT: JO RICE
JRICE@SCCOURTS.ORG
OFFICIAL COURT REPORTER
SOUTH CAROLINA JUDICIAL DEPARTMENT

INDEX

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE-CROSS</u>
<u>STEVEN MCELRATH</u>				
MR. SANDS	4-14		16-17	
MR. LEE		15-16		17
 <u>MR. ROBINSON</u>				
MR. SANDS	18-22		26-28	
MR. LEE		22-26		
 CERTIFICATE				29

(*NO EXHIBITS WERE ENTERED INTO EVIDENCE AT THIS HEARING)

1 May it please the Court?

2 THE COURT: Yes, sir.

3 MR. Your Honor, this is Steven McElrath versus The State
4 of South Carolina. It's case number 2009-CP-04-00012. It
5 comes to the court by way of application for post-conviction
6 relief filed January 2, 2009. The Applicant was indicted at
7 the June of '07 meeting of the Anderson County Grand Jury for
8 kidnapping and criminal sexual conduct in the first degree.
9 He was represented by Mr. Scott Robinson and on May 19, 2008,
10 the Applicant pled guilty as indicted. He was sentenced by
11 The Honorable J. C. Nicholson, Jr. to confinement for a
12 period of 30 years for kidnapping and 10 years for the
13 criminal sexual conduct.

14 Notice of appeal was filed on the Applicant's behalf and
15 The South Carolina Court of Appeals subsequently dismissed
16 the appeal on September 23, 2008 for lack of any showing
17 there were any issues reserved for appellate review.
18 Remittitur was issued on October 9, 2008.

19 In his current application for post-conviction relief,
20 the Applicant alleges that he has been held in custody
21 unlawfully for ineffective assistance of counsel.
22 Specifically, that counsel failed to object to the sentence
23 received, counsel failed to discuss viable offenses with the
24 Applicant, and counsel failed to investigate the Applicant's
25 mental capacity. The Applicant also alleged that his guilty

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

4

1 plea was involuntarily entered.

2 At this time, I will turn it over to the Applicant's
3 attorney, Mr. George Sands to expand upon those claims.

4 THE COURT: Mr. Sands.

5 MR. SANDS: Thank you, Your Honor. Your Honor, at this
6 time, we would call the Defendant.

7 THE COURT: Before you do that, let me ask you, Mr.
8 Sands, have you reviewed the petition in this case?

9 MR. SANDS: Yes, I have, Your Honor.

10 THE COURT: And other than the grounds stated by Mr. Lee,
11 are you adopting any grounds in this action or any other
12 grounds other than alleged in this petition?

13 MR. SANDS: We are going to expound on these, but I think
14 they are all covered, Your Honor.

15 THE COURT: Okay Thank you. Go ahead and call your
16 witness.

17 (After being duly sworn by the Clerk of Court,
18 **STEVEN MCELRATH** testified as follows:)

19 CLERK OF COURT: If you would please have a seat in the
20 witness stand. (Witness complies) If you would please state
21 your full name for the Court.

22 MR. MCELRATH: Steven Clayton McElrath.

23 DIRECT EXAMINATION

24 BY MR. SANDS:

25 Q Steven, how old were you at the time the crime -- that

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

5

1 you pled guilty and was committed?

2 A I was 19 years old.

3 Q You were 19 or 18?

4 A I was 18 when I first got arrested on the charge. I was
5 19 when I finally got to court.

6 Q Okay. So, 18 when they arrested you?

7 A Yes, sir.

8 Q Were you still living with your parents at that time?

9 A Yes, sir. I lived with my parents in North Carolina. I
10 had just got adopted. The adoption was finalized not
11 long before my 18th birthday.

12 Q Okay. And how did you come to be down here in South
13 Carolina?

14 A I took a job working for a construction company that had
15 a job down here putting in water lines and I worked
16 through the week.

17 Q Okay. And where were you staying while you were doing
18 your work down here?

19 A I was staying at the Days Inn Motel on Clemson
20 Boulevard.

21 Q Okay. Is that -- the crime that you were arrested for,
22 is that where that occurred, at the Days Inn?

23 A Yes, sir.

24 Q Did they involve the night clerk there?

25 A Yes, sir.

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

6

1 Q At the time that you were arrested or even convicted,
2 had you ever been convicted of any other crimes?

3 A No, sir.

4 Q Okay. You've alleged, amongst other things, ineffective
5 assistance of counsel. Is that correct?

6 A Yes, sir.

7 Q Okay. And prior to my getting to that, do you remember
8 giving a confession at the Sheriff's office the night
9 you were arrested?

10 A I was very intoxicated when I was arrested. They brought
11 me in and they put me in a holding cell, I guess to try
12 to sleep some of it off. I'm not sure. I really don't
13 recount much of anything from giving any kind of
14 statement I was just so intoxicated. I really don't
15 recall.

16 Q Okay. Let's go back earlier that evening. Had you been
17 drinking that evening?

18 A Yes, sir. I was drinking. As the statement said, I did
19 drink in my room. I had had about four or five beers in
20 the room. I went down to Charlie T's. I was drinking
21 down there. I really couldn't honestly tell you, maybe,
22 the total amount of consumption. Then, I came back to my
23 room after Charlie T's and I continued drinking in the
24 room and I consumed a pretty good amount of alcohol.

25 Q When did you actually go into the -- how did you go to

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

7

1 the office that night?

2 A To be honest with you, I don't even know exactly what
3 time it was. It was alleged to have happened or occurred
4 at three-thirty or three in the morning, that morning. I
5 guess it would have been around that time.

6 Q You had been drinking up until that time?

7 A Yes, sir. Well, actually, I was there before, once
8 before everything happened, because I turned in my key
9 and I was going to leave and then I came back to the
10 office area. All the way up to the time I decided to
11 turn in my key, I had a confrontation with the foreman
12 that I worked for.

13 Q Okay. So what time, how soon after that were you
14 arrested?

15 A I honestly don't -- I was so drunk, I don't even
16 remember when the officers came to arrest me. I mean, I
17 remember getting handcuffed and getting in the car, but
18 what time it was and when my arrest was, it had to have
19 been, maybe, an hour, I guess, I'm not sure, afterwards.

20 Q And how soon after that were they interviewing you for
21 this confession that you made?

22 A Well, the time stated that I signed my Miranda rights at
23 9:43, I believe it was, or somewhere close to that time,
24 but I'm not exactly sure if that's the time I was
25 questioned or if I was questioned before. I don't even

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

8

1 know the time I was questioned, I just remember signing
2 a bunch of papers.

3 Q How much time did you spend with your attorney prior to
4 the day you pled guilty in court?

5 A It was only -- the total times I met him was three:
6 Once, was the first time he came to visit me in the
7 county jail to tell me that he had been appointed as my
8 counsel and informed me he had my statement, which, at
9 that time, I had mentioned the statements that were
10 written, requesting them getting withdrawn, or whatever.
11 He didn't really comment on that too much. He said he
12 was trying to get my discovery. The second time would
13 have been the Friday before. I think that was the 16th,
14 before the week I was going to be on the trial docket.
15 He explained that he'd have a investigator to come by to
16 talk to me, and then the day of the plea.

17 Q Okay. So you met with him a total of three times?

18 A Yes, sir.

19 Q Did the investigator come and meet with you?

20 A He met with me later that evening. I think it was
21 probably, I'm not sure what time, but sometime later
22 that evening on a Friday, the 16th, three days before
23 the plea.

24 Q Okay. To your knowledge, did your attorney seek to have
25 the confession thrown out?

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

9

1 A No, sir. He didn't. It didn't seem like there was any
2 attempt that had been made for the investigation. I was
3 never informed of any kind of investigation that was
4 going to be taking place, no kind of questioning
5 involved as far as the breathalyzer, what my
6 intoxication level was before I even signed the
7 statement. None of that was looked into. It just didn't
8 appear he was trying to do anything along those lines
9 for the statement, tried to get it withdrawn or
10 whatever.

11 Q Were you even aware of what your, this supposedly,
12 confession said?

13 A At first, they gave me a copy of it. At first, I was
14 trying to explain how I had a problem with drinking and
15 stuff and then all of a sudden it just jumped straight
16 into a so-called confession and I know that there were
17 some things that I did tell the investigators that were
18 left out as far as the occurrences and the things that
19 happened. Like I said, nothing else was looked into as
20 far as the statement goes, so that was really not
21 brought up.

22 Q Were you aware at the time of what was being written?

23 A Yeah, no. At the time it was being written -- Honestly,
24 the conversation was kind of shaky. I can't really
25 remember much of the conversation that took place. I

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

10

1 remember telling the things that she did during the act,
2 the alleged crime. I noticed that those were not on the
3 statement. I remember trying to tell them that no, I
4 didn't do exactly what they were trying to accuse me of.
5 They kept trying to push for the issue of, well, you
6 jumped over a counter and you did this and you choked
7 the person and that was mainly the gist of it.

8 Q Did you talk to them about the voluntariness on her
9 part?

10 A Yes, sir. I mentioned that. Like I said, she was engaged
11 in the sexual act that had taken place, a willing
12 participant and ...

13 Q Did they put that in the statement?

14 A No, they did not. They omitted that or they left it out,
15 the terminology used.

16 Q Did your lawyer ever talk to you about any of the -- she
17 was -- the physical findings or the medical findings
18 when she was examined following this incident at the
19 hospital?

20 A I've never seen any kind of documentation as far as
21 medical reports, or when, no forensic results.

22 Q Have you seen any of those since you were sent to
23 prison?

24 A Yes, sir. After I was incarcerated, I wrote my lawyer
25 for my material dealing with my case so I could try to

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

11

1 work on my case to see what I could do in the courts. He
2 sent me another copy of my motions and discovery, and it
3 had listings of, like, I'm not sure how many were on
4 there, but it described medical reports and forensic
5 reports I had not yet seen and I know for a fact I
6 didn't get to see those with the original discovery,
7 because the original discovery was to have been sent
8 December 3rd. According to the letterhead that I have
9 with the date, I did not receive those forensics, I
10 believe, until April 3, 2007. That's a good bit of time
11 after the original discovery was sent. But no, I did not
12 see those until I was incarcerated.

13 Q Did the medical reports indicate any bruising or signs
14 of a struggle?

15 A It mentioned some linear abrasions, I guess would be
16 minor abrasions. I'm not sure. There were scuff marks on
17 the knees that were listed in the medical reports, there
18 really was no explanation for that according to the
19 report that had been given. There was no accusation that
20 she was placed on her knees at any point in time. So it
21 was kind of hard to explain. They were all, they alleged
22 I grabbed her by the throat and slammed her and choked
23 her, or whatever, with such force that her shoes came
24 off her feet, but according to the medical findings
25 there were no markings or anything whatsoever on the

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

12

1 neck area, which was, that was one of the main things
2 they were using trying to push for in a trial. It made
3 me appear to be very violent.

4 Q Did you explain to your lawyer that, to your knowledge,
5 this was -- she engaged in sex with you voluntarily?

6 A Yes, sir. I did mention it to him that she took up the
7 axe. I don't really want to go into, in depth,
8 explaining exactly what all happened, because it was
9 pretty graphic or whatever. So...

10 Q Did your lawyer ever go over with you the elements of
11 the crimes you were charged with?

12 A No, sir. I was never set down and explained the elements
13 of the offenses that I was charged with, what the State
14 would have to prove in order to convict me on. There
15 wasn't anything mentioned to me about the elements that
16 would make up those charges.

17 Q And I guess it goes without saying that he didn't go
18 over the evidence that they had to prove those elements,
19 then?

20 A Yes, sir.

21 Q Did he go over any of that with you?

22 A No. We did not discuss my case any of the times that we
23 met, really, other than working on, he mentioned some
24 kind of an investigator and we're going to get you your
25 discovery. There was really no discussion as far as the

1 findings on what could happen. The only main thing that
2 was brought up, I think, was that I was asked how many
3 drinks somebody could consume at one time, but as far as
4 anything else other than that, nothing really was
5 mentioned.

6 Q Did he ever advise you that there had been a plea offer
7 from the State in this matter prior to your pleading
8 guilty?

9 A He did tell me, he told me the day that I was supposed
10 to go that I wasn't going to plea, the he had turned it
11 down, that he didn't see that much time. I guess, it was
12 a 20-year plea offer. So I thought, I guess it was
13 because I'm young or something or maybe we could prove
14 something, I'm not sure, but I wasn't really given an
15 option or a chance to go over it and think about it. He
16 said I wasn't going to plea that day and I was going to
17 go back to the county. Basically, I wasn't really told
18 anything else up until ---

19 Q He didn't give you a chance to decide whether you wanted
20 to take the ---

21 A Yeah. I had no option in the matter. He said, basically,
22 that flat out, I wasn't going to plea that day, I was
23 going back to the county jail. I didn't even stand up
24 before the judge that day.

25 Q Did your attorney ever advise you what sort of sentence

DIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

14

1 he thought you might get?

2 A He told me that if I went to trial, I would receive the
3 max sentence, which was 60 years. To my understanding, I
4 was thinking that like him telling me that if I would go
5 ahead and plead guilty that I would receive under that
6 20-year mark that he turned down and it ended up
7 pleading for mercy from the Court, but it ended up being
8 the maximum sentence for a kidnapping charge.

9 Q When the judge sentenced you, did your attorney object
10 to the sentence?

11 A No, sir.

12 Q Do you feel like he should have?

13 A Yes, sir. I felt like he should have objected to the
14 sentence. After researching, I found the -- I felt like
15 I should have been given concurrent sentences. After
16 researching, I came across some things that I thought
17 they should have run them concurrent according to the
18 code of laws that I came across. Yes, sir, I feel like
19 he should have objected to the sentence I was given.

20 Q Okay. Answer any questions the State may have. Thank
21 you.

22 MR. SANDS: That's all the questions I have,

23 Your Honor.

24 THE COURT: Cross examination?

25 MR. LEE: Yes, sir, Your Honor. Thank you.

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

CROSS EXAMINATION OF STEVEN MCELRATH BY MR. LEE

15

CROSS EXAMINATION

BY MR. LEE:

Q Mister, is it, did you say, McElrath?

A Yes, sir.

Q I have a couple of questions. Do you recall the guilty plea hearing and the judge asked you how you'd like to plea and you said guilty? Do you recall that?

A Yes, sir.

Q Do you recall saying or being asked if you believed the State could prove you guilty beyond a reasonable doubt and your saying, yes?

A Yes, I recall that.

Q Do you recall the judge asking you if you were satisfied with the services of your attorney and your saying, yes?

A Yes, sir.

Q Do you recall the Judge asking you if you were, if anybody had threatened or coerced you into pleading guilty and you said, no?

A Yes, sir. I recall that.

Q Do you recall saying that you were pleading guilty of your own free will?

A Yes, sir.

Q And do you recall saying that you answered all his questions truthfully?

A Yes, sir.

THE STATE OF SOUTH CAROLINA VERSUS STEVEN MCELRATH

REDIRECT EXAMINATION OF STEVEN MCELRATH BY MR. SANDS

16

1 Q Do you recall the judge asking if you were, in fact,
2 guilty and your saying, yes, you were?

3 A Yes, sir.

4 Q And do you recall at the end of that guilty plea
5 hearing, well, actually, let me back up a bit. Do you
6 recall agreeing with the Solicitor's statement of the
7 facts of the case?

8 A Yes, sir.

9 Q And do you recall at the end of that hearing, giving an
10 apology, of sorts, to the victim?

11 A Yes, sir.

12 MR. LEE: That will be all my questions for this witness,
13 Your Honor.

14 THE COURT: Redirect?

15 MR. SANDS: Briefly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. SANDS:

18 Q Following your incarceration and obtaining information
19 from your attorney, did you discover things that you did
20 not know at the time of the plea hearing?

21 A Yes, sir. I was not aware that there were no markings
22 and in the allegations that were made, there was a
23 conflict of things in the material that I received that
24 I did not have. Had I had that at that time, I could
25 have used that to try to defend myself in court. I

1 didn't know of any kind of defense, whatsoever.

2 Therefore, when my lawyer directed me to, basically,
3 plead guilty, I agreed with the questions not knowing of
4 any kind of defense.

5 MR. SANDS: That's all I have, Your Honor.

6 MR. LEE: One more question.

7 THE COURT: Based on that cross?

8 MR. LEE: Yes, Your Honor.

9 RE-CROSS EXAMINATION

10 BY MR. LEE:

11 Q Do you recall in the guilty plea hearing, your attorney
12 Mr. Robinson's statement to the Court, stating to the
13 Court that there were no marks or anything that was
14 found on the victim in this case?

15 A Honestly, I didn't really look over that so I didn't
16 discover that until I was going over my transcript. It
17 was a very emotional time. It's kind of hard to stand in
18 front of the Court, but yeah, I did see that in the
19 transcript that he said something about that.

20 Q All Right.

21 MR. LEE: That's all my questions. Thank you.

22 THE COURT: May this witness come down?

23 MR. SANDS: Yes, Your Honor.

24 THE COURT: Any further witnesses?

25 MR. SANDS: Yes, sir, Your Honor. We would call Mr.

DIRECT EXAMINATION OF SCOTT ROBINSON BY MR. SANDS

18

1 Robinson.

2 THE COURT: You may step down. (Witness complies)

3 (After being duly sworn by the Clerk of Court, **SCOTT**
4 **ROBINSON** testified as follows:)

5 CLERK OF COURT: Please have a seat in the witness stand
6 and please state your name for the Court.

7 MR. ROBINSON: Scott Robinson.

8 DIRECT EXAMINATION

9 BY MR. SANDS:

10 Q Mr. Robinson, did the Defendant inform you he was
11 intoxicated at the time he signed the confession?

12 A Yes.

13 Q He did? Did you seek to have the confession thrown out?

14 A I would have done that. If the case had gone to trial, I
15 would have made a motion at that time, at that point, to
16 make a motion to suppress that statement.

17 Q Did you obtain the results of the medical examination
18 performed on the victim done at the hospital following
19 this incident?

20 A Yes. The plea was actually, I think, on May 18th. We got
21 the, we received the information from SLED, it would
22 have probably been around two or three weeks before so
23 it wasn't something we got months and months before in
24 discovery. It was only two or three weeks before. That's
25 why I mentioned it in the sentencing.

1 Q Prior to the sentencing hearing, did you go over those
2 results with the Defendant and explain to him how they
3 tied into this theory of his defense? In effect, he
4 claimed the girl consented to the sex they had.

5 A I believe that he has always maintained that it was
6 consensual. That's what he maintains. The victim, on the
7 other hand, says it was not consensual. In terms of the
8 statement, I would have gone over with him -- any
9 information that I had, I would have gone over with him.
10 We sent him the discovery. He signed for discovery. We
11 received this information three weeks beforehand, two or
12 three weeks beforehand and my investigator had possibly
13 taken it to the jail. I know I went over it with him. I
14 believe I did, went over the medical with him, but I
15 mentioned that at the sentencing part, as the Attorney
16 General mentioned just a few moments ago, regarding the
17 fact that there were no marks on her. I didn't think
18 that was something that would completely exclude the
19 statement that she did in this case.

20 Q Did you ever go over the elements of each of these
21 crimes, the kidnapping and the CSC, that would have to
22 be proved, you know, during the State's case if the case
23 went to trial, with the Defendant?

24 A I would have gone over the elements of the crimes in
25 this case as it applied to the facts of this particular

DIRECT EXAMINATION OF SCOTT ROBINSON BY MR. SANDS

20

1 case. Yes, that's true. I would have done that.

2 Q Did you discuss with him what they had to prove their
3 case beyond a reasonable doubt?

4 A Yes. He had the discovery. He had the statements of all
5 the witnesses in the case. It was a case where Ms. Johns
6 was the victim, the person who was grabbed, taken to the
7 back closet and so forth. The medical records did show
8 semen and so forth on her that matched him, so we went
9 over the discovery as it applies to this case in
10 preparation for any sort of defense we had in this
11 matter.

12 Q Prior to his guilty plea, did the State offer a plea
13 deal in the nature of 20 years?

14 A I have no recollection of that. I don't. I looked back
15 through the file and I saw no notes like that. I did
16 not. And I can imagine why because I believe that
17 Kristin Reeves had this case and you can see from the
18 transcript that the victim and her husband were very
19 adamant about these charges and what they wanted to do.
20 They wanted to have Steven, basically, thrown under the
21 courthouse. They were just very adamant about it and
22 very embarrassed and they were very strong on the case.

23 Q When the judge issued his sentences, 10 years for the
24 rape and then 30 years for the kidnapping, did you
25 object to that sentence?

1 A Not at the time, I did not. We did file a notice of
2 appeal. As far as the -- you know, I really don't know
3 if there has been a time when I have ever made an
4 objection and stated on the record, "Judge, I don't
5 agree with your sentence". I have never done that. I've
6 done motions for reconsideration when there are new
7 facts or information of that nature, but I don't really,
8 other than the appellate process, I really don't know
9 that you can object to a judge's sentence on the same
10 day when the judge just read the sentence. I don't
11 normally, I've never made it my practice to level a
12 verbal objection on the record in a sense because I
13 think -- I've just never, it's not my custom to do that.

14 Q Did you file a motion for reconsideration?

15 A I did not. I did not, because I didn't really have a
16 basis for it. The Judge read the sentence and the
17 Appellate Court can say whether or not they felt the
18 sentence, or there was something wrong with the
19 sentence. But Judge Nicholson, I thought, was very, he
20 just found every single part of what the sentence could
21 be. I didn't know of a legal objection to that sentence.
22 I thought the appellate process -- which we filed a
23 notice of appeal and it was perfected and the South
24 Carolina Appellate Defense can appeal it. I thought
25 that's what I could do.

CROSS EXAMINATION OF SCOTT ROBINSON BY MR. LEE

22

1 Q What about section 17-25-50 of the code that says
2 incidents which occur so close to a point in time could
3 not be treated as separate incidents, but should be
4 sentenced as one incident?

5 A I think there is some case law that supports it, but
6 there is a ton of case law that is completely against
7 that. That would not have worked in that situation for
8 this case. I don't think, I think they were totally --
9 they may have happened around the same period of time,
10 but they were different in the sense that there was an
11 attack. According to the Solicitor, there was an attack
12 of rape and then the person was taken against their
13 will, kept in a room. I don't think that argument would
14 work in this particular case. I know it's worked in some
15 cases, there is some case law on it, but there's a lot
16 of case law that's against that and I didn't feel that
17 was something that I could have argued in this case.

18 MR. SANDS: That's all I have, Your Honor.

19 THE COURT: Mr. Lee?

20 MR. LEE: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. LEE:

23 Q Mr. Robinson, I don't want to be too repetitive here,
24 but I do have a few questions. Did you have an occasion
25 to meet with the Applicant before you went into the plea.

CROSS EXAMINATION OF SCOTT ROBINSON BY MR. LEE

23

1 hearing?

2 A Yes.

3 Q Do you recall how many times you met with the Applicant?

4 A I don't know that. I would have -- the day of the plea
5 we would have met probably downstairs. They have a place
6 where they take inmates when they come in from the
7 county and there is an area where you can have privacy
8 and we would have spoken back there. That's the last
9 time I would have spoken to him.

10 Q You've testified already about some of the evidence that
11 you had in the case. The Applicant made an allegation
12 that he was not given discovery and it was not reviewed
13 with him. Did you review the discovery with him?

14 A Yes. I think I have the -- I sent him a letter and he
15 signed off on it and we went over it. He also would have
16 gone over it with my investigator, as well.

17 Q You hired an investigator on the case?

18 A Yes.

19 Q Now, based on your review of the evidence in this case
20 and your conversations with the Applicant, at some
21 point, did you form an opinion about whether the State
22 could have proven the Applicant guilty?

23 A I think there is no question the State could have proven
24 him guilty.

25 Q Why?

CROSS EXAMINATION OF SCOTT ROBINSON BY MR. LEE

24

1 A Steven had no prior record. He was getting into the
2 ministry at the time. I felt that the Judge would
3 consider that and craft a sentence that hopefully would
4 be in the realm of allowing him to get on with his life
5 after he was punished for the crimes.

6 Q Did you communicate your opinion about this case and the
7 State's ability to prove their case with the Applicant?

8 A Yes. And with the investigator, as well.

9 Q Did you attempt to engage in plea negotiations on the
10 Applicant's behalf?

11 A I did, but I did not have any luck with that.

12 Q Who's decision was it, ultimately, to plead guilty in
13 this case?

14 A It had to be the Applicants. It had to be Steven's,
15 because I don't, I can't tell someone to do something.
16 It's always the client's decision in their case. He is
17 an articulate young guy. He has a good head on his
18 shoulders and so forth and it was his decision, but I
19 think it was a decision made because of the fact that
20 the victim in the case was very adamant about this as
21 far as what happened. Although he had no prior record,
22 the story that it was a consensual sexual act in this
23 case would not have stood up to any sort of barrage of
24 cross examination the State would have made in this
25 matter, because it didn't really make, it just didn't

CROSS EXAMINATION OF SCOTT ROBINSON BY MR. LEE

25

1 make sense. In his statement, in the last paragraph of
2 the first page, he actually acknowledged that at some
3 point during this sexual encounter, that she said,
4 "Stop," and he acknowledged that, and at that point,
5 that's when I think it just would not have worked for
6 him.

7 Q Had the Applicant expressed the desire to proceed to
8 trial, would you have done so?

9 A I would have. His statement, I thought, was pretty
10 strong. The argument would have been that he was under
11 the influence of alcohol and didn't know what he was
12 doing. That would have been the argument and whether or
13 not that would have been successful, I don't know. I
14 don't know what would have happened. Judge Nicholson was
15 a great judge, but the statement was pretty convincing.
16 Plus he signed off on a waiver of rights form, he
17 initialed each part of it and so forth, and I just don't
18 think alcohol was a defense for something like this. I
19 didn't see it.

20 Q Were you asked to file a motion for reconsideration?

21 A No.

22 Q Were you asked to object to the sentence?

23 A At the time, if he had asked me to object to the
24 sentence while we were sitting in this courtroom and the
25 Judge had done the sentence, I would not have done it. I

REDIRECT EXAMINATION OF SCOTT ROBINSON BY MR. SANDS

26

1 would not have done it, because I don't believe that is
2 the proper thing to do. When you are an attorney and you
3 are at a sentencing hearing, the proper way to do it is
4 to file an appeal and let the Appellate Court address
5 whether or not the Judge made the correct call or was
6 there is some flaw. I don't think there was a sentencing
7 flaw. I believe the sentencing was -- it was a harsh
8 sentence. I did not agree with the sentence, but it was
9 something where the Judge followed the language set down
10 by the South Carolina Supreme Court as far as the
11 questions you ask to make sure the plea is voluntary,
12 knowing, and intelligently done, that the person is not
13 under the influence of alcohol or drugs that day and
14 that they are doing it knowing what the risks are.

15 MR. LEE: That will be all my questions for this witness
16 at this time, Your Honor.

17 THE COURT: Redirect?

18 MR. SANDS: Yes, Your Honor.

REDIRECT EXAMINATION

19
20 BY MR. SANDS:

21 Q Mr. Robinson, you stated you felt that the correct way
22 to address his sentence was to appeal it, to file an
23 appeal?

24 A Yes.

25 Q Was the appeal not dismissed?

REDIRECT EXAMINATION OF SCOTT ROBINSON BY MR. SANDS

27

1 A It was dismissed, because it was handled by the South
2 Carolina Appellate Defense Division, and they dismissed
3 it because they found no merit in it.

4 Q Did they not appeal it, because they said no objections
5 were made during the trial?

6 A There was no trial in the case. If there had been a
7 trial and I could have objected at some point or made an
8 objection, that's how you preserve something for the
9 Appellate Court at trial, but at sentencing, all you are
10 appealing is whether or not the Judge may have made a
11 mistake during sentencing and not done something
12 properly during the sentencing, but Judge Nicholson has
13 done a lot of pleas and he did exactly as the, he did
14 everything right. The sentence was not good. I didn't
15 like the sentence, but that's something at the Court's
16 discretion. He didn't -- I think any Appellate Court
17 looking at it would say -- no I don't know what they
18 would think, but I think it was within the parameters of
19 the sentence, each charge carried zero to thirty years.
20 I mean, if he had sentenced him to life in prison
21 without parole or the death penalty or forty years in
22 jail on a charge that only takes 30 years, that's an
23 error and would have been addressed at the Appellate
24 Court level, but Judge Nicholson would not have allowed
25 that to happen, because he is a very good judge.

REDIRECT EXAMINATION OF SCOTT ROBINSON BY MR. SANDS

28

1 Q But if you don't object or you don't file a motion, what
2 are you appealing from?

3 A There is case law that I'm aware of that the person
4 doesn't -- my understanding is you can appeal it, but
5 the grounds have to be whether or not the judge made an
6 error in the case. That's what -- the judge can make an
7 error, again, by sentencing a person to something he
8 can't sentence the person to, a sentence, as I said,
9 beyond the parameters the legislature set down for what
10 the sentence would be. If he or she missed a -- I'm not
11 exactly sure about the Appellate Court rules on that,
12 but that's what I believe. Judicial error is what I
13 believe it would be.

14 Q Okay. Thank you.

15 MR. SANDS: Nothing further, Your Honor.

16 THE COURT: Mr. Lee, anything further?

17 MR. LEE: No, Your Honor.

18 THE COURT: You may step down. Anything further?

19 MR. SANDS: No further witnesses, Your Honor.

20 THE COURT: Do you have any evidence to present, Mr. Lee?

21 MR. LEE: No witnesses from the State, Your Honor.

22 THE COURT: All right. Thank you, gentlemen. I'm going to
23 take this under advisement and I will get you may order
shortly.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, SO GIVEN ON THE 15TH DAY OF JUNE, 2010, TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 25TH DAY OF JUNE, 2015.

s/JoRice

JO RICE
 OFFICIAL COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Steven McElrath, # 328413,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT
Case No: 2009-CP-04-0012

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 2, 2009. The State submitted its Return on or about April 2, 2009. An evidentiary hearing into the matter was convened on June 15, 2010, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by George Sands, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State presented testimony from Applicant's Plea Counsel, Charles Anderson, Esquire. This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June

2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there is an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

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

- 1) Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
 - b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
 - c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing the Applicant to enter into a plea of guilty without full understanding of the nature of the plea."
- 2) Involuntary Guilty Plea

APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Counsel is alleged as a ground for relief, the Applicant must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of Counsel. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 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).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An Applicant who enters a plea on the advice of Counsel may only attack the voluntary and

intelligent character of the plea by showing that trial Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial Counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of Counsel, and it will be treated as such.

Involuntary Guilty Plea

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir. 1985). This Court finds that Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea

that double jeopardy should not have allowed him to be sentenced on both the sexual assault and the kidnapping. He also testified Counsel should have filed a motion for reconsideration.

Scott Robinson, Esquire

Counsel testified that he met with the Applicant on multiple occasions. He testified that he discussed with the Applicant the charges, the elements of those charges, and what the state had to prove in order for the Applicant to be found guilty. Counsel also testified that he discussed with the Applicant the potential punishments he faced and his constitutional rights. Counsel testified that it was Applicant's position that the sex was consensual, but added that it was always the victim's position that it was not consensual.

Counsel testified that he received the State's evidence in the case, and reviewed it with the Applicant. He stated that the only part of the discovery he may not have had occasion to review with the Applicant was the forensic evidence, which he did not receive until a few weeks before trial. Counsel testified that the evidence included statements given by the Applicant and the victim, as well as the forensic evidence. He stated that after reviewing the evidence and discussing it with the Applicant, he came to the conclusion that the State had a very good case and could likely prove the Applicant guilty beyond a reasonable doubt.

Counsel testified that, to the best of his knowledge, double jeopardy would not have applied in this case because the Applicant moved the victim into the closet and kept her there until she was rescued. Counsel testified that Applicant also told him that he was intoxicated at the time of the incident and when he gave his confession. He testified that he would have contested the statement if the Applicant had elected to proceed to trial, but added that voluntary intoxication would not have been a defense to the crime itself. However, Counsel testified that

the Applicant ultimately wanted to plead guilty. He testified that the Applicant expressed remorse for his actions, and recollected that the Applicant made an apology of sorts at the guilty plea hearing.

Finally, Counsel testified that he did not object to the sentence because there was nothing objectionable about it. Further, he testified that he did not make a motion for reconsideration because Applicant did not ask him to.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-2-80 (2003).

Involuntary Guilty Plea

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he met with the Applicant, discussed the charges, the Applicant's constitutional rights and the discovery, and that the Applicant ultimately made an informed and voluntary decision to plead guilty to be credible, while simultaneously finding Applicant's testimony on this issue not to be credible.

This finding is supported by a review of the guilty plea transcript. At the guilty plea hearing, the Applicant testified that he had not consumed any drugs or alcohol in the past twenty-four hours. (Tr. p. 5, lines 7-9). He also testified that although he took prescription medication, it did not affect his ability to understand the proceedings against him. (Tr. p. 5, line 10 – p. 7,

line 4). He testified that he understood the possible punishments he was facing, that he understood his constitutional rights, and that he was satisfied with the services of his attorney. (Tr. p. 7, line 5 – p. 13, line 2).

The Applicant testified that no one had threatened him, coerced him, or promised him anything in order to secure his guilty plea. (Tr. p. 13, lines 6-13). He testified that he pled guilty of his own free will, and further testified that he understood all the court's questions and had answered the court's questions truthfully. (Tr. p. 13, lines 20-24). Applicant further testified that he wished to plead guilty, and in fact was guilty of the charges. (Tr. p. 14, lines 3-6). Finally, he agreed with the Solicitor's statement of facts (Tr. p. 17, lines 18-20), and made an apology of sorts. (Tr. p. 26, lines 4-25).

Based on the testimony presented at the PCR Hearing and a review of the record of the guilty plea hearing, this Court finds that the Applicant's guilty plea was knowingly, intelligently, freely and voluntarily entered. Therefore, this allegation is denied and dismissed.

Failure to Object to the Sentence or File Motion for Reconsideration

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he did not object to the sentence because he saw nothing objectionable about the sentence and did not believe double jeopardy to apply to be credible. This Court notes that the sentences handed down to the Applicant were within the parameters allowed by their respective statutes, and further notes that it was within the plea judge's discretion to run the sentences concurrently or consecutively. That he chose to run them consecutively is not a reflection upon Counsel's representation. Additionally, this Court notes that the facts of the case were sufficient to charge kidnapping as a separate offense. As

such, this Court finds that the Applicant cannot prove that he received ineffective assistance of counsel or resulting prejudice. Accordingly, this claim is denied and dismissed.

Failure to Provide Applicant with Knowledge of Viable Defense

With respect to this claim, this Court again finds that the Applicant has failed to meet his burden of proof. Applicant testified that he informed Counsel that he was intoxicated at the time of the incident and when he gave his confession. Counsel testified that if the Applicant had elected to proceed to trial, he would have challenged the confession, but added that this was not the Applicant's desire. Counsel also testified that voluntary intoxication would not have been a viable defense to the crime. Applicant also testified that the sex was consensual, and Counsel corroborated that this was the Applicant's position. However, Counsel also testified that the victim's position was always that it was not consensual, and that he would not have been confident in the Applicant's chances of success when it was his word versus that of the victim.

This Court finds that Counsel's testimony on these issues is credible, while simultaneously finding that the Applicant's testimony is not credible. Further, this Court notes that the Applicant has provided no additional evidence of other defenses that should have been explored on his behalf. As such, this Court finds that the Applicant is unable to prove ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 465 S.E.2d 384 (1992). A waiver may be express or

implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by Counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate Counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of August, 2010.



R. Lawton McIntosh
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

RECEIVED
JUL 23 2010

JUL 23 2010

JUL 23 2010

The South Carolina Court of Appeals

The State,

Respondent,

v.

Steven McElrath,

Appellant.

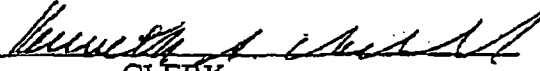
The Honorable Francis B. Nicholson
Anderson County
Trial Court Case No. 2007-GS-04-01896
2007-GS-04-01897

ORDER

Pursuant to SCACR Rule 203(d)(1)(B)(iv), this appeal is dismissed for want of any showing that there is an issue preserved for appellate review.

IT IS SO ORDERED.

KAYE G. HEARN, C.J.
For the Court

BY 
CLERK

Columbia, South Carolina

9/23/2008

cc: Chief Appellate Defender Joseph L. Savitz, III
Scott David Robinson, Esquire
Steven McElrath # 307275
Assistant Deputy Attorney General Salley W. Elliott
The Honorable J. C. Buddy Nicholson, Jr.
The Honorable Cathy M. Phillips
Kristen W. Reeves, Esquire

STATE OF ALABAMA

IN THE COURT OF CRIMINAL APPEALS

ANDERSON

FILED CLERK'S OFFICE
ANDERSON SC
200 JUL -1 A 11: 14-000
CLERK OF COURTS
ANDERSON SC

STEVEN MEERATH #328413

APPLICANT,

VS.

STATE OF SOUTH CAROLINA

RESPONDENT.

CA No. 2009-07-04-000

MOTION TO ALTER OR

AMEND JUDGEMENT

59(E) S.C.R. CIV-P

OR RECONSIDERATION

NOW COMES THE APPLICANT WHO MOVES THIS COURT FOR A MOTION TO ALTER OR AMEND JUDGEMENT OR TO RECONSIDER HIS CLAIM PURSUANT TO ANDERSON V. STATE, 535 S.E.2d (649) SUP. CT. 2000 GOYKIN V. ALABAMA, STATE V. BIKARD, 638 S.E.2d 290 (SUP. CT. 2001), AND STATE V. LAMBERT, 225 S.E.2d 340 (SUP. CT. 1976).

AS TO THE ELEMENTS OF THE OFFENSE TO WHICH ONE IS ENTERING A PLEA, THE COURT STATES THE DEFENDANT "MUST" BE AWARE OF THE CRUCIAL ELEMENTS OF THE OFFENSE. THIS LINE OF CASES REQUIRE THAT THE TRIAL COURT MUST BE CERTAIN THAT A PLEADING DEFENDANT UNDERSTANDS THE CHARGE TO WHICH HE OR SHE IS PLEADING. THE COURT MAY ESTABLISH THIS THROUGH A COLLOQUY WITH THE DEFENDANT OR COUNSEL. SEE BIKARD, SUPRA. THIS REQUIREMENT FALLS UNDER DUE PROCESS.

STATE V. LAMBERT, 225 S.E.2d 340 (SUP. CT. 1976) REQUIRES THE RECORD TO REFLECT THAT THE TRIAL COURT HAS ASSURED ITSELF THAT THE PLEA IS VOLUNTARY AND INTELLIGENTLY ENTERED WITH FULL KNOWLEDGE OF THE NATURE OF THE OFFENSE. HOWEVER,

TO THE DEFENDANT BY THE COURT OR TRIAL COUNSEL MUST¹⁰⁹
ESTABLISH THAT HE OR SHE CONVEYED TO THE DEFENDANT
INFORMATION AS TO THE NATURE OF THE OFFENSE TO WHICH
HE IS PLEADING TO THE EXTENT THAT THE DEFENDANT HAS
FULL KNOWLEDGE OF THE NATURE OF THE OFFENSE.

FURTHER, A GUILTY PLEA IS INVALID ONLY IF IT DOES NOT
REPRESENT VOLUNTARY AND INTELLIGENT CHOICE AMONG ALTER-
NATIVE COURSES OF ACTION OPEN TO DEFENDANT. EASTER V.
NORRIS, 100 F.3d 523 (1996) CERT. DENIED. 117 S.C.T. 1322.

HERE, APPLICANT ASKS THE COURT TO REVIEW PS. 7, TRIAL
TRANSCRIPT, LINES 10-13. THE COURT ONLY ASKS MR. ROBINSON
DID HE EXPLAIN HIS CONSTITUTIONAL RIGHTS, THE (CRIMINAL)
CHARGES, AND THE ELEMENTS.

MR. ROBINSON ANSWERS YES, I HAVE.

THIS IS TOTALLY INADEQUATE. MR. ROBINSON DEFENDANTS
ATTORNEY DOES NOT FULLY APPRAISE THE COURT TO "WHAT" RIGHTS
HE TOLD THE DEFENDANT, "WHAT" CHARGES, AND "WHAT" ELEMENTS
THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT.
THE RECORD IS DEVOID OF "WHAT" THE ATTORNEY TOLD HIS
CLIENT. THE ANSWERS WERE VAGUE AND DOES NOT ESTABLISH
WHICH ARE THE CRUCIAL ELEMENTS THAT WOULD REQUIRE A
CONVICTIONS. COUNSEL COULD HAVE TOLD HIS CLIENT THE ELEMENTS
OF THE PERIODIC TABLE AND THAT COULD HAVE BEEN THE
ELEMENTS HE EXPLAINED TO DEFENDANT. AT NO TIME IS HE
APPRAISED IN OPEN COURT OF "WHAT" THE ELEMENTS OF THE
OFFENSES WERE. THE TRIAL TRANSCRIPT CLEARLY SHOWS THIS.
COUNSEL CANNOT TESTIFY IN OUR COURT THAT HE TOLD HIM

1162(11) SCR. CIV. P. APPLICANT REQUESTS THIS COURT TO FULLY REVIEW HIS CLAIM AND ISSUE A SPECIFIC FINDING OF FACT AND CONCLUSIONS OF LAW CONCERNING "WHAT" ELEMENTS COUNSEL TOLD HIS CLIENT - THE RECORD DOES NOT SUPPORT THIS. APPLICANT SHOULD BE GRANTED ANOTHER EVIDENTIARY HEARING TO AVOID REPRAND PURSUANT TO PAUETT V. STATE, 423 S.E.2d 127 (1992), AND MCCRAY V. STATE, 408 S.E.2d 241 (1991).

6-30-10
DATE:

RESPECTFULLY SUBMITTED,
Steve McElrath
STEVE MCELATH #328413
MCCORMICK C.F. F-1-B-144
386 REDEMPTION WAY
MCCORMICK S.C. 29855

THE ELEMENTS, THAT HAS TO BE DONE ON RECORD PURSUANT ^{AL} LAMBERT, SUPRA AND EXPLAIN IN OPEN COURT "WHAT" ELEMENTS HE HAS BEEN APPRAISED OF.

ON PS. 18, LINES 5-9 GUILTY PLEA TRANSCRIPT THE COURT ESTABLISHED ON ITS OWN THAT ALL THE ELEMENTS OF THE CHARGE HAVE BEEN MET. THE COURT DID NOT ASK HIM ONE TIME IF HE UNDERSTOOD THOSE ELEMENTS. THE COURT ONLY ASKS DEFENDANT. DOES HE AGREE WITH THE FACTS. PS. 18, LINE 12-4.

THE ASSERTION BY TRIAL COUNSEL THAT HE TOLD APPLICANT THE ELEMENTS DOES NOT SATISFY DUE PROCESS REQUIREMENTS. UNTIL THIS DAY APPLICANT STILL HAS NO IDEA "WHAT" THE ELEMENTS THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT. FURTHER, APPLICANT WAS NOT TOLD HE COULD CHALLENGE HIS STATEMENT UNDER JACKSON V. DENNO, AND AND EXPERT WAS NOT OBTAINED, AND BOTH OFFENSES WERE CLOSELY RELATED TO CONSIDER IT ONE OFFENSE.

APPLICANT REQUESTS THE COURT GRANT HIM A 55(e) MOTION OR A MOTION FOR RECONSIDERATION TO SHOW THAT HIS PLEA WAS NOT KNOWING OR VOLUNTARY BECAUSE HE WAS NOT TOLD "WHAT" ELEMENTS HE WOULD HAVE TO DEFEND HIMSELF AND "WHAT" THE CRUCIAL ELEMENTS WERE OF EACH CHARGE. THE RECORD IS DEVOID OF THIS. COUNSEL WAS INEFFECTIVE BY NOT REQUESTING A JACKSON V. DENNO, TO CHALLENGE HIS STATEMENT. ALSO APPLICANT REQUESTS ANOTHER EVIDENTIARY HEARING TO FULLY ADJUDICATE ALL ISSUES RAISED IN HIS PETITION. SEE BRAYSON V. STATE, 493 S.E.2d 500 NO. 24715. COUNSEL FOR APPLICANT REQUESTS THIS "FULL BITE OF THE APPLE" UNDER S.C. CODE ANN §17-27-80 (1985) AND

STATE OF SOUTH CAROLINA

County of Anderson

In the Court of Common Pleas

Steven McElrath # 328413

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

vs.

The State

Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2011-CP-04-02710

INSTRUCTIONS — READ CAREFULLY

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

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention McCormick Corr. Inst. 386 Redemption Way
McCormick, SC 29849
2. Name and location of Court which imposed sentence Anderson Ct. of Gen Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2007-GS-04-1896 / Kidnapping
 - (b) 2007-GS-04-1897 / CSC first degree
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 19, 2008 - 30 years
 - (b) May 19, 2008 - 10 years "consecutively"
 - (c) _____

FILED - CLERK'S OFFICE
ANDERSON SC
2011 SEP - 9 P 3:21
CO. CLERK OF COMMON PLEAS AND
GENERAL SESSIONS

A TRUE CC

SEP - 9 2011

5. 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 _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

7. If you answered "yes" to (6), list

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

- i. South Carolina Court of Appeals
- ii. _____
- iii. _____

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

- i. Dismissed NO-93-1105
- ii. _____
- iii. _____

(c) the date of each such result:

- i. Sept. 23, 2008
- ii. _____
- iii. _____

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

- i. NO issue preserved for appellate review
- ii. _____
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
- (b) _____
- (c) A

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

- (a) Violation of the 5th and 14th Amendments per. the
- (b) Federal U.S. and S.C. Constitutions
- (c) Ineffective assistance of P.C.R. counsel

10. State concisely and in the same order, the facts which support each of the grounds set out in (9):

- (a) SEE ATTACHED SHEETS 1-7
- (b) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? YES
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Appeal
- ii. P.C.R.
- iii. 59 (e) motion
- iv. _____

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

- i. S.C. Ct. of Appeals
- ii. Anderson Ct. of Common Pleas
- iii. " " " "
- iv. _____

(c) the disposition thereof:

- i. Dismissed
- ii. Dismissed
- iii. 59 (e) motion never ruled on
- iv. _____

(d) the date of each such disposition:

- i. Sept 23 08
- ii. Aug 13 10
- iii. 59 (e) motion never ruled on
- iv. _____

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

- i. No issue preserved for appellate review
- ii. Dismissed
- iii. 59 (e) motion never ruled on
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

(a) which grounds have been presented:

115

- i. N
ii. A
iii. A

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

- i. N
ii. A
iii. A

15. If any ground set forth in (9) 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) See 9 (a) Applicant first time presenting grounds
(b) See 9 (b)
(c)

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

- (a) your arraignment and plea? YES
(b) your trial; if any? N/A
(c) your sentencing? YES
(d) your appeal; if any, from the judgment of conviction or the imposition of sentence? YES
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

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

- i. Scott Robinson of Greenville Bar
ii. ?
iii. George L. Sands Jr
515 N. Mc Duffie St. Anderson SC 29621

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

- i. Plea & Sentencing
ii. Appeal
iii. P.C.R.

18. State clearly the relief you seek in filing this application.

New P.C.R. hearing upon "all" issues; an appeal from my first P.C.R. hearing and any other relief that I may be entitled to.

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

NO

STATE OF SOUTH CAROLINA

County of Mc Cormick

VERIFICATION

I, Steven McElrath, being duly sworn upon 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 the application; and that the matters and allegations therein set forth are true.

Steven McElrath

SWORN to and subscribed before me this 2day of September, 19 2011

Perry G. Norton (L.S.)
Notary Public

My Commission Expires: Feb 28, 2018

A TRUE COPY

SEP - 9 2011

Perry G. Norton
CLERK OF COURT

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

I, Steven McElrath, 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 therefor.

Steven McElrath
Applicant

SWORN or affirmed to and subscribed before me this

2 day of September, 19 2011
Perry G. Norton
Notary Public

My Commission Expires Feb 28 2018COMMON PLEAS AND
GENERAL SESSIONS

2011 SEP - 9, P 3: 2

FILED-CLERK'S OFFICE
ANDERSON SC

VIOLETION OF THE 5th and 14th AMENDMENTS PER. THE
FEDERAL: U.S. and S. C. CONSTITUTIONS

117

- (1) Counsel, Sands was required to withdrew my pro-se
59 (c) motion upon seeing that it was hybrid
representation SEE: State v Carpenter 286 SE2d 384
State v Kornah 350 SE2d 180; Foster v State 379 SE2d
907. And counsel was required to submit his own 59 (c)
motion, when he knew I wanted a 59 (c) motion,
if the order of dismissal did not address all my
issues raised SEE: S.C. Code Ann 17-27-80; Pruitt v
State 423 SE2d 127. When I prematurely filed my
pro-se 59 (c) motion after I received Judge
McIntosh's form 4 denying my prior P.C.R. June 15, 10
SEE: Exhibit 1 and Ex. 2 counsel Sands letter dated
June 24, 10 which I rec'd June 29, 10

Also see Exhibit 3, my pro-se 59(e) motion, which was filed by the Clerk of Court July 2, 2010.

Which counsel Sands acknowledged my pro-se 59(e) motion in his letter to me dated July 29, 2010. When he sent me the State's proposed unsigned order of dismissal, and the matter regarding my appeal. SEE: Exhibit 4.

- (3) And, on Aug 27, 2010 I received only the signed formal order of dismissal from counsel Sands. Which Judge McIntosh had signed Aug 13, 2010 and the Clerk of Court filed Aug 24, 10.
- (4) Again on Sept 14, 2010 counsel Sands sent me another signed order of dismissal, which I rec'd Sept 18, 10

At this time counsel also informed me per. the Clerk of Court that the Atty. Gen's office would set a date for the hearing upon my pro-se 59(c) motion

SEE: Exhibit 5.

(5) Once again on May 5, 2011 counsel Sands wrote me informing me of my pro-se 59(c) motion, as no date had been set for my pro-se 59(c) motion.

SEE: Exhibit 6

(6) Since I hadn't heard anything upon my 59(c) motion nor my appeal. I became concern. Therefore, I wrote the Atty. Gen's office Aug 1, 2011 about my 59(c) motion. Which the Atty. Gen's office informed me Aug 10, 2011 that my pro-se 59(c)

Motion was premature SEE: Exhibit 7.

(7) Here I am not arguing ineffectiveness of PCR counsel per the above const. violation(s). But per State v Sanders 237 SE2d 53; Foster v State 379 SE2d 907; Jones v State 558 SE2d 517 by law I was not required or entitled to submit anything pro-se once I had appointed counsel. Thus,

Counsel Sands should have submitted his 59(c) motion but failed to do so SEE: Marler v State

653 SE2d 266; Bryson v State 493 SE2d 500; Pruitt v State 423 SE2d 127; McCray v State 408 SE2d 241

When the Atty Gen's / Judges order failed to address each issue raised. Also see: S.C. Code Ann 17-27-80.

INEFFECTIVE ASSISTANCE OF P.C.R. COUNSEL

(1) Further counsel Sands did not appeal the denial of my first P.C.R. as I requested him to do so.

(2) I understand one does not have a right to counsel in P.C.R. matters per Pennsylvania v Finley 109 S.Ct. 1990; Coleman v Thompson 111 S.Ct. 2546 Also see Arice v State 409 SE2d 392

(3) But I also understand the courts have developed some exceptions based upon "unique facts" presented on a case-by-case basis See Case v State 289 SE2d 413.

- (4) And, in my case at bar. I did not freely and or voluntarily waive my RIGHT to appeal my first P.C.R. Which I am entitled to a belated appeal SEE: Austin v State 409 SE2d 395.
- (5) Moreover, the State law expressly authorizes the RIGHT to seek appellate review of the denial of my first P.C.R. SEE: S.C. Code Ann 17-27-100; Austin Id. Also see Bullis v State 675 SE2d 734; Wilson v State 559 SE2d 581 and Odom v State 523 SE2d 753. Thus,
- (6) I strongly argue that the one year statute of limitations per. S.C. Code Ann 17-27-45(9) does not apply in my case.
- (7) Further the above issues/grounds is not successive

per. S.C. Code Ann 17-27-90 Also see Aice v State

409 SE2d 392 and Arnold v St./Plath v State 420 SE2d

834 Nor time barred per. 17-27-45(a).

Where I have clearly shown why I could not
have raised the above issues/grounds in my prior
P.C.R

WHEREFORE: this court should grant me an evidentiary
hearing upon "all" issues/grounds, an appeal from my
first P.C.R and any other relief that I am
entitled to.

Date:

Respectfully submitted

Exhibit: ①

GEORGE L. SANDS, JR., P.A.
Attorney at Law
515 N. McDuffie Street
Anderson, SC 29621

Office Phone
(864) 261-8788

Office Fax
(864) 261-9097

June 24, 2010

Steven McElrath #328413
386 Redemption Way, FLB144
McCormick, SC 29899

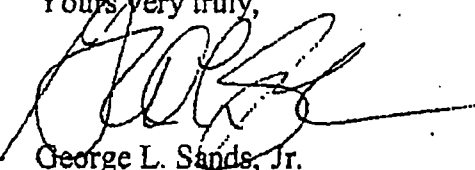
Re: PCR

Dear Steven:

Judge McIntosh denied your PCR motion as you can see from the enclosed copy of his form Order. It indicates that a formal Order will follow. I didn't much hope once your trial attorney testified that he explained to you all elements of the two crimes to you and the evidence required to prove them. Obviously, this contradicted your testimony that he did not explain these things to you. Judge McIntosh agreed that your sentence seemed severe, but said he could not overturn on that basis. Your first attorney also felt that the sentence was severe, but said it was given because a victim and her husband were at the sentencing hearing and, in effect, demanded an extreme sentence.

I am sorry that the Judge has ruled as he did. We will send the formal Order once we receive it.

Yours very truly,



George L. Sands, Jr.

GLSjr/bl

Enclosure

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS 2010 JUN 16 A 10:24

FILED-CLERK'S OFFICE
ANDERSON SC

JUDGMENT IN A CIVIL CASE¹²⁵

CASE NO: 2009CP0400012

COMMON PLEAS AND
GENERAL SESSIONS
Steven C. McElrath vs State Of South Carolina

FILED-CLERK'S OFFICE
ANDERSON SC
2010 JUN 16 A 5:47
COMMON PLEAS AND
GENERAL SESSIONS

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

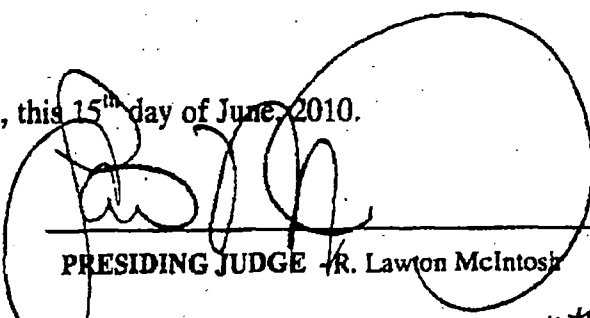
☐ See attached order;

☐ Statement of Judgment by the Court;

Steven C. McElrath's application for Post Conviction Relief is DENIED. Assistant Attorney General, West L prepare formal order.

Dated at Anderson, South Carolina, this 15th day of June, 2010.

Court Reporter:


PRESIDING JUDGE R. Lawton McIntosh

This judgment was entered on the 16th day of June, 2010, and a copy mailed first class this 16th day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Steven C McElrath Lieber Correctional Inst., 5A
- 46 Po Box 205 Ridgeville, SC 29472
Robin Sloan Cromer 1305 N. Boulevard
Anderson, SC 29621
George L. Sands Jr. Attorney at Law 515 N.
McDuffie St. Anderson, SC 29621

Gregory P Jones Jr Assistant Attorney General,
Po Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Martha D Newton - Clerk of Court

SCRPC APP-24/FORM 4

A TRUE COPY

JUN 16 2010



STATE OF A TRUE COPY OF A		FILED-CLERK'S OFFICE ANDERSON SC	
IN THE COURT OF COMMON PLEAS		200 JUL -1 A 11:14-000	
ANDERSON <i>Mark A. Anderson</i> CLERK OF COURTS		GENERAL SESSIONS AND CRIMINAL DIVISION	
STEVEN MEERATH #328413 APPLICANT, VS. STATE OF SOUTH CAROLINA RESPONDENT.		CA/NO: 2009-07-04-000 <u>MOTION TO ALTER &</u> <u>AMEND JUDGEMENT</u> <u>59(E) S.C. R. CIV-P</u> <u>OR RECONSIDERATION</u>	

NOW COMES THE APPLICANT WHO MOVES THIS COURT FOR A MOTION TO ALTER OR AMEND JUDGEMENT OR TO RECONSIDER HIS CLAIM PURSUANT TO ANDERSON V. STATE, 535 S.E.2d (649) SUP CT. 2000 GOYKIN V. ALABAMA, STATE V. RIKARD, 638 S.E.2d 290 (SUP. CT. 2001), AND STATE V. LAMBERT, 225 S.E.2d 340 (SUP. CT. 1976).

AS TO THE ELEMENTS OF THE OFFENSE TO WHICH ONE IS ENTERING A PLEA, THE COURT STATES THE DEFENDANT "MUST" BE AWARE OF THE CRUCIAL ELEMENTS OF THE OFFENSE. THIS LINE OF CASES REQUIRE THAT THE TRIAL COURT MUST BE CERTAIN THAT A PLEADING DEFENDANT UNDERSTANDS THE CHARGE TO WHICH HE OR SHE IS PLEADING. THE COURT MAY ESTABLISH THIS THROUGH A COLLOQUY WITH THE DEFENDANT OR COUNSEL. SEE RIKARD, SUPRA. THIS REQUIREMENT FALLS UNDER DUE PROCESS.

STATE V. LAMBERT, 225 S.E.2d 340 (SUP. CT. 1976) REQUIRES THE RECORD TO REFLECT THAT THE TRIAL COURT HAD ASSURED ITSELF THAT THE PLEA IS VOLUNTARY AND INTELLIGENTLY ENTERED WITH FULL KNOWLEDGE OF THE NATURE OF THE OFFENSE. HOWEVER

TO THE DEFENDANT BY THE COURT OR TRIAL COUNSEL MUST ESTABLISH THAT HE OR SHE CONVEYED TO THE DEFENDANT INFORMATION AS TO THE NATURE OF THE OFFENSE TO WHICH HE IS PLEADING TO THE EXTENT THAT THE DEFENDANT HAS FULL KNOWLEDGE OF THE NATURE OF THE OFFENSE.

FURTHER, A GUILTY PLEA IS INVALID ONLY IF IT DOES NOT REPRESENT VOLUNTARY AND INTELLIGENT CHOICE AMONG ALTERNATIVE COURSES OF ACTION OPEN TO DEFENDANT. EASTER V. NORRIS, 100 F.3d 523 (1996) CERT. DENIED. 117 S. CT. 1332.

HERE, APPLICANT ASK THE COURT TO REVIEW PS. 7, TRIAL TRANSCRIPT, LINES 10-13. THE COURT ONLY ASKS MR. ROBINSON DID HE EXPLAIN HIS CONSTITUTIONAL RIGHTS, THE (CRIMINAL) CHARGES, AND THE ELEMENTS.

MR. ROBINSON ANSWERS YES, I HAVE.

THIS IS TOTALLY INADEQUATE. MR. ROBINSON DEFENDANTS ATTORNEY DOES NOT FULLY APPRAISE THE COURT TO "WHAT" RIGHTS HE TOLD THE DEFENDANT, "WHAT" CHARGES, AND "WHAT" ELEMENTS THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT. THE RECORD IS DEVOID OF "WHAT" THE ATTORNEY TOLD HIS CLIENT. THE ANSWERS WERE VAGUE AND DOES NOT ESTABLISH WHICH ARE THE CRUCIAL ELEMENTS THAT WOULD REQUIRE A CONVICTION. COUNSEL COULD HAVE TOLD HIS CLIENT THE ELEMENTS OF THE PERIODIC TABLE AND THAT COULD HAVE BEEN THE ELEMENTS HE EXPLAINED TO DEFENDANT. AT NO TIME IS HE APPRAISED IN OPEN COURT OF "WHAT" THE ELEMENTS OF THE OFFENSES WERE. THE TRIAL TRANSCRIPT CLEARLY SHOWS THIS. COUNSEL CANNOT TESTIFY IN OUR COURT THAT HE TOLD HIM

THE ELEMENTS, THAT HAS TO BE DONE ON RECORD PURSUANT TO LAMBERT, SUPRA AND EXPLAIN IN OPEN COURT "WHAT" ELEMENTS HE HAS BEEN APPRAISED OF.

ON PS. 18, LINES 5-9 GUILTY PLEA TRANSCRIPT THE COURT ESTABLISHED ON ITS OWN THAT ALL THE ELEMENTS OF THE CHARGE HAVE BEEN MET. THE COURT DID NOT ASK HIM ONE TIME IF HE UNDERSTOOD THOSE ELEMENTS. THE COURT ONLY ASKS DEFENDANT, DOES HE AGREE WITH THE FACTS. PS. 18, LINES 2-4.

THE ASSERTION BY TRIAL COUNSEL THAT HE TOLD APPLICANT THE ELEMENTS DOES NOT SATISFY DUE PROCESS REQUIREMENTS. UNTIL THIS DAY APPLICANT STILL HAS NO IDEA "WHAT" THE ELEMENTS THE STATE WOULD HAVE TO PROVE BEYOND A REASONABLE DOUBT. FURTHER, APPLICANT WAS NOT TOLD HE COULD CHALLENGE HIS STATEMENT UNDER JACKSON V. DENNO, AND AND EXPERT WAS NOT OBTAINED, AND BOTH OFFENSES WERE CLOSELY RELATED TO CONSIDER IT ONE OFFENSE.

APPLICANT REQUESTS THE COURT GRANT HIM A 55(e) MOTION OR A MOTION FOR RECONSIDERATION TO SHOW THAT HIS PLEA WAS NOT KNOWING OR VOLUNTARY BECAUSE HE WAS NOT TOLD "WHAT" ELEMENTS HE WOULD HAVE TO DEFEND HIMSELF AND "WHAT" THE CRUCIAL ELEMENTS WERE OF EACH CHARGE. THE RECORD IS DEVOID OF THIS. COUNSEL WAS INEFFECTIVE BY NOT REQUESTING A JACKSON V. DENNO, TO CHALLENGE HIS STATEMENT. ALSO APPLICANT REQUESTS ANOTHER EVIDENTIARY HEARING TO FULLY ADJUDICATE ALL ISSUES RAISED IN HIS PETITION. SEE BRYSON V. STATE, 493 S.E.2d 500 NO. 24715. COUNSEL FOR APPLICANT REQUESTS THE "FULL BITE OF THE APPLE" UNDER S.C. CODE ANN §17-27-80 (1985) AND

52(A) SCA. CIV. P. APPLICANT REQUESTS THIS COURT TO FULLY REVIEW
HIS CLAIMS AND ISSUE A SPECIFIC FINDING OF FACT AND
CONCLUSIONS OF LAW CONCERNING "WHAT" ELEMENT) COUNSEL TOLD
HIS CLIENT - THE RECORD DOES NOT SUPPORT THIS. APPLICANT
SHOULD BE GRANTED ANOTHER EVIDENTIARY HEARING TO AVOID
REMAND PURSUANT TO PRUETT V. STATE, 423 S.E.2d 127 (1992),
AND MCGRAY V. STATE, 408 S.E.2d 241 (1991).

6-30-10
DATE:

Respectfully Submitted,
Steu McEath
STEVEN MCEATH #328413
MCCORMICK C.F. F-1-B-144
306 REDEMPTION WAY
MCCORMICK S.C. 29859

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT STEVEN McELRATH #328413
DID MAIL HIS MOTION TO ALTER OR AMEND JUDGMENT OR
RECONSIDERATION TO THE CLERK OF COURT ANDERSON
COUNTY, CATHY PHELPS, P.O. BOX 8002, ANDERSON S.C.
29622 AND PLACED IN THE MAIL BY THE NOTARY OF McELMICH
C.F. ON THIS 30 DAY OF June, 2010 WITH POSTAGE
PREPAID.

SWORN AND SUBSCRIBED before
ME THIS 30 DAY OF June, 2010

J. C. Franklin

NOTARY PUBLIC SOUTH CAROLINA
MY COMMISSION EXPIRES

12.16.2019

X Steven McElrath

STEVEN McELRATH #328413

McELMICH CEF-1-B-149

386 REDEMPTION WAY

McELMICH S.C. 29855

A TRUE COPY

JUL - 2 2010

Martha A. Starbuck
CLERK OF COURTS

FILED - CLERK'S OFFICE
ANDERSON SC
2010 JUL - 1 A 11:1
COURT CLERK'S AMI
GENERAL SESSIONS

GEORGE L. SANDS, JR., P.A.
Attorney at Law
515 N. McDuffie Street
Anderson, SC 29621

Ex 4

131

Office Phone
(864) 261-8788

Office Fax
(864) 261-9091

July 29, 2010

Steven McElrath #328413
386 Redemption Way, FLB144
McCormick, SC 29899

Re: Motion Hearing

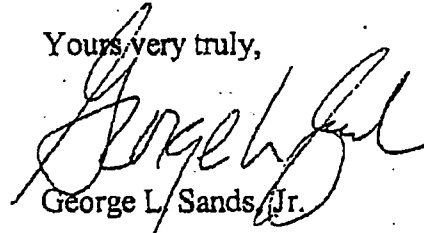
Dear Steven:

The Clerk of Court sent me a copy of the Rule 55(e) motion that you filed. The Court may not set a hearing until the formal Order has been signed. The judge can rule on your motion without a hearing. Now that the motion has been filed, it stays the time to appeal until after the Court has ruled on your motion. I thought the motion was very well done.

In response to the vast majority of your letter dated July 25, 2010, I share your faith.

P.S. I just received the proposed formal Order which the judge will sign in due course. I have enclosed a copy for your review. Should the judge change it in any manner, I will so advise.

Yours very truly,



George L. Sands, Jr.

GLSjr/bl

Enclosure

GEORGE L. SANDS, JR., P.A.
Attorney at Law
515 N. McDuffie Street
Anderson, SC 29621

Ex 5

Office Phone
(864) 261-8788

Office Fax
(864) 261-9001

September 14, 2010

Steven McElrath #328413
386 Redemption Way, FLB144
McCormick, SC 29899

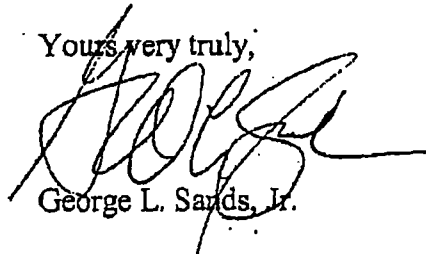
Re: Order of Dismissal

Dear Steven:

Enclosed please find a copy of the formal Order of Dismissal which I recently received from the Court on the PCR hearing held back in June.

As to your Rule 59(e) motion which you filed the first of July, that motion is still pending and no hearing date has been set. I spoke today with the Clerk of Court's Office and was informed that the hearing date would be set by the Attorney General's Office and both you and I should be notified when a hearing date had been set. Until such notification occurs, please let me know should you have any other questions or concerns.

Yours very truly,


George L. Sands, Jr.

GLSjr/bl

Enclosure

Ex. 6

Telephone
(864) 261-8788

GEORGE L. SANDS, JR., P.A.

Attorney at Law
515 North McDuffie Street
Anderson, S.C. 29621

Telefax
(864) 261-9092

May 5, 2011

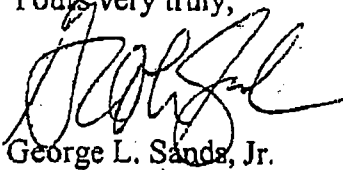
Steven McElrath #328413
386 Redemption Way, F4B-241
McCormick, SC 29899

Re: PCR

Dear Steven:

Steven, the Court has not set a hearing date for your Rule 59(e) motion yet. They are slow in setting hearings of this nature. I have, in fact, spoken with the Judge regarding your motion. We are not allowed to contact the Judge without the Attorney General being present, but luckily, he called me when you filed the motion. He is aware of the situation, but his only option is to grant your PCR request, or turn it down. He does not have the right to alter your sentence. Of course, if the PCR is granted, then you start over from the beginning with the Solicitor's Office as you would be entitled to a new trial. I hope this answers your questions which I received today. As soon as I have word regarding your motion hearing I will let you know.

Yours very truly,



George L. Sands, Jr.



Ex. 7

ALAN WILSON
ATTORNEY GENERAL

August 10, 2011

Mr. George Sands, Jr., Esquire
515 N. McDuffie Street
Anderson, South Carolina 29621

RE: Steven McElrath, #328413 v. State
Case No. 2009-GS-04-0012

Dear Mr. Sands:

Please be advised our office received the attached documents on August 8, 2011 from Mr. Steven McElrath, inmate number 328413. Mr. McElrath filed a post-conviction relief application with the Attorney General's Office, case number 2009-CP-04-0012. An evidentiary hearing was held in June 2010 at the Anderson County Courthouse. Mr. McElrath's PCR application was subsequently Denied and Dismissed on or about July 27, 2010.

It appears Mr. McElrath is inquiring about a Rule 59(e), SCRCP, Motion filed either by him or on his behalf. Our records indicate the Motion was filed on July 1, 2010, making it premature as the Order of Dismissal was not filed until July 27, 2010. If Mr. McElrath intends this matter to be submitted to the Court of Common Pleas, this office is not aware of any case currently pending for Mr. McElrath which would permit action. Mr. McElrath's post-conviction relief action ended in 2010.

Sincerely,

Kaelon E. May
Assistant Attorney General

Enclosures

cc: Mr. Steven McElrath, # 328413

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Steven McElrath, # 328413,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT
Case No: 2009-CP-04-0012

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 2, 2009. The State submitted its Return on or about April 2, 2009. An evidentiary hearing into the matter was convened on June 15, 2010, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by George Sands, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State presented testimony from Applicant's Plea Counsel, Charles Anderson, Esquire. This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the State's Return, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June

2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there is an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

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

- 1) Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
 - b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
 - c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing the Applicant to enter into a plea of guilty without full understanding of the nature of the plea."
- 2) Involuntary Guilty Plea

APPLICABLE LAW

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of Counsel is alleged as a ground for relief, the Applicant must prove that "Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of Counsel. First, the Applicant must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

An Applicant who enters a plea on the advice of Counsel may only attack the voluntary and

intelligent character of the plea by showing that trial Counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial Counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of Counsel, and it will be treated as such.

Involuntary Guilty Plea

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leake, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) *overruled on other grounds by U.S. v. Whitley*, 759 F.2d 327 (4th Cir. 1985). This Court finds that Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea

hearing.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial, Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT POST-CONVICTION RELIEF HEARING

Steven McElrath

The Applicant testified that he only met with his attorney once prior to the entry of his guilty plea. He testified that he never saw the discovery in the case or discussed it with Counsel. He stated that in that meeting, he informed Counsel that the sex was consensual and took place when Applicant was highly intoxicated, and that he also gave his confession while intoxicated. Applicant testified that Counsel should have contested the admissibility of the statement, and presented the consensual nature of the sex as a defense on his behalf.

Applicant further testified that Counsel did not adequately investigate his case. He testified that Counsel told him if he went to trial, he would get the maximum sentence.

Applicant testified that he thought if he entered a guilty plea he would get less. Finally,

Applicant testified that Counsel should have objected to the sentence that was given on the basis

that double jeopardy should not have allowed him to be sentenced on both the sexual assault and the kidnapping. He also testified Counsel should have filed a motion for reconsideration.

Scott Robinson, Esquire

Counsel testified that he met with the Applicant on multiple occasions. He testified that he discussed with the Applicant the charges, the elements of those charges, and what the state had to prove in order for the Applicant to be found guilty. Counsel also testified that he discussed with the Applicant the potential punishments he faced and his constitutional rights. Counsel testified that it was Applicant's position that the sex was consensual, but added that it was always the victim's position that it was not consensual.

Counsel testified that he received the State's evidence in the case, and reviewed it with the Applicant. He stated that the only part of the discovery he may not have had occasion to review with the Applicant was the forensic evidence, which he did not receive until a few weeks before trial. Counsel testified that the evidence included statements given by the Applicant and the victim, as well as the forensic evidence. He stated that after reviewing the evidence and discussing it with the Applicant, he came to the conclusion that the State had a very good case and could likely prove the Applicant guilty beyond a reasonable doubt.

Counsel testified that, to the best of his knowledge, double jeopardy would not have applied in this case because the Applicant moved the victim into the closet and kept her there until she was rescued. Counsel testified that Applicant also told him that he was intoxicated at the time of the incident and when he gave his confession. He testified that he would have contested the statement if the Applicant had elected to proceed to trial, but added that voluntary intoxication would not have been a defense to the crime itself. However, Counsel testified that

the Applicant ultimately wanted to plead guilty. He testified that the Applicant expressed remorse for his actions, and recollected that the Applicant made an apology of sorts at the guilty plea hearing.

Finally, Counsel testified that he did not object to the sentence because there was nothing objectionable about it. Further, he testified that he did not make a motion for reconsideration because Applicant did not ask him to.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Involuntary Guilty Plea

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he met with the Applicant, discussed the charges, the Applicant's constitutional rights and the discovery, and that the Applicant ultimately made an informed and voluntary decision to plead guilty to be credible, while simultaneously finding Applicant's testimony on this issue not to be credible.

This finding is supported by a review of the guilty plea transcript. At the guilty plea hearing, the Applicant testified that he had not consumed any drugs or alcohol in the past twenty-four hours. (Tr. p. 5, lines 7-9). He also testified that although he took prescription medication, it did not affect his ability to understand the proceedings against him. (Tr. p. 5, line 10 – p. 7,

line 4). He testified that he understood the possible punishments he was facing, that he understood his constitutional rights, and that he was satisfied with the services of his attorney. (Tr. p. 7, line 5 – p. 13, line 2).

The Applicant testified that no one had threatened him, coerced him, or promised him anything in order to secure his guilty plea. (Tr. p. 13, lines 6-13). He testified that he pled guilty of his own free will, and further testified that he understood all the court's questions and had answered the court's questions truthfully. (Tr. p. 13, lines 20-24). Applicant further testified that he wished to plead guilty, and in fact was guilty of the charges. (Tr. p. 14, lines 3-6). Finally, he agreed with the Solicitor's statement of facts (Tr. p. 17, lines 18-20), and made an apology of sorts. (Tr. p. 26, lines 4-25).

Based on the testimony presented at the PCR Hearing and a review of the record of the guilty plea hearing, this Court finds that the Applicant's guilty plea was knowingly, intelligently, freely and voluntarily entered. Therefore, this allegation is denied and dismissed.

Failure to Object to the Sentence or File Motion for Reconsideration

With respect to this claim, this Court finds that the Applicant has failed to meet his burden of proof. This Court finds Counsel's testimony that he did not object to the sentence because he saw nothing objectionable about the sentence and did not believe double jeopardy to apply to be credible. This Court notes that the sentences handed down to the Applicant were within the parameters allowed by their respective statutes, and further notes that it was within the plea judge's discretion to run the sentences concurrently or consecutively. That he chose to run them consecutively is not a reflection upon Counsel's representation. Additionally, this Court notes that the facts of the case were sufficient to charge kidnapping as a separate offense. As

such, this Court finds that the Applicant cannot prove that he received ineffective assistance of counsel or resulting prejudice. Accordingly, this claim is denied and dismissed.

Failure to Provide Applicant with Knowledge of Viable Defense

With respect to this claim, this Court again finds that the Applicant has failed to meet his burden of proof. Applicant testified that he informed Counsel that he was intoxicated at the time of the incident and when he gave his confession. Counsel testified that if the Applicant had elected to proceed to trial, he would have challenged the confession, but added that this was not the Applicant's desire. Counsel also testified that voluntary intoxication would not have been a viable defense to the crime. Applicant also testified that the sex was consensual, and Counsel corroborated that this was the Applicant's position. However, Counsel also testified that the victim's position was always that it was not consensual, and that he would not have been confident in the Applicant's chances of success when it was his word versus that of the victim.

This Court finds that Counsel's testimony on these issues is credible, while simultaneously finding that the Applicant's testimony is not credible. Further, this Court notes that the Applicant has provided no additional evidence of other defenses that should have been explored on his behalf. As such, this Court finds that the Applicant is unable to prove ineffective assistance of counsel or resulting prejudice. Accordingly, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or

implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by Counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate Counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, PCR Counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 13 day of August, 2010.



R. Lawton McIntosh
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina.

FILED-CLERK'S OFFICE
JULY 23 2010
GENERAL SESSIONS

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Steven McElrath, #328413,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
Case No.: 2011-CP-04-2710**RETURN**
AND PARTIAL MOTION TO DISMISS
(Appointment of Counsel Requested)

Respondent, making its Return and Partial Motion to Dismiss to the application for post conviction relief (PCR) filed September 9, 2011, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there is an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

The Applicant subsequently filed an application for PCR on January 2, 2009, (2009-CP-04-0012) asserting the following claims:

1) Ineffective Assistance of Counsel

- a) counsel failed to object to sentence given to Applicant;
- b) counsel failed to provide Applicant with knowledge of a viable defense that was available to him, causing Applicant to accept his guilty plea without full knowledge of the consequences of that plea;
- c) counsel failed to investigate the mental capacity of the Applicant to plead guilty causing Applicant to enter into a plea of guilty without full understanding of the nature of the plea; and

2) Involuntary Guilty Plea

Respondent filed its Return on April 2, 2009. An evidentiary hearing into the matter was convened on June 15, 2010, at the Anderson County Courthouse. The Applicant was present at the hearing and was represented by George Sands, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office. On August 13, 2010, the Honorable R. Lawton McIntosh issued an Order denying and dismissing Applicant's application with prejudice.

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

II.

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

1) Violation of the 5th and 14th Amendments Per the Federal, U.S., and S.C. Constitutions

2) Ineffective Assistance of PCR Counsel

- a) Failure to File Rule 59 Motion
- b) Failure to File Appeal

III.

The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. The Respondent lacks sufficient information to admit or deny this allegation. The Respondent requests an evidentiary hearing solely on this ground for relief. Sharper, Id.; Austin, 305 S.C. 453, 409 S.E.2d 395.

IV.

The Court should summarily dismiss the remaining grounds for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The Respondent therefore moves for summary dismissal of the remaining allegations pursuant to S.C. Code Ann. § 17-27-70(c) (2003).

V.

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

VI.

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

VII.

WHEREFORE, having made its Return and Partial Motion to Dismiss, the State requests that a hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211

February 9, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

2011-CP-04-2710

STEVEN McELRATH, #328413)

Applicant,)

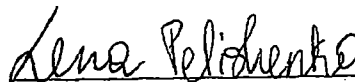
vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

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

Steven McElrath, #328413**McCormick Correctional Institution****386 Redemption Way****McCormick, SC 29899**DATED this 9th day of February, 2012

Lena Pelishenko, Legal Assistant

For Respondent

State of South Carolina

County of Anderson

In the Court of Common Pleas

Steven McElrath,

Applicant,

2011-CP-04-2710

-VS-

July 30, 2014

State of South Carolina,

Respondent.

Transcript of Record

BEFORE:

The Honorable Edgar W. Dickson, Judge

APPEARANCES:

Carolyn Galloway, Esquire
Attorney for the Applicant

John W. Whitmire, Esquire
Attorney for the State

Renee H. Tollison
Circuit Court Reporter

INDEX

	PAGE
Post-conviction Relief Hearing	3
Certificate of Reporter	5

EXHIBITS

No	DESCRIPTION	ID	EV
A-1	<i>No exhibits were presented during the hearing</i>		
A-2			
A-3			

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 9:57 a.m.)

4 THE COURT: Mr. Whitmire?

5 MR. WHITMIRE: May it please the Court, Your
6 Honor. The first matter before the Court today is Steven
7 McElrath v. State of South Carolina, case number 2011-CP-
8 04-2710. This is a successive P.C.R. application within
9 the statute and the rules.

10 Mr. McElrath pled guilty to kidnapping and sexual --
11 criminal sexual conduct first-degree. He was represented
12 by Scott Robinson. He appealed that conviction. He also
13 filed a timely post-conviction relief action in which he
14 was represented by George Sands. Judge McIntosh denied
15 the relief, and an order -- that order was not timely
16 appealed. He has filed other things in his application
17 in which he has no grounds for relief on in the statute.
18 However, successive applications have that small window
19 for failure to file an Austin appeal for P.C.R. counsel.
20 The State feels that Mr. McElrath would meet his burden
21 of proof and consents to all relief.

22 THE COURT: Okay.

23 Are you Ms. Galloway?

24 MS. GALLOWAY: I am, Your Honor.

25 THE COURT: You did a great job arguing that.

1 MS. GALLOWAY: Yes, sir.

2 THE COURT: You want him to be allowed to file
3 that appeal?

4 MS. GALLOWAY: Yes, sir.

5 THE COURT: Okay. I grant the -- who's going
6 to do the order?

7 MS. GALLOWAY: Mr. Whitmire.

8 MR. WHITMIRE: Your Honor, I can draft an order
9 of dismissal pursuant to Austin.

10 THE COURT: Okay.

11 MR. WHITMIRE: It has all the instructions for
12 filing that Austin appeal.

13 MS. GALLOWAY: Thank you.

14 THE COURT: All right. Thank you.

15 MR. WHITMIRE: Thank you, Judge.

16 (WHEREUPON, the hearing ended at approximately 9:59
17 a.m.)

18 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Anderson County, South Carolina,
9 on the 30th day of July 2014.

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

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

14 September 3, 2015

15

16 s/ *Renee H. Tollison*

17 Circuit Court Reporter

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
 COUNTY OF ANDERSON FOR THE TENTH JUDICIAL CIRCUIT

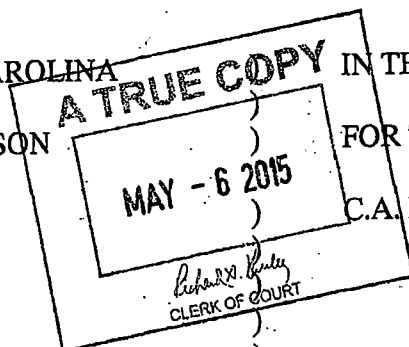
Steven McElrath,
 S.C.D.C. No. 328413

Applicant,

v.

State of South Carolina,

Respondent.



C.A. No. 2011-CP-04-2710

ORDER OF DISMISSAL

FILED-CLERK'S OFFICE
 ANDERSON SC
 2015 MAY - 6 AM 11:00
 COMMON PLEAS
 GENERAL

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 9, 2011. The State submitted its responsive pleadings requesting partial summary dismissal. An evidentiary hearing into the matter was convened on July 30, 2014 at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Carolyn E. Galloway, Esq. The Respondent was represented by Walt Whitmire of the South Carolina Attorney General's Office.

At the hearing, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2009-CP-04-0012 Application entitled him to an Austin relief. Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed.

This Court also had before it a copy of the transcript from the Applicant's guilty plea proceedings, the records of the Anderson County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the Application for Post-Conviction Relief, the

State's Return, and evidence presented at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Applicant was indicted at the June 2007 term of the Anderson County Grand Jury for kidnapping (2007-GS-04-1896) and criminal sexual conduct – first degree (2007-GS-04-1897). Scott D. Robinson, Esquire, represented the Applicant. On May 19, 2008, Applicant pled guilty as indicted. The Honorable J.C. Nicholson, Jr., consecutively sentenced him to confinement for a period of thirty (30) years for kidnapping and ten (10) years for criminal sexual conduct – first degree.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there was an issue preserved for appellate review. The Remittitur was issued on October 9, 2008.

C.A. No. 2009-CP-04-0012

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

- 1) Ineffective Assistance of Counsel
 - a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
 - b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
 - c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing the Applicant to enter into a plea of guilty without full understanding of the nature of the plea."
- 2) Involuntary Guilty Plea

A hearing was convened into the matter on June 15, 2010. Applicant was present and was represented by George Sands, Esq. Plea counsel, Charles A. Anderson was present and testified to his course of conduct during the representation concerning the

matters at issue. The State was represented by A. West Lee, Esq., of the Office of the Attorney General. On August 13, 2010, the Honorable R. Lawton McIntosh issued an order denying the Application with prejudice. A notice of appeal was not filed on Applicant's behalf.

C.A. No. 2011-CP-04-2710 (present case)

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

- 1) Violation of the 5th and 14th Amds per the Federal, U.S., and S.C. Constitutions.
- 2) Ineffective Assistance of PCR Counsel:
 - a. Failure to file a Rule 59(e);
 - b. Failure to file a notice of appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the stipulations and waivers presented at the evidentiary hearing. Further, this Court reviewed the Clerk of Court records regarding the subject's convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents, the written plea agreement from the General Sessions Records, the record from the original 2009 PCR Application, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact.

A.

At the hearing, the State stipulated that Applicant would be able to meet his burden to prove that PCR counsel's failure to file a notice of appeal from denial of the C.A. No. 2009-CP-04-0012 Application entitled him to an Austin relief where PCR counsel was unable to locate his file to rebut the allegation. Successive PCR Counsel for Applicant apprised the Court that she had fully discussed the current PCR Application with Applicant, advised Applicant of the

procedural bars against successive and untimely PCR litigation, and was fully prepared to proceed on his case. Successive PCR Counsel apprised the Court that Applicant desired a discretionary appeal from Judge McIntosh's order. Successive PCR Counsel also apprised the Court that Applicant wished to abandon any and all allegations that are procedurally barred as untimely and successive.

This Court accepts the stipulation and finds that Applicant was denied an appeal from the decision in his prior post-conviction relief action. "The right to seek appellate review of the denial of PCR is expressly authorized by state law." Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (citing S.C. Code Ann. § 17-27-100). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citations omitted). Even if the post-conviction court determines the applicant did not freely and voluntarily waive his appellate rights, the applicant must still petition the South Carolina Supreme Court to determine "whether he was prejudiced by his failure to obtain review of a meritorious issue." Odom, 337 S.C. at 263, 523 S.E.2d at 756 (1999).

Based on the stipulations, the Court finds Applicant did not knowingly and voluntarily waive the right to seek appellate review of Judge McIntosh's order. Accordingly, the Court hereby grants Applicant's request for appellate review of his prior post-conviction relief action pursuant to Austin v. State.

B.

To the extent Applicant seeks to further explore the issues raised in his initial application, the Court finds those issues cannot be revisited in a successive application. S.C. Code Ann. § 17-27-90 requires that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Accordingly, the Court finds all remaining grounds should be denied and dismissed because Applicant has not shown a sufficient reason why these grounds should be re-raised in a successive application.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant is entitled to an appeal of his prior post-conviction relief action pursuant to Austin v. State.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Counsel and Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), for the appropriate procedure for securing appellate review pursuant to Austin v. State.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief seeking an appeal pursuant to Austin v. State is granted; and
2. All other grounds for relief are denied; and
3. Applicant shall be remanded to the custody of the Department of Corrections.

AND IT IS SO ORDERED this 30th day of April, 2015.



EDGAR W. DICKSON
Presiding Judge
10th Judicial Circuit

Orangeburg, South Carolina

FILED-CLERKS OFFICE
ANDERSON SC
2015 MAY -6 AM 11:47
COMMON PLEAS AND
GENERAL SESSIONS