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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Roger E. Henderson, Circuit Court Judge

TOMMY MONTGOMERY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002163

APPENDIX

LANELLE CANTEY DURANT
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

J. RUTLEDGE JOHNSON
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON	)	
State of South Carolina	)	
	)	
v.	)	Case No. 11-GS-10-7917
	)	
Tommy Montgomery,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on June 26, 2013, before The Honorable R. Markley Dennis in Courtroom E of the Berkeley County, 300 California Avenue, Moncks Corner, South Carolina; attended by counsel as follows:

APPEARANCES:

Burns Wetmore, Assistant Solicitor
 9TH CIRCUIT SOLICITOR'S OFFICE
 100 Broad Street, 4th Floor
 Charleston, South Carolina 29402
 Appearing for State of South Carolina

Meghan Erhlick, Assistant Public Defender
 CHARLESTON COUNTY PUBLIC DEFENDERS
 100 Broad Street, 5th Floor
 Charleston, South Carolina 29402
 Appearing for Defendant

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

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(DEFENDANT PRESENT)

1
2 THE COURT: Thank y'all for being
3 so organized and pulling this together. Good
4 morning, sir. You are Tommy Montgomery?

5 DEFENDANT: Yes, sir.

6 THE COURT: Mr. Montgomery, you're
7 here today in response to Indictment 2011-
8 7917. Your lawyer is with you.

9 You've also, I think, had an
10 opportunity to talk with Dr. Knight this
11 morning; is that correct?

12 DEFENDANT: Yes, sir.

13 THE COURT: You've communicated
14 with Dr. Knight this morning?

15 DEFENDANT: Yes, sir.

16 THE COURT: All right. It is your
17 desire to go forward here this morning with
18 what has been presented to me as a negotiated
19 sentence; meaning that you, your lawyer and
20 the State have worked out a punishment that
21 you're asking me to accept. Is that correct?

22 DEFENDANT: Yes, sir.

23 THE COURT: Have you discussed
24 that fully with your lawyer?

25 DEFENDANT: Yes, sir.

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1 THE COURT: Your lawyer has been
2 kind enough, certainly helpful, to submit an
3 entire package; which I've made Court's
4 Exhibit 1. It contains her memo, supporting
5 documents in mitigation in this case.

6 (SO ENTERED AS COURT'S EXHIBIT 1)

7 THE COURT: Have you discussed
8 those items with your lawyer, as well?

9 DEFENDANT: Yes, sir.

10 THE COURT: And you want me to
11 consider that package, as well:

12 DEFENDANT: Yes, sir.

13 THE COURT: Are you under the
14 influence of any alcohol or any medication
15 here today, sir?

16 DEFENDANT: I'm taking psycho-
17 tropic medications now, sir.

18 THE COURT: And that has been
19 prescribed by a physician?

20 DEFENDANT: Yes, sir.

21 THE COURT: And are you taking it
22 as prescribed?

23 DEFENDANT: Yes, sir.

24 THE COURT: Does it in any way
25 impair your ability to think and reason?

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1 DEFENDANT: No, sir. It actually
2 helps me think better.

3 THE COURT: That would be my
4 thought. That's the intent, it enhances your
5 ability to make decisions; is that correct?

6 DEFENDANT: Yes, sir.

7 THE COURT: And you're comfortable
8 with your decision here today?

9 DEFENDANT: Yes, sir.

10 THE COURT: Okay. Let's have Dr.
11 Knight come forward and put on her -- Dr.
12 Knight, thank you very much for being here,
13 as well. Appreciate it. If you would, give
14 me your full name for the record?

15 DR. KNIGHT: Up here?

16 THE COURT: That'd be fine. You
17 may go up there (witness stand) or stand
18 where you are, whatever you prefer.

19 DR. KNIGHT: Okay. My name is
20 Susan Knight. I am an assistant profession
21 of forensic psychiatry at the Medical
22 University of South Carolina.

23 I've evaluated Mr. Montgomery
24 several times over the years, with varying
25 results. But I also had a chance to meet

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1 with him this morning. He appears clinically
2 stable this morning. His symptoms are well-
3 controlled with the medication that they have
4 prescribed. I think he's on a good regiment
5 of medication for his symptoms.

6 I spoke with him today about what
7 was going to happen in court and about this
8 case. He does appear to have a rationale and
9 factual understanding of the proceedings
10 against him and he appears to be able to work
11 with his attorney in his defense. So it
12 would be my opinion that he is competent to
13 stand trial today.

14 THE COURT: As a physician, would
15 you also concur with his statement that the
16 medications which he is taking would enhance
17 his cognitive skills/ability?

18 DR. KNIGHT: It appears that it
19 does. Having met with him several times over
20 the years, he's looking very good today. I
21 believe that's a primary result of the
22 medication.

23 THE COURT: Thank you, Dr. Knight.
24 I appreciate your participation in this
25 process. Have a great day.

25 (WHEREUPON WITNESS SWORN)

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1 THE COURT: You heard Dr. Knight's
2 statement this morning that you were able to
3 communicate with her. Is that correct?

4 DEFENDANT: Yes, sir.

5 THE COURT: And you have likewise
6 been able to communicate with your lawyer
7 also?

8 DEFENDANT: Yes, sir.

9 THE COURT: As you stated earlier,
10 you are comfortable going forward with this
11 plea today?

12 DEFENDANT: Yes, sir.

13 THE COURT: And it is your under-
14 standing, having talked with your lawyer,
15 that if I accept the plea that I would
16 sentence you to forty (40) years and give you
17 credit for the time that you have served. Is
18 that your understanding?

19 DEFENDANT: Yes, sir.

20 THE COURT: And is that what you
21 want me to do, sir?

22 DEFENDANT: Yes, sir.

23 THE COURT: What is your plea,
24 sir? Guilty or not guilty?

25 DEFENDANT: Guilty under Alford.

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1 THE COURT: And your lawyer has
2 explained what that means?

3 DEFENDANT: Yes, sir.

4 THE COURT: Basically it means one
5 of two things. Primarily -- this was a case,
6 and in that case the defendant didn't know
7 whether he was guilty of a crime. He just
8 didn't have any recollection. But based on
9 what the State was presenting and the
10 evidence shown, it was his opinion that if he
11 went to trial that there was a probability
12 that a jury could find him guilty beyond a
13 reasonable doubt. Is that your understand-
14 ing?

15 DEFENDANT: Yes, sir.

16 THE COURT: As it relates to this
17 case, you had a chance to discuss with your
18 lawyer, and she's shown you the results of
19 her investigation as to what the State is
20 prepared to prove; is that correct?

21 DEFENDANT: Yes, sir.

22 THE COURT: And a lot of that is
23 contained in the memorandum and submissions
24 that I've reviewed, as well; and that you've
25 reviewed also. You agree with that

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1 presentation, is that correct?

2 DEFENDANT: Yes, sir.

3 THE COURT: And is it your opinion
4 that if you went to trial that there is a
5 probability that you would be found guilty
6 beyond a reasonable doubt of the offense of
7 murder. Is that correct?

8 DEFENDANT: Yes, sir.

9 THE COURT: The benefit that
10 you're hoping to obtain here is to receive a
11 forty-year sentence; is that the benefit?

12 DEFENDANT: Yes, sir.

13 THE COURT: And avoid a life
14 sentence, is that correct?

15 DEFENDANT: Yes, sir.

16 THE COURT: And you consider that
17 a significant benefit?

18 DEFENDANT: Yes, sir.

19 THE COURT: Given your history,
20 past history, and all of the factors that the
21 court would consider in determining what
22 would be an appropriate sentence?

23 DEFENDANT: Yes, sir.

24 THE COURT: Okay. Are you totally
25 satisfied with your lawyer, sir?

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1 DEFENDANT: Yes, sir.

2 THE COURT: And I certainly --
3 the contents of Court's Exhibit 1 reflects
4 what you've observed and I've observed over
5 the years. You believe that she is a
6 competent lawyer and has done a good job for
7 you, sir?

8 DEFENDANT: Yes, sir.

9 THE COURT: Ms. Erhlich, have you
10 had an opportunity to investigate this matter
11 fully on your client's behalf?

12 MS. ERHLICH: I have, Your Honor.

13 THE COURT: And you've shared, as
14 he has indicated, the results of that
15 investigation with him?

16 MS. ERHLICH: I have.

17 THE COURT: After fully consulting
18 with you and discussing it with you, you've
19 explained the significance of an Alford plea?

20 MS. ERHLICH: I have, Your Honor.

21 THE COURT: And you believe that
22 he fully understands and appreciates the
23 significance of that, as well?

24 MS. ERHLICH: I do. I've also
25 has met with him in prior months about an

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1 Alford plea, as well. So I've explained that
2 to Mr. Montgomery, as well.

3 THE COURT: Okay. First of all,
4 do you concur with his assessment of the
5 evidence that if he went to trial that a jury
6 would probably find him guilty beyond a
7 reasonable doubt?

8 MS. ERHLICH: I do.

9 THE COURT: Based on all the
10 factors that the court would consider, do you
11 believe that a forty-year sentence would be
12 in his best interests?

13 MS. ERHLICH: Absolutely.

14 THE COURT: You have been able to
15 communicate with him recently, obviously but
16 there have been times when you were not able
17 to -- he was not able to assist you, is that
18 a fair statement?

19 MS. ERHLICH: It is, Your Honor.

20 THE COURT: But recently he has.
21 Well he's been medicated, he certainly has
22 been?

23 MS. ERHLICH: I've known him now for
24 three and a half years and I think that this
25 is probably the best he has ever been

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1 mentally, as far as the ability to
2 communicate with me.

3 THE COURT: Mr. Montgomery, do you
4 agree with that statement?

5 DEFENDANT: Yes, sir.

6 THE COURT: That -- it's apparent
7 to me today, given your responses as well as
8 just observing you, that you are certainly
9 very aware of what we're doing. You have
10 responded as if -- and I know that -- I'm
11 glad that you are able -- that your
12 condition, that you're able to have had
13 treatment for that condition. It's
14 apparently working at this point. Would you
15 agree with that, sir?

16 DEFENDANT: Yes, sir.

17 THE COURT: Because right now it
18 appears that you are a person that does not
19 suffer from any psychological issues. Do you
20 understand that?

21 DEFENDANT: Yes, sir.

22 THE COURT: Do you think that's an
23 accurate description of what I'm looking at?

24 DEFENDANT: Yes, I do, sir, due to
25 the medication.

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1 THE COURT: The medication?

2 DEFENDANT: Yes, sir.

3 THE COURT: I understand that
4 without the medication that you're a
5 different person. That's clear from the
6 records, everything that I review. But
7 medicated, you feel comfortable this morning?

8 DEFENDANT: Yes, sir.

9 THE COURT: Your lawyer has
10 explained to you that an Alford plea will
11 have, basically, on your record another
12 conviction for murder. Do you understand
13 that?

14 DEFENDANT: Yes, sir.

15 THE COURT: You also understand,
16 notwithstanding an Alford plea, that I can
17 sentence -- without a negotiated sentence
18 that I could sentence you from thirty years
19 to life. Do you understand that?

20 DEFENDANT: Yes, sir.

21 THE COURT: But if I accept the
22 negotiated sentence, I would impose a forty-
23 year sentence. Do you understand that?

24 DEFENDANT: Yes, sir.

25 THE COURT: Do you realize that

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1 you're giving up your right to have a jury
2 trial, sir?

3 DEFENDANT: Yes, sir, I do.

4 THE COURT: And your lawyer has
5 explained to you, and you fully understand,
6 that you don't have to prove your innocence,
7 you don't have to disprove the State's
8 assertions, you don't have to present any
9 evidence whatsoever? You don't have to prove
10 anything whatsoever. The burden rests solely
11 on the State, do you understand that?

12 DEFENDANT: Yes, sir.

13 THE COURT: You also understand
14 that by entering this guilty plea that the
15 State will now not be required to prove you
16 guilty beyond a reasonable doubt?

17 DEFENDANT: Yes, sir.

18 THE COURT: Because under *Alford*
19 that it is sufficient to establish proof of
20 a crime? Do you understand that?

21 DEFENDANT: Yes, sir.

22 THE COURT: Do you also understand
23 that if you went to trial that you would have
24 an opportunity to see and hear the witnesses'
25 testimony against you, and that your lawyer

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1 would have an opportunity to challenge that
2 testimony. Do you understand that?

3 DEFENDANT: Yes, sir.

4 THE COURT: It is your desire to
5 give up that right to confrontation, as well?

6 DEFENDANT: Yes, sir.

7 THE COURT: And your lawyer has
8 indicated to you that you have absolutely no
9 responsibility or obligation to say anything,
10 to prove anything, to present any evidence;
11 do you understand that?

12 DEFENDANT: Yes, sir.

13 THE COURT: But by answering my
14 questions today, you're giving up your
15 Constitutional right to remain silent. Do
16 you realize that, as well?

17 DEFENDANT: Yes, sir.

18 THE COURT: Has anyone threatened
19 you in any way, Mr. Montgomery, to get you to
20 plead guilty under Alford?

21 DEFENDANT: No, sir.

22 THE COURT: Other than the
23 promises which are contained in the
24 negotiated sentence, are there any other
25 promises that have been made to you, sir?

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1 DEFENDANT: No, sir.

2 THE COURT: And, again, it is your
3 desire that I accept the negotiated sentence?

4 DEFENDANT: Yes, sir.

5 THE COURT: Nobody has told you
6 that you should say that or that you have to
7 say that; but that's what you have decided?

8 DEFENDANT: Yes, sir.

9 THE COURT: And you've made this
10 decision with an ability to think clearly?

11 DEFENDANT: Yes, sir.

12 THE COURT: These are your
13 responses, not something that the lawyer
14 said, 'this is what you have to say.' Right?

15 DEFENDANT: Right. Yes, sir.

16 THE COURT: I want you to listen
17 now to Mr. Wetmore as he tells me the facts
18 concerning this case. Then I am going to ask
19 you certain question about that, sir. Okay?

20 DEFENDANT: Yes, sir.

21 THE COURT: Mr. Wetmore?

22 SOLICITOR: Thank you, Judge.

23 This case happened way back on June 23rd,
24 2006. There was a witness that reported a
25 struggle between a man and a woman in the

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1 middle of the night. The next morning the
2 victim, Pamela Fyalls, was found. She was
3 partially naked, there was a sexual undertone
4 to the scene.

5 Examiners came out and they listed
6 the cause of death as blunt sharp (sic)
7 trauma to the neck, head and chest and also
8 strangulation. They deemed it a homicide.

9 The murder weapon was very clearly a
10 bottle found next to the body.

11 The Charleston police department
12 worked pretty hard throughout 2006. Any
13 potential leads they had were unfounded and
14 this investigation went cold at that point.

15 Later on in December of 2009, Mr.
16 Montgomery was accused of killing his
17 roommate, Brandon Jenkins. He stabbed him
18 almost a hundred times. Again, in that
19 incident there was also some sexual undertone
20 or allegation.

21 That case was resolved June 6th of
22 2011. Mr. Montgomery pled guilty but
23 mentally ill, actually on the Monday morning
24 we were to begin the trial.

25 As Your Honor has seen in the

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1 packet, there's a tremendous amount of
2 mitigation.

3 THE COURT: I do.

4 SOLICITOR: Judge Young had that
5 packet probably at least -- probably the same
6 packet, and he took the plea. He gave him a
7 thirty (30) year sentence.

8 Mr. Montgomery was sent up the road
9 to SCDC. Typically, they collected their DNA
10 evidence. That was done here and his matched
11 up to up a 2006 murder.

12 The defendant's DNA, in the form of
13 semen, was found in the victim's mouth.
14 Partial DNA of the defendant was found, in
15 the form of skin cells, underneath the
16 victim's fingernails; which indicates a
17 struggle.

18 Further, on the bottle, the murder
19 weapon, the defendant's fingerprints were
20 identified and also the victim's DNA, in the
21 form of DNA; so clearly making that link as
22 the murder weapon.

23 Based on that, he was charged with
24 this murder from 2006. CPD interviewed him.
25 Initially he didn't have any knowledge and

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1 then later he did admit to having sex with
2 the victim, but he did not admit to killing
3 her.

4 His only conviction, Judge, is that
5 2009 murder, for which he is serving a
6 thirty-year sentence.

7 I have worked with Ms. Erhlich
8 diligently on this case. We do ask that that
9 you accept the forty-year sentence.

10 THE COURT: Thank you so much.

11 SOLICITOR: There is some of the
12 victim family here, Judge. They are here to
13 support what we are doing here today, Judge,
14 and they do not wish to speak.

15 THE COURT: Very well. And they
16 have discussed with you the negotiated
17 sentence?

18 SOLICITOR: Yes, sir.

19 THE COURT: And I appreciate them
20 being here. I'm sorry that they have to be
21 here under these circumstances.

22 Mr. Montgomery, under the *Alford*
23 plea, I am not going to ask you whether you
24 agree with that or support those facts.

25 I am going to ask you this question,

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1 do you believe that the State is prepared to
2 present a witness or witnesses who will
3 testify to those facts -- or certainly an
4 extended version of those facts?

5 DEFENDANT: Yes, sir.

6 THE COURT: And that's a condensed
7 version that you believe that if a jury hears
8 that they would most probably find you
9 guilty, beyond a reasonable doubt?

10 DEFENDANT: Yes, sir.

11 THE COURT: Have you truthfully
12 responded to all of my questions?

13 DEFENDANT: Yes, sir.

14 THE COURT: Did you truthfully
15 respond to any question that Dr. Knight asked
16 you?

17 DEFENDANT: Yes, sir.

18 THE COURT: Were you totally open
19 and candid with her?

20 DEFENDANT: Yes, sir.

21 THE COURT: Have you fully
22 understood all of my questions?

23 DEFENDANT: Yes, sir.

24 THE COURT: And have you
25 completely answered each one?

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1 DEFENDANT: Yes, sir.

2 THE COURT: You realize and under-
3 stand this morning that I will be relying on
4 your responses as being truthful?

5 DEFENDANT: Yes, sir.

6 THE COURT: And completely
7 accurate?

8 DEFENDANT: Yes, sir.

9 THE COURT: And you want me to do
10 that?

11 DEFENDANT: Yes, sir.

12 THE COURT: I find, Mr.
13 Montgomery, that you've certainly had the
14 benefit of very competent counsel in this
15 matter, that you have indicated by your
16 responses to me that you fully understand the
17 consequences of an Alford plea.

18 DEFENDANT: (Affirmative nod).

19 THE COURT: And I find that the
20 factual recitation supports your conclusion
21 that if you went to trial that there is a
22 strong probability that you would be found
23 guilty beyond a reasonable doubt. Therefore,
24 I think an Alford plea is appropriate and I
25 will accept the plea.

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1 I also find that from my
2 observation, as I stated, and now having gone
3 through the entire colloquy, that Mr.
4 Montgomery has demonstrated for me that he is
5 very competent today and understand fully
6 what he is doing. That he's had the ability
7 to communicate with the court and, obviously,
8 has had the ability to communicate with his
9 attorney.

10 Ms. Erhlich, I will be happy to hear
11 now from you, from your vantage point, as to
12 why I should accept the negotiated sentence
13 of forty years?

14 MS. ERHLICH: Thank you, Your
15 Honor. Most of what I would present to the
16 court was in the mitigation package.

17 THE COURT: Yes.

18 MS. ERHLICH: Just for the sake
19 of, you know, Mr. Montgomery and everybody in
20 the courtroom, I don't want to rehash all of
21 that. I think it's obvious he had a really
22 horrific childhood.

23 THE COURT: Yes.

24 MS. ERHLICH: I think that but
25 for everything that happened to him that we

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1 probably wouldn't be here today. There's no
2 way to change that.

3 He just went untreated for so long.
4 The flashbacks are so intense for him. They
5 have calmed down a lot since he's been on the
6 treatment regiment.

7 But if he could offer more closure
8 for the family, I think that he would. He
9 did that in the prior case. But we just
10 can't give them that, we can't give them any
11 answer. I certainly know that he wants them
12 to have closure. That's part of his decision
13 to move forward and, hopefully, they will be
14 able to move forward somewhat.

15 He is doing well at Leiber, getting
16 mental health treatment. He has a job there.
17 He seems to have settled in well.

18 I think, given all the mitigation,
19 that a forty-year sentence would be
20 appropriate, so we would just ask that you
21 accept that and give him credit back to
22 December 8th, 2009.

23 THE COURT: December 8th, 2009?

24 MS. ERHLICH: Yes, sir.

25 THE COURT: Thank you so much.

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1 Mr. Montgomery, is there anything else that
2 you wish to add?

3 DEFENDANT: No, sir.

4 THE COURT: First of all, let me
5 reiterate that the Court fully incorporates
6 Court's Exhibit 1, the entire packet, for the
7 purpose of supporting the decision to accept
8 the negotiated sentence. I believe that it
9 is in the best interest of everyone. I wish
10 that it could provide closure, but at least
11 it provides something. That's to try to
12 help. I pray that the victim's family and
13 loved ones will find some peace in their
14 lives.

15 Mr. Montgomery, not that -- it
16 doesn't excuse anything that you did, but
17 it's something -- and I don't know why this
18 seems to be the year of it, because I've
19 heard -- at least in the governmental part --
20 that we as a society -- I understand that it
21 was 1955, because I spoke to the Rotary Club
22 earlier this year, and our review showed that
23 that is when we deinstitutionalized people
24 with mental illness. We used to put them in
25 hospitals. While everybody didn't need to be

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1 in a hospital, we went the other way -- we
2 went too far. While you may not need
3 hospitalization, people need help. They need
4 psychological help, psychiatric help. I am
5 glad that you have that. I wish that had
6 been available in this case. If it had been
7 maybe none of this would have happened; you
8 wouldn't be where you are and, most
9 importantly, these folks wouldn't be here and
10 their loved one would still be present. I
11 hope that you understand that, we as a
12 society. I hope that we do a better job.

13 I wish you well. The sentence of
14 the Court is that you committed to the
15 Department of Corrections for a term of forty
16 years. I give you credit for time served
17 since December the 8th, 2009. Good luck to
18 you, sir.

19 (HEARING CONCLUDED)
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21
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23
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Guilty Plea Hearing of June 26, 2013

Before The Honorable R. Markley Dennis

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF CHARLESTON)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on June 26, 2013; before The Honorable R. Markley Dennis, Jr.;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison

Deborah Garrison

Charleston, South Carolina
January 23, 2015

FORM 5

STATE OF SOUTH CAROLINA

County of CharlestonTommy Antwan Montgomery 346324
Full name and prison number (if any) of Applicant

v.

State of South Carolina

2013-CP-10-4035
IN THE COURT OF COMMON PLEASAPPLICATION FOR
POST-CONVICTION RELIEFFILED
2013 JUL 11 AM 11:19
JULIE J. ARSTRONG
CLERK OF COURTINSTRUCTIONS - 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 Corr Inst
2. Name and location of Court which imposed sentence Charleston County
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 CS-10-07917
 - (b)

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) June 26, 2013 day for day
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- no
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) I entered a guilty plea under North Carolina v Alford
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) _____
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____
- (b) _____
- (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? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

(a) _____
 (b) _____
 (c) _____

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

(a) your arraignment and plea? Yes
 (b) your trial, if any? _____
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes, Mitigation Packet

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. Megan S. Ehrlich
101 Meeting St. 5th Floor Charleston, SC 29401
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. guilty Plea, Preliminary Hearing,
Sentencing
 ii. _____
 iii. _____

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

time reconsideration

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

STATE OF SOUTH CAROLINA)

County of Charleston)

VERIFICATION

I, Tommy A Montgomery, 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.

Tommy Montgomery

SWORN to and subscribed before me this 8th
day of June, 2013.

Ludhean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

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

I, Tommy A. Montgomery, 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.

Tommy Montgomery
Applicant

SWORN or affirmed to and subscribed before me this
8th day of July, 2013.

Ludreaan Bryant
Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
	)	
	)	2013-CP-10-4035
	)	
Tommy Montgomery, #346324,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed July 11, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-7917). The Applicant was represented by Megan Ehrlich, Esquire.

The Applicant pled guilty as indicted. On June 26, 2013, the Honorable R. Markely Dennis sentenced the Applicant to confinement for a period forty (40) years. The Applicant did not appeal his convictions or sentences.

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

II.

In his Application, the Applicant makes no allegations or claims in support of this application for post-conviction relief. The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed 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).

In his application for post-conviction relief, the Applicant fails to state concisely the grounds on which the allegation that he is being held in custody unlawfully is based. The application is blank. Therefore, the Court should summarily dismiss this application for post-conviction relief.

III.

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

IV.

WHEREFORE, Respondent moves to summarily dismiss the application because the Applicant failed to state a cognizable claim for post-conviction relief.

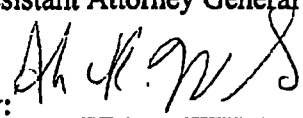
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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

Dec. 3, 2013.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

2013-CP-10-4035

TOMMY MONTGOMERY, #346324

Applicant,

vs

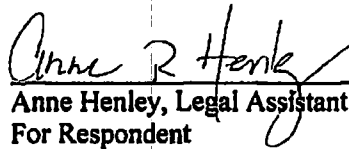
AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,
Respondent.

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

Rodney D. Davis, Esquire
4000 Faber Place Drive
Suite 300
Charleston, SC 29405

DATED this 3rd day of December, 2013


Anne Henley, Legal Assistant
For Respondent

12
28
AT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Tommy Montgomery, #346324,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2013-CP-10-4035

CONDITIONAL ORDER OF DISMISSAL

FILED
2013 DEC 18 AM 10:25
JULIE A. STRONG
CLERK OF COURT
BY

This matter comes before this Court by way of an application for post-conviction relief filed July 11, 2013. Respondent made its return and motion to dismiss on %%.

PROCEDURAL HISTORY

The records before this Court reflect The records before this Court reflect the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-7917). The Applicant was represented by Megan Ehrlich, Esquire.

The Applicant pled guilty as indicted. On June 26, 2013, the Honorable R. Markely Dennis sentenced the Applicant to confinement for a period forty (40) years. The Applicant did not appeal his convictions or sentences.

Before this Court are the records of the Charleston County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's Application for Post-Conviction Relief, and the Respondent's Return and Motion to Dismiss.

B

In his Application, the Applicant makes no allegations or claims in support of this application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. Sec. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

This Court finds that this Application should be summarily dismissed 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).

In his application for post-conviction relief, the Applicant fails to state concisely the grounds on which the allegation that he is being held in custody unlawfully is based. Therefore, this Court summarily dismisses this application for post-conviction relief with prejudice.

CONCLUSION

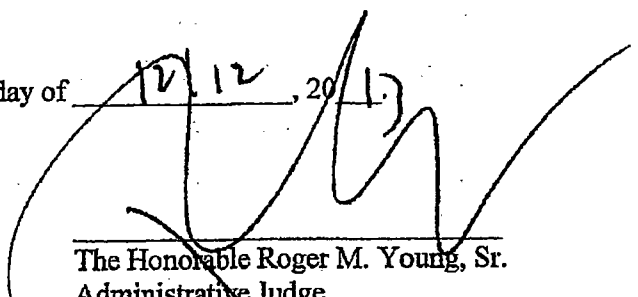
S.C. Code Ann. § 17-27-70(b) states in pertinent part:

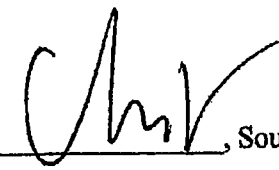
When a court is satisfied, on the basis of the application, the answer or motion, and on the record, that the Applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and give reason for so doing. Applicant shall be given an opportunity to reply to the proposed dismissal.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Ashleigh Wilson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this ____ day of 12.12, 2013


The Honorable Roger M. Young, Sr.
Administrative Judge
9th Judicial Circuit


_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO: 2013-CP-10-4035
TOMMY MONTGOMERY,	)	
Applicant,	)	
vs.	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

**AMENDED APPLICATION FOR
POST CONVICTION RELIEF**

2014 JAN -3 AM 10:39
FILED
KILLIE J. AMSTRONG
CLERK OF COURT

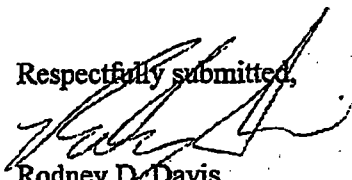
The Applicant, Tommy Montgomery, now having the benefit of appointed counsel and in response to the Conditional Order to Dismiss (received December 20, 2013), alleges the following:

1. Tommy Montgomery is detained at Lieber Correctional Institution under Inmate Number: 346324.
2. He was convicted and sentenced in Charleston County for Murder on June 26, 2013 under Indictment Number: 2011-GS-10-07917.
3. He was represented by Assistant Public Defender, Megan Ehrlich (trial attorney).
4. He entered a plea of guilty under North Carolina v. Alford, 400 U.S. 25 (1970).
5. No appeal was made from the guilty plea.
6. The Applicant filed an *in forma pauperis* application for post conviction relief on July 11, 2013.
7. The undersigned counsel, Rodney D. Davis, was appointed to represent the Applicant on August 21, 2013.
8. The State filed a Motion to Dismiss on December 3, 2013.
9. A Conditional Order of Dismissal was filed on December 18, 2013.
10. Applicant's counsel received the Order on December 27, 2013.

11. Applicant's trial attorney provided ineffective assistance of counsel in failing to fully investigate, analyze and advise her client prior to the case going to trial or entering the guilty plea.
12. The Applicant felt undue pressure to make a decision on a plea offer to avoid a Life Without Parole Notice (LWOP) from the State.
13. The Applicant felt undue pressure to accept a plea offer from the State prior to the offer expiring.
14. The Applicant believed his trial attorney was insufficiently prepared to take the case to trial for a variety of reasons, including:
 - A. Failing to fully investigate the evidence and witnesses in the case.
 - B. Failing to obtain full discovery until June 2013 (the month of the guilty plea).
 - C. Failing to provide full discovery to the Applicant.
 - D. Failing to have the fingerprint evidence independently reviewed.
 - E. Failing to have the DNA evidence independently reviewed.
15. Since the trial attorney failed to complete the previous tasks, the Applicant was denied effective assistance of counsel and entered a guilty plea under Alford.

Wherefore, the Applicant requests that the Conditional Order of Dismissal be rescinded and his Application for Post Conviction Relief be reinstated and a hearing on the merits scheduled.

Respectfully submitted,



Rodney D. Davis
Attorney for Applicant
4000 Faber Place Drive, Suite 300
Charleston, SC 29405
Davis@LowcountryLawOffice.com
(843) 323-4353

January 3, 2014

CC 44
HG
AT

AWA

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case #: 2013-CP-10-4035

Tommy Montgomery,

Applicant,

vs.

State of South Carolina,

Defendant.

ORDER

FILED
2014 JAN 30 AM 12:37
CLERK OF COURT

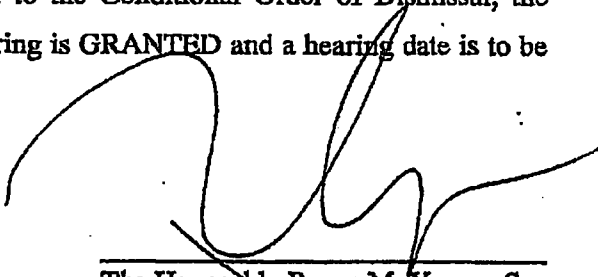
This matter comes before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed July 11, 2013. The State made its Return and Motion to Dismiss dated December 6, 2013, requesting that the application be summarily dismissed.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated December 12, 2013 and filed December 18, 2013, provisionally dismissing this action. This Court gave the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant's attorney was served on December 20, 2013.

The Applicant submitted a response entitled "Amended Application for Post Conviction Relief", which was filed on January 3, 2014 and served on the State the next day. This Court reviewed the Applicant's response and finds that the allegations are sufficient to warrant a hearing.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Applicant's Amended Application for Post Conviction Relief to the Conditional Order of Dismissal, the Applicant's request for a full PCR evidentiary hearing is GRANTED and a hearing date is to be set immediately.

IT IS SO ORDERED.


The Honorable Roger M. Young, Sr.
Ninth Judicial Circuit

1/27, 2014

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Tommy Montgomery,	)	CASE NO. 2013-CP-10-4035
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
The State of South Carolina,	)	
	)	
DEFENDANT.	)	
	)	

July 21, 2015 and July 31, 2015

Charleston, South Carolina

B E F O R E:

The Honorable Roger E. Henderson

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

Rodney D. Davis, Esquire
For the Applicant

J. Rutledge Johnson, Esquire
For the Respondent

Phyllis Norton, CVR, *Nationally Certified Verbatim Court Reporter*
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

(AW) - DENOTES STATE'S WITNESS

(RW) - DENOTES DEFENSE WITNESS

PCR Hearing	--	03
Exhibits - None Proffered		

WITNESSES(AW) Tommy Montgomery:

Direct Examination by Mr. Davis	--	11
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Cross-Examination by Mr. Johnson	--	25
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(SW) Megan Ehrlich:

Direct Examination by Mr. Davis	--	29
---------------------------------	----	----

Cross-Examination by Mr. Johnson	--	32
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(AW) Tommy Montgomery - RECALL:

Direct Examination by Mr. Davis	--	41
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Cross-Examination by Mr. Johnson	--	42
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CERTIFICATION OF TRANSCRIPT -- 49

Look for an original signature in blue ink on the certification sheet to verify that the court reporter has certified the transcript you are viewing.

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 (WHEREUPON, July 21, 2015, 5:28 p.m, discussions regarding
2 scheduling were had; and this case will begin today and then
3 resume Thursday, July 23, 2015.)

4 THE COURT: All right. Mr. Johnson, if you would
5 identify this matter ---

6 MR. JOHNSON: Yes, Your Honor.

7 THE COURT: --- and give me the basics and I will
8 question him about the risks and then we will adjourn for
9 the day.

10 MR. JOHNSON: Yes, Your Honor. This is Tommy
11 Montgomery versus the State of South Carolina. It is Case
12 Number 2013-CP-10-4035.

13 Mr. Montgomery was indicted at the December 2011 term
14 of Charleston County Grand Jury for murder. On June 26th,
15 2013, he pled guilty as indicted before the Honorable R.
16 Markley Dennis, Jr. He was sentenced to a negotiated 40
17 years.

18 There was no appeal filed. However, there was a timely
19 PCR application filed July 11th, 2013. The State filed its
20 return and motion to dismiss for failure to state a claim on
21 December 6th, 2013.

22 There was a conditional order of dismissal filed
23 December 18th, 2013. Applicant's counsel, Mr. Davis, filed
24 an amended application January 3rd, 2014.

25 The Honorable Roger Young issued an order granting an

1 evidentiary hearing January 30, 2014.

2 And obviously he is represented here today by Mr.
3 Rodney Davis.

4 THE COURT: Okay. Did you swear the witness?
5 (WHEREUPON, the witness was duly sworn.)

6 THE COURT: Okay. Mr. Montgomery, how old are you,
7 sir?

8 MR. MONTGOMERY: Thirty-four.

9 THE COURT: Okay. How far did you go in school?

10 MR. MONTGOMERY: Graduated.

11 THE COURT: Graduated what?

12 MR. MONTGOMERY: High school.

13 THE COURT: High school. Any training beyond high
14 school?

15 MR. MONTGOMERY: Yeah, I went to college.

16 THE COURT: All right. How long did you go to college?

17 MR. MONTGOMERY: About a year.

18 THE COURT: About a year. Where did you go?

19 MR. MONTGOMERY: Miller Mott. Miller Mott Technical
20 College.

21 THE COURT: Okay. All right, sir. You have filed this
22 application for post-conviction relief.

23 MR. MONTGOMERY: Yes, sir.

24 THE COURT: My question to you is what are you seeking
25 from this petition; what do you think you are going to get

1 or what do you want to get out of this?

2 MR. MONTGOMERY: I would like to get a new trial so I
3 can be able to get my fair chance.

4 THE COURT: Okay, your fair chance. Okay. All
5 right. Now counsel before this matter was called did --
6 was there some mention that this could possibly be a result
7 of a life without parole; is this the one we were talking
8 about?

9 MR. JOHNSON: Yes, sir, if he is granted this he
10 already has another murder that is 30 years that has been
11 locked up on PCR. He failed to file timely. We just got an
12 order of dismissal on that case. And so if he goes back on
13 this then it is a second most serious and eligible for life
14 without parole. Let alone it is a murder, so it is eligible
15 in and of itself.

16 THE COURT: For -- yeah, right.

17 Okay. Mr. Montgomery.

18 MR. MONTGOMERY: Yes, sir.

19 THE COURT: Do you understand the risk involved in
20 going forward with this hearing today?

21 MR. MONTGOMERY: Yes, sir.

22 THE COURT: If I grant you the relief that you are
23 seeking, which is a new trial, ---

24 MR. MONTGOMERY: Yes, sir.

25 THE COURT: --- then you could possibly end up serving

1 a life sentence, possibly a life sentence without parole; do
2 you understand that?

3 MR. MONTGOMERY: Yes, sir.

4 THE COURT: You clearly understand that?

5 MR. MONTGOMERY: Yes, sir.

6 THE COURT: Okay. And you are willing to take that
7 risk?

8 MR. MONTGOMERY: Yes, sir.

9 THE COURT: Had enough time to talk to Mr. Davis about
10 this?

11 MR. MONTGOMERY: Yes, I did.

12 THE COURT: Has he answered all of your questions to
13 your satisfaction?

14 MR. MONTGOMERY: Yes, he has.

15 THE COURT: Okay. Has anybody threatened you to get
16 you to do this?

17 MR. MONTGOMERY: No, sir.

18 THE COURT: Has anybody promised you anything to get
19 you to do this?

20 MR. MONTGOMERY: No, sir.

21 THE COURT: Are you under the influence of any alcohol
22 or drugs today?

23 MR. MONTGOMERY: I took my mental health meds last
24 night. But that's about it.

25 THE COURT: Okay. So you do have some mental health

1 issues?

2 MR. MONTGOMERY: Yes, sir.

3 THE COURT: Okay. And you have been -- obviously you
4 are being treated for that?

5 MR. MONTGOMERY: Yes, sir.

6 THE COURT: Okay. What is your mental health issue?

7 MR. MONTGOMERY: Bipolar and PTSD.

8 THE COURT: Okay. But you do take medication to
9 control your PTSD and the bipolar condition?

10 MR. MONTGOMERY: Yes, sir.

11 THE COURT: Okay. All right. Does your condition or
12 the medication you are taking interfere with your ability to
13 think, reason and understand in any way?

14 MR. MONTGOMERY: No, sir.

15 THE COURT: You have understood everything I have
16 discussed with you thus far?

17 MR. MONTGOMERY: Yes, sir.

18 THE COURT: Okay. Mr. Davis, do you have any
19 questions?

20 MR. DAVIS: I don't, Judge. If I may expand on that of
21 just slightly. The diagnosis of bipolar and PTSD, you know,
22 obviously is quite some time ago. He has been incarcerated
23 at Lieber for quite some time. They take him regularly for
24 medical checkouts to Kirkland and also to outside medical
25 for him to maintain treatment.

1 I certainly appreciate the State they had him
2 transported in on Friday so at the county jail we could get
3 him on his meds so that when he came to court today.

4 He has been very involved in this case. He has been
5 very helpful in his case. He assisted me on the amended
6 complaint. We talked about it many times.

7 Having said that, I believe he fully understands what
8 he's doing. I, of course as you have gone over, I have
9 relayed my concerns to him simply because of the prior
10 conviction. So not only would murder carry 30 to life
11 potentially for anyone, with the State to even supersede
12 that and simply serve life notice that it is life or nothing
13 if convicted they can certainly do that.

14 I know we have talked about it. I am prepared to go
15 forward. Obviously not today. But I will be prepared to go
16 forward later in the week. I have advised him my concerns
17 on that though.

18 THE COURT: Okay. All right. Do we need to do any
19 kind of order like we did earlier to keep him? Okay, my
20 clerk is a step ahead -- radar is ahead of us, and he has
21 already ---

22 THE CLERK: We are trying to stay ahead of it for you,
23 Judge.

24 THE COURT: Okay. All right, sir. Okay. All right.
25 then we will recess at this point. We will reconvene this

1 hearing at some point in time on Thursday.

2 (WHEREUPON, July 21, 2015; 5:41 p.m., hearing was recessed
3 until July 23, 2015.)

4 (WHEREUPON, resume PCR hearing July 23, 2015, 9:53 a.m.)

5 MR. JOHNSON: This is Tommy Montgomery versus The State
6 of South Carolina, 2013-CP-10-4035. Mr. Montgomery was
7 indicted at the December 2011 term of the Charleston Grand
8 Jury for murder.

9 On June 26, 2013 he pled pursuant to a negotiated
10 sentence as indicted before the Honorable R. Markley Dennis,
11 Junior, and he was sentenced to 40 years. There's no appeal
12 filed. However, there was a timely PCR application filed
13 July 11th, 2013.

14 The State filed its return and motion to dismiss
15 for failure to state a claim on December 6th, 2013.
16 Conditional order of dismissal was filed thereafter on
17 December 18th, 2013. Applicant's counsel filed an amended
18 application on January 3rd, 2014. The Honorable Judge Young
19 issued an order granting an evidentiary hearing on January
20 30th, 2014. And he is represented here today by Mr. Rodney
21 Davis.

22 THE COURT: Okay. I believe we went through the risk
23 issue the other afternoon, did we not so.

24 MR. DAVIS: Your Honor did that on Tuesday when we are
25 here previously. So I appreciate you getting that on the

1 record. The other thing if I could put this on the record
2 again today: Your Honor gave me a moment -- several minutes
3 just now to speak with my client again. But just to put on
4 the record, he does take several medications while he is
5 either at the Department of Corrections County or the county
6 jail.

7 He has been at the county jail since last Friday. And
8 it is my -- I have just had a very clear conversation with
9 him. I reminded him about what we did on Tuesday, reviewing
10 some issues in the case just briefly.

11 But I have had very clear conversation with him. I
12 have no doubts about his competency and ability to go
13 forward today. But just to be clear, he is on a cocktail
14 of medications that assist him in being clearheaded.

15 THE COURT: Okay. Mr. Montgomery, would you stand.

16 Go ahead and swear him. Here will be fine.

17 (WHEREUPON, the witness was duly sworn.)

18 THE COURT: Mr. Montgomery, are you aware of what is
19 taking place today?

20 MR. MONTGOMERY: Yes, sir.

21 THE COURT: Your attorney told me that you have got
22 certain medications that you take; but do they affect your
23 ability to think, reason and understanding in any way?

24 MR. MONTGOMERY: No, sir.

25 THE COURT: Okay. So you have a complete understanding

1 of what we are doing here today?

2 MR. MONTGOMERY: Yes, sir.

3 THE COURT: The other afternoon we went through the
4 risks in going forward with this application. Do you
5 remember that?

6 MR. MONTGOMERY: Yes, sir.

7 THE COURT: And is your response still the same that
8 you wish to go forward?

9 MR. MONTGOMERY: Yes, sir.

10 THE COURT: Okay.

11 All right. You may call your first witness, Mr.
12 Davis.

13 MR. DAVIS: Thank you, Your Honor. We would call Mr.
14 Montgomery to the stand.

15 (WHEREUPON, the witness was duly sworn.)

16 THE CLERK: State your first and last name and spell
17 your last name loudly and clearly into the microphone.

18 MR. MONTGOMERY: Tommy Montgomery, M-O-N-T-G-O-M-E-R-Y.

19 **DIRECT EXAMINATION BY MR. DAVIS OF TOMMY MONTGOMERY:**

20 Q. Mr. Montgomery, you were convicted in Charleston County
21 on a murder charge, and that is the subject matter of this
22 PCR; is that accurate?

23 A. Yes, sir.

24 Q. And your attorney throughout the case and up through
25 the guilty plea was Megan Ehrlich with the Public Defender's

1 Office?

2 A. Yes, sir.

3 Q. Is she in court with us today?

4 A. Yes, she is.

5 Q. Okay. Now leading up to that guilty plea there are
6 some complaints you have about her representation; is that
7 accurate?

8 A. Yes, sir.

9 Q. And have you reviewed with me the amended application
10 that was filed on your behalf from January 3rd, 2014?

11 A. Yes, we have.

12 Q. I would like to go through your complaints one by one
13 if we could. One of the issues you had with her
14 representation dealt with investigation of this case; is
15 that accurate?

16 A. Yes, sir.

17 Q. Okay. That is a pretty broad comment. Let me ask you
18 first of all how many times would you say you met with Ms.
19 Ehrlich before this plea was entered?

20 A. Oh, I would say she -- she met with me pretty
21 frequently throughout the time span of the case.

22 Q. Okay. Now during these conversations about this case
23 were you able to receive from her your discovery or your
24 Rule 5 materials?

25 A. We received some of it, but the month of the guilty

1 plea we noticed that there was some of it missing. So we
2 didn't get the rest of it until June 20th of 2013, six days
3 before the guilty plea was entered.

4 Q. And can you tell the judge if you recall what the
5 substance of that late discovery was?

6 A. It was basically the evidence with the murder weapon
7 and some DNA analyst.

8 Q. And up to that point had she reviewed the evidence
9 against you prior to receiving some of that DNA evidence?

10 A. Yeah, we went over some of the fingerprints and stuff
11 like that; but we never noticed that the rest of it was
12 missing.

13 Q. But on that very point you were aware prior to six days
14 before the plea that there was some fingerprint evidence in
15 this case; is that right?

16 A. Yes, sir. Actually we found out in January when the
17 plea was put on the table.

18 Q. To the fingerprint evidence specifically, do you feel a
19 sufficient investigation was done on that part of this case?

20 A. I really don't because from my understanding my palm
21 print was the one that was found and not my actual -- my
22 actual fingerprints.

23 Q. Did you and Ms. Ehrlich talk about ways to try to deal
24 with that evidence, the palm print on some broken bottle
25 glass; did you discuss that?

1 A. Not to my knowledge. I am not clear about that right
2 now. I don't remember.

3 Q. Do you recall any discussions about if this had gone to
4 trial how she might try to address that in front of a jury?

5 A. It was -- it was discussed because of the way how the
6 palm print was on the bottle, but me personally I really
7 didn't go too deep into it.

8 Q. Just for a little more clarity for the court tell the
9 judge what you mean about how the palm print was on the
10 bottle and the relevance of that.

11 A. Okay. The relevance of it is because my palm print was
12 actually on the body of the bottle and it was like in a
13 drinking motion instead of like a stabbing motion.

14 So it didn't -- it really didn't establish that it was
15 used as a murder weapon; it was established that it was used
16 as a drinking tool.

17 Q. Is that something that Ms. Ehrlich would have discussed
18 with you or that you had in your on mind?

19 A. That was something that Ms. Ehrlich discussed with me.

20 Q. Okay. Back for a second about the DNA evidence you got
21 a few days before the court date, what is your opinion on
22 whether that was fully investigated and analyzed or not?

23 A. I feel it wasn't fully investigated and analyzed
24 because it came in July 20th and the guilty plea was
25 supposed to be entered on July 26th which gave a new

1 precedent to make the guilty plea because of the
2 investigation.

3 Q. Prior to going to court did Ms. Ehrlich talk with you
4 about your right to go to trial and not enter a plea?

5 A. Yes, she did. But being that the evidence that was
6 stacked against me and I had a previous charge already, it
7 was basically either go to trial and get a life sentence or
8 go ahead and take the guilty plea. And the guilty plea was
9 already on the table for like six months anyway.

10 Q. Well, the fact that the plea offer had been on the
11 table for six months did that -- did that cause you to think
12 you would have more time or less time to accept it?

13 A. Less time because being that I was already there for so
14 long I didn't want the State to go ahead and take it back
15 and then I get a life sentence for it.

16 That is why -- that is when we came up with going ahead
17 and doing North Carolina versus Alford plea because being
18 that I didn't do it but the evidence that was stacked
19 against me more than likely I would have been convicted. So
20 I basically lost life to save life.

21 Q. Let's talk a little bit more about that particular
22 fact. In your conversations with Ms. Ehrlich did you feel
23 that if you had asked to go to trial that that was a
24 legitimate option for you based on her work on the case?

25 A. I chose to take the guilty pleas because being that I

1 already had one previous charge of the same by statute. By
2 Statute 17-2545 states that two most serious offenses equals
3 a life sentence. And I didn't want to get a life sentence,
4 so that's why I went on ahead and took the plea because I
5 was afraid that the State would take the plea off the table.

6 Q. Did you feel that the option for trial was a viable
7 option based on Ms. Ehrlich's preparation?

8 A. At the end of it where towards the guilty plea I didn't
9 because we only had six days after we got the rest of the
10 evidence and that wasn't enough time to actually go through
11 a full investigation.

12 Q. What is your understanding as far as Ms. Ehrlich's
13 investigation of witnesses in this case?

14 A. There was no witnesses -- by the time I went to court
15 there was no witnesses that they could have bring because
16 every suspect that was leading up to the case no one could
17 find any of them and there was -- we was going over third-
18 party guilt.

19 If somebody else -- there was a third suspect, but
20 nobody ever could find out who it was or try to look up
21 anything about the person or whatever. So basically I was
22 the only that they had in custody that they could actually
23 give a charge to.

24 Q. Let me clear that up a little better then. One of the
25 discussions that you and Ms. Ehrlich had about trial

1 strategy would have been potentially third-party guilt; is
2 that right?

3 A. Yes, sir.

4 Q. Was there a -- was there a specific other party that
5 y'all were focused on?

6 A. There were -- there were other suspects leading up to
7 the case. There was one suspect that actually dug a grave
8 for the victim; and somebody told the detective about it who
9 was over the case, Detective Goldstein, and had pictures of
10 it, Detective Goldstein actually standing in this grave.

11 But at the same time there was nobody at all that could
12 have put my name into the investigation throughout the whole
13 time from 2006 until 2011 when I got charged with it. My
14 name never came up into the investigation at all. Detective
15 Goldstein actually stated that on the record.

16 MR. JOHNSON: Objection. That is hearsay, Your Honor.

17 THE COURT: Sustained.

18 Q. You can talk about what you know ---

19 A. Yes, sir.

20 Q. --- and what you said. But as far as what someone else
21 said, you are not going to be able to do that, okay?

22 A. Okay.

23 Q. As far as this specific other suspect and this grave
24 that was found, did your attorney have information on that?

25 A. She had the pictures.

1 Q. Okay. What's your understanding about the
2 investigation of that potential suspect?

3 A. The investigation went cold. They arrested some of
4 them. They -- the DNA analyst is on some of them. But no
5 one actually got convicted for the charge.

6 Q. Was there a name of this supposed third -- other
7 suspect?

8 A. Not that I know of.

9 Q. You don't remember a nickname?

10 A. I remember one nickname throughout the case a guy named
11 cave man.

12 Q. Now you talked about some law-enforcement activity
13 there, some arrests and that kind of thing; but as far as
14 your defense team what are you aware that they did about
15 that issue or that suspect?

16 A. They couldn't find any other suspects, but there they
17 was doing an investigation of my case so nothing was done to
18 them.

19 Q. Mr. Montgomery, I'm going to circle back around a
20 second. Forgive me. I want to go back to the forensic
21 evidence, the fingerprint and the DNA. Do you know whether
22 your defense team attempted to independently test either of
23 those?

24 A. From my knowledge I believe that they did. But I don't
25 think it was analyzed very good because there is a document

1 stating that from the Medical University coroner that there
2 was certain evidence found and then a SLED investigation had
3 something different.

4 Q. I'm sorry, can you go through that again. I apologize.

5 A. The coroner from MUSC when they did the coroner's
6 report and everything they had something different as far as
7 with the DNA. And SLED had something totally different from
8 theirs as well. Neither one of their paperwork matched up.

9 Q. And did you have discussion about that discrepancy?

10 A. No, sir. I -- I didn't notice it until after the plea
11 and I started going through the files myself after I got
12 everything.

13 Q. So that issue was never discussed between you and your
14 attorney?

15 A. No, sir.

16 Q. Is it fair to say that -- is it accurate that there
17 was -- there is no eyewitness that would have been called at
18 the trial of this case?

19 A. No, sir.

20 Q. Is it fair to say that the evidence in the case that
21 linked you to this crime was that forensic evidence, the DNA
22 and the fingerprints?

23 A. Just that only.

24 Q. There was -- there was another complaint you have about
25 the DNA collection -- or the collection of your DNA; is that

1 right?

2 A. Yes, sir.

3 Q. Can you tell the judge what your complaint about the
4 DNA collection is?

5 A. My complaint about that was when I was at -- I was
6 already sentenced with my first charge and I was at the
7 Gillian Center at Kirkland Yard. That is the psychiatric
8 hospital for the State -- the Department of Corrections.

9 And I was there for a month. And Detective Goldstein
10 came up there to question me. I was under medication and I
11 just had took my new medication when he came up there to
12 test me.

13 And after he talked to me or whatever he himself went
14 to Richland County and got a search warrant for the buccal
15 swab. After he got the buccal swab from me he went and he
16 took and dropped it off at SLED or whatever.

17 But when I came down in January of 2013 for the case
18 they had to do a whole nother DNA buccal swab because the
19 first one wasn't done right.

20 MR. JOHNSON: Objection, and move to strike all of that
21 testimony. Whatever the detective did is irrelevant for
22 whether or not counsel was ineffective, Your Honor.

23 MR. DAVIS: I would ask you not strike all of it.

24 THE COURT: I will overrule the objection. I will give
25 it what weight I deem appropriate.

1 MR. DAVIS: Thank you.

2 MR. JOHNSON: Thank you, Your Honor.

3 Q. Did you and Ms. Ehrlich discuss those -- the legal
4 issues about that seizure of evidence?

5 A. She stated to me that the search warrant was messed up
6 and that the State had to do another one. And she told me
7 don't be surprised that when I get to County that if they
8 come and do another search warrant for a buccal swab.

9 Q. Did she ever discuss how she might attempt to suppress
10 that evidence if this case went to trial?

11 A. Not that I can remember.

12 Q. Mr. Montgomery, I think you have stated clearly some of
13 the reasons why you entered the plea.

14 A. Yes, sir.

15 Q. But did you feel you had a legitimate option other than
16 pleading guilty?

17 A. No, sir, I didn't.

18 Q. And other than the already stated prior sentence and
19 life without parole ---

20 A. Yes, sir.

21 Q. --- why did you feel this could not have been a trial
22 back then?

23 A. Because I didn't feel it would have been a good trial
24 back then because for the lack of evidence that we had as I
25 was chilling and right before the guilty plea. And at the

1 same time, like I stated before, being that I already was
2 convicted on one serious -- most serious offense I didn't
3 want to get a life sentence.

4 So when we sat down and she went to the prosecutor and
5 she asked them about a plea deal and they gave me a plea
6 deal I felt that that was the best option at the time.
7 Because I didn't have too much knowledge of the law or
8 anything like that as far as my discovery or anything.

9 Q. As far as that Rule 5 coming in late was there any
10 discussion about requesting a continuance?

11 A. No, sir.

12 Q. If you had asked for more time what was your
13 understanding about whether the offer would remain open or
14 not?

15 A. I -- my thinking -- my understanding was if I were to
16 ask for more time that the State would have took the offer
17 off of the table and they would have gone ahead and seeked
18 live without parole.

19 MR. DAVIS: Your Honor, if I could have just a moment?

20 THE COURT: Yes, sir.

21 BY MR. DAVIS:

22 Q. You testified just a bit ago about some contact with
23 law-enforcement while you are at Gilliam in Columbia; is
24 that correct?

25 A. Yes, sir.

1 Q. Other than a swab being done was there also a
2 discussion of law-enforcement?

3 A. Yes, sir, Detective Goldstein when he first came to
4 Kirkland Yard to the Gilliam Center I was pulled out of my
5 cell and I was taken to operations where I sat down with
6 him to be questioned about the case.

7 But at the -- at the time when he came to question me I
8 was on my medication. I had just took my new meds at the
9 time and I was taking medication three times a day. And I
10 was under the influence of the medication when he did it.

11 Q. If you recall, what medication were you taking then?

12 A. It was a while ago. And my medication has been
13 changing up so much since then. So I really can't remember.

14 Q. Can you tell the court is it the same -- you are on
15 medication today; we have already put that on the record;
16 correct?

17 A. Yes, sir.

18 Q. The medical issues that you are on medication for today
19 would have been the same issues you are on medication then
20 for at Gilliam?

21 A. Yes, sir.

22 Q. Can you tell the judge what those issues are?

23 A. Bipolar and PTSD. Being that I as I was growing up I
24 witnessed my father kill my mother at the age of nine, and
25 when I moved to Virginia with my mother's brother I was

1 molested from the age of nine to fourteen.

2 Q. You mentioned about the investigation going cold as to
3 other suspects or witnesses. Do you recall that?

4 A. Yes, sir.

5 Q. When is it that you are aware -- when were you made
6 aware that your defense team could not find for example the
7 witness who discovered the body?

8 A. I wasn't aware of that until right around about the
9 time of making the guilty plea or whatever. Because the
10 private investigator that we had hired, he went around to
11 the neighborhood. He was canvassing the neighborhood to try
12 to find people -- to find people. But he couldn't find
13 anybody.

14 The only person he did find was a guy who was dealing
15 with the case. He was the witness that actually showed the
16 detective the gravesite. And he was at McDougal
17 Correctional Facility. But once he got out nobody knew
18 where he was at.

19 Q. Mr. Montgomery, I believe we've covered the grounds
20 that you wanted me to. But since this is your last shot in
21 State court if there is anything that we have not covered
22 that you want the judge to know about that you have
23 complaints as far as Ms. Ehrlich's representation if you can
24 let the judge know those issues.

25 A. Right now the only issues that I really have was just

1 basically the timeframe of the guilty plea being that it was
2 six days after I got the last information dealing with the
3 case as far as like statements and stuff like that I feel
4 like that wasn't fully investigated.

5 I felt that as far as like trying to find witnesses
6 dealing with the case that that wasn't fully investigated.
7 And I don't -- I felt that at the same time being that I did
8 not commit the crime and I was being charged with it, it was
9 basically prior bad acts that is the reason why I was
10 actually given a charge and convicted for it.

11 MR. DAVIS: Thank you, Your Honor. That's all the
12 questions I have.

13 And thank you, Mr. Montgomery. The attorney may have
14 some questions for you.

15 THE COURT: Mr. Johnson.

16 **CROSS-EXAMINATION BY MR. JOHNSON OF TOMMY MONTGOMERY:**

17 Q. Mr. Montgomery, these witnesses you speak of, are they
18 here in the courtroom today to testify on your behalf?

19 A. No, sir.

20 Q. Okay. And you have testified that you pled guilty in
21 order to avoid a life sentence, correct?

22 A. Yes, sir.

23 Q. So now what you are saying is that you want to undue
24 the 40 years and go back and face that life sentence, don't
25 you?

- 1 A. Yes, sir.
- 2 Q. Okay. But at the time you pled because you wanted to
3 avoid it?
- 4 A. Yes, sir, because I had no knowledge of the law.
- 5 Q. But you actually had already pled guilty beforehand ---
- 6 A. Yes, I did.
- 7 Q. --- to another murder, right?
- 8 A. Yes, I did.
- 9 Q. Okay. So you had gone through a guilty plea before?
- 10 A. Yes, sir.
- 11 Q. And you had a PCR did you not?
- 12 A. Yes, sir.
- 13 Q. And you withdrew that PCR, correct?
- 14 A. Yes, I did.
- 15 Q. Okay. So you have been through this process before?
- 16 A. I didn't actually go to a PCR. I withdrew my PCR right
17 at the motion hearing for a psych expert.
- 18 Q. But you have gone through the guilty plea process
19 before?
- 20 A. Yes, I have.
- 21 Q. Okay. And you pled guilty on your own free will, did
22 you not?
- 23 A. Yes, I did.
- 24 Q. Okay. And you were satisfied with your attorney during
25 the guilty plea, correct?

1 A. Yes, I did.

2 Q. But now apparently you are not satisfied with her?

3 A. Yes, sir.

4 Q. Is that correct?

5 A. Yes, sir.

6 Q. Okay. So did you lie during the guilty plea that you
7 were satisfied with Ms. Ehrlich's representation?

8 A. I basically pled in North Carolina versus Alford for
9 the simple fact that I was trying to use like to say like
10 because I didn't do this crime but the evidence that was
11 stacked against me more than likely I would have went to
12 trial and I would have lost.

13 Q. That is not my question. My question was did you lie
14 during the guilty plea when you said you were satisfied with
15 her representation?

16 A. I wouldn't say I lied.

17 Q. But now you are saying -- so you were satisfied then
18 but now you aren't satisfied?

19 A. Yes ---

20 Q. You can have it both ways. Which -- are you lying
21 today or are you lying ---

22 MR. DAVIS: Objection, Your Honor. It is badgering.

23 THE COURT: I think he has answered the question.

24 Q. Nobody threatened you to plead guilty?

25 A. No, sir.

1 Q. Nobody promised you anything other than that
2 negotiation, correct?

3 A. No, sir.

4 Q. And the judge read your constitutional rights and you
5 waived the right to a jury trial, correct?

6 A. Yes, I did.

7 Q. And that includes the right to challenge any evidence
8 against you, correct?

9 A. Yes, sir.

10 Q. And to cross-examine any witnesses that may testify
11 against you, correct?

12 A. Yes, sir.

13 Q. And you did that freely and voluntarily?

14 A. Yes, I did.

15 MR. JOHNSON: That's all the questions I have, Your
16 Honor.

17 THE COURT: Anything else, Mr. Davis?

18 MR. DAVIS: No redirect, Your Honor. But if I could
19 have a moment with my attorney -- or with my client. It has
20 been a long week, Your Honor.

21 THE COURT: Yes, sir, it has.

22 (WHEREUPON, break was had.)

23 MR. DAVIS: ??? Call Megan Ehrlich to the stand ???

24 Your Honor, so that my client can take notes during
25 this can he have -- are you right-handed?

1 MR. MONTGOMERY: Uh-huh.

2 THE COURT: ... his right hand unshackled so he can
3 take notes?

4 THE COURT: I don't have a problem with that.

5 MR. DAVIS: Thank you, Your Honor.

6 THE COURT: You can unshackle his right hand.

7 (WHEREUPON, deputy complied.)

8 (WHEREUPON, the witness was duly sworn.)

9 THE CLERK: Once seated state your first and last name
10 and spell your last name loudly and clearly into the
11 microphone.

12 THE WITNESS: Megal Ehrlich. My last name is
13 E-H-R-L-I-C-H.

14 **DIRECT EXAMINATION BY MR. DAVIS OF MEGAN EHRLICH:**

15 Q. Ms. Ehrlich, just a couple of matters that I want to
16 focus on. Mr. Montgomery testified that this offer had been
17 made -- I believe his testimony was in about five or six
18 months it had been on the table. Do you recall that as
19 being accurate?

20 A. I believe the offer was made in January of 2013. And
21 the State agreed to keep it open as of February of 2013
22 because there were issues with the DNA and some other
23 discovery that we needed prior to him making a decision.

24 Q. So it's also accurate that DNA evidence from the State
25 came in later than much of the other discovery; is that

1 fair?

2 A. It is a little more complicated than that. There was
3 DNA evidence that we had already received that had been
4 tested by SLED. The State figured out that they had an
5 issue with the search warrant so when he was -- he was
6 actually here in Charleston for court I think in January of
7 2013. They got a second search warrant for his DNA, and so
8 that was the DNA testing that wasn't back until closer to
9 his plea hearing.

10 Q. As to the DNA evidence that you received close to the
11 plea, ---

12 A. Right.

13 Q. --- did you attempt to have that independently
14 analyzed?

15 A. I didn't have that independently analyzed. I had it
16 previously -- the prior testing was analyzed.

17 And the focus of having an expert in that situation was
18 more to try to help us figure out how to deal with that at
19 trial more than anything else.

20 Q. Very quickly, the other forensic evidence, the
21 fingerprint evidence, did you attempt to have that
22 independently analyzed?

23 A. I did. I retained an expert who analyzed both a
24 fingerprint and a palm print on a glass bottle. Again to
25 verify results, but also more importantly to help deal with

1 it at trial.

2 Q. Mr. Montgomery pled on June 26, 2013. Do you recall
3 when this, for lack of a better term, last batch of
4 discovery came in in relation to that date?

5 A. I can't -- I can't give you an exact date because
6 things were kind of continuously coming in. The most
7 significant thing I think we probably received would have
8 been the updated DNA testing.

9 And then in addition to that when he is talking about
10 other suspects there were other people's DNA that was tested
11 and we could never really get a true answer as to why those
12 people were suspects. And so that is some of the
13 information that was coming in leading up to his plea
14 hearing.

15 And there really was no good explanation for why their
16 DNA was tested. It's like the police were desperate at that
17 point, and, you know, so-and-so was in the paper for this
18 case or so-and-so was a suspect in a rape case. They just
19 threw those -- threw them into the like testing process.
20 But nothing that was really going to help us.

21 Q. As this -- as Rule 5 was continuously arriving and most
22 importantly that DNA close to the actual court date did you
23 ever request a continuance of the court date?

24 A. I didn't. He was pretty clear that he wanted to plead
25 guilty. I think he officially accepted with us June 12th.

1 We didn't discuss having the second batch of DNA
2 tested. If he had wanted that I certainly would have done
3 that for him or asked for a continuance.

4 We were on the trial docket in July, and if there were
5 any issues that would have prevented me from being ready I
6 would have asked for the continuance.

7 Q. You have been practicing in the Charleston County
8 Public Defender's Office how many years?

9 A. Since November of 2006.

10 Q. You are familiar with the Ninth Circuit Solicitor's
11 Office policy that once a case is placed on a trial docket
12 then there's no more negotiation about an offer?

13 A. I'm familiar with them telling us that that is policy.
14 Whether or not that always applies I think it depends on who
15 the prosecutor is.

16 Q. Has -- have you found that frequently it does apply to
17 your cases?

18 A. I have found that it frequently does apply.

19 MR. DAVIS: Your Honor, if I could have a moment.

20 (WHEREUPON, Mr. Davis confers with his client.)

21 MR. DAVIS: Ms. Ehrlich, thank you.

22 Your Honor, no other questions.

23 THE COURT: Mr. Johnson.

24 MR. JOHNSON: Thank you, Your Honor.

25 **CROSS-EXAMINATION BY MR. JOHNSON OF MEGAN EHRLICH:**

1 Q. Good morning, Ms. Ehrlich. So you were appointed on
2 this case, correct?

3 A. I was.

4 Q. Okay. And did you actually work on his -- are you
5 familiar with Mr. Montgomery?

6 A. I have known Tommy since December of 2009. I actually
7 represented him on his first charge. So I have known him
8 quite a while.

9 Q. And that would be the other murder that he pled to?

10 A. That is correct.

11 Q. Okay. And did you ever have him mentally evaluated?

12 A. Yes, sir.

13 Q. Do you remember how many times you would have had him?

14 A. I mean just on this case or on the prior cases? He
15 went through -- he has significant mental health problems.
16 He went through multiple evaluations.

17 Specifically with this case I had Dr. Susan Knight
18 evaluating him. She actually saw him the morning of his
19 plea and was present in court and felt he was competent to
20 proceed.

21 Q. That is the morning of?

22 A. Yes.

23 Q. Okay. And I think your testimony is that throughout
24 your representation that you got the guilty plea you got
25 discovery in different stages?

1 A. Right. I mean we would get -- I don't think it is --
2 it is not unusual to get a big batch of discovery. And then
3 especially in the time leading up to a trial things starts
4 trickling in as the State starts to really prepare their
5 case.

6 Q. Were you preparing for trial as well?

7 A. I always thought this case was going to be a trial. In
8 his prior case there was never a plea offer made despite us
9 having specific mitigation. And at that point as far as the
10 Solicitor's Office he came across as much more sympathetic.

11 And so if there wasn't a plea offer in the first case
12 we thought there certainly would never be a plea offer in
13 this case. So I always thought it would be a trial. When
14 there was a plea offer made it was -- honestly, it was a
15 surprise.

16 Q. A good surprise?

17 A. A surprise. I mean it gave him an option.

18 Q. Now was he ever noticed for life without parole in this
19 case?

20 A. I don't believe they ever served him with notice, but
21 it was certainly part of the conversation. The plea was
22 made in January. And had he not -- we were told that if he
23 did not accept they would serve him with notice.

24 Q. And so that never became an option because he did
25 accept the plea offer?

1 A. Right.

2 Q. Another allegation he claims is that failure to --
3 well, first of failure to investigate. Can you explain to
4 the court what all investigation you did in this case.

5 A. I had an investigator who looked into everything that
6 we knew about the case including specifically there were --
7 there was an individual, last name Nesbitt, who had been a
8 suspect. He had made a comment that was pretty
9 incriminating to somebody else. That person was
10 interviewed.

11 And that is when Tommy is talking about as far as the
12 detective going out to what appeared to be a shallow grave.
13 We fully investigated that. And that is something we would
14 have used at trial.

15 A lot of the witnesses -- there weren't that many real
16 witnesses because there wasn't an eyewitness. There was
17 allegation that somebody heard a fight during the middle of
18 the night. That person was out of state.

19 My investigator went out into the community to try to
20 get more information about the victim to see what people
21 knew of her. He did a pretty thorough job.

22 Q. And so you attempted to track down these witnesses?

23 A. We did everything that we could as far as
24 investigation.

25 Q. And they fully investigated the DNA evidence, the palm

1 and the fingerprint on the bottle?

2 A. The palm and the fingerprint were analyzed by an
3 independent expert. He went down, reviewed the evidence at
4 the police department, and then met with me and also Ted
5 Smith who was my second chair with the case.

6 We had a second expert who looked at the DNA and was
7 helping us form a strategy for how to do it at trial. He
8 did not independently test the second DNA -- or analyze the
9 second DNA testing that was done after they discovered the
10 search warrant issue. He didn't have that done.

11 Q. And the reason for that being you only got it six days
12 before Mr. Montgomery pled guilty?

13 A. At that point it was more how are we going to deal with
14 the DNA. That was the main reason for having it -- somebody
15 else involved. And I felt like that was what was most
16 important.

17 If he had decided to go to trial and we wanted to get
18 the DNA looked at, it is possible we could have it done in
19 the timeframe. Because the trial date wasn't until July.
20 But it just never got to that point because he had decided
21 to enter the plea.

22 Q. Did you discuss that with Mr. Montgomery?

23 A. The testing?

24 Q. Yes.

25 A. I can't remember if he -- if we discussed whether or

1 not we should get it tested again. I don't remember.

2 Q. And had he gone to trial would you have sought a
3 suppression hearing?

4 A. For the DNA?

5 Q. Yeah, for the search warrant?

6 A. I would have tried to keep the DNA out. I would have
7 tried to keep the statement out. We discussed how he was
8 under medication when police came at prison to interrogate
9 him. We discussed any sort of way to deal with the evidence
10 as far as trying to suppress things and then also if they
11 weren't suppressed how would we use that at trial.

12 And third par- -- I think we had a strong enough third-
13 party guilt issue and based on some of our investigation
14 that we could give an alternative explanation for the
15 presence of DNA and the fingerprint. That's why we had the
16 experts.

17 Q. And you testified you discussed all of this with Mr.
18 Montgomery?

19 A. I did. And it is possible that he has -- because of
20 his mental health problems I don't know how clear his memory
21 is. There were times I had to repeat some things.

22 Q. But ---

23 A. I had a second attorney meet with him after he decided
24 to accept the plea offer, separate from me to make sure.

25 Q. And in your opinion did he seem to understand these

1 conversations?

2 A. Yes.

3 Q. Did you ever force him to accept the guilty plea?

4 A. No.

5 Q. Did you ever threaten him to accept the guilty plea?

6 A. No.

7 Q. Whose decision was it to pled guilty?

8 A. It was his decision as far as I am aware.

9 MR. JOHNSON: The court's indulgence, Your Honor.

10 THE COURT: Yes, sir.

11 MR. JOHNSON: That's all the questions I have for Ms.
12 Ehrlich at this time. Thank you.

13 THE COURT: Mr. Davis.

14 **REDIRECT EXAMINATION BY MR. DAVIS OF MEGAN EHRLICH:**

15 Q. Ms. Ehrlich, I think you testified that this case was
16 already docketed for a July trial date. Was it the July
17 18th trial date; do you recall?

18 A. I don't -- I am not sure. I know it was in July.

19 Q. Okay.

20 A. I know we brought him down here well in advance of the
21 trial date.

22 Q. Down here meaning to Charleston County jail from SCDC
23 or to the courthouse from the Charleston County jail?

24 A. We brought -- because of Tommy's medication problems it
25 was important there was always these issues with whether the

1 Detention Center were giving the right medicine. So he was
2 brought to Charleston -- I can't remember the exact date.
3 But at least a couple weeks before the actual plea hearing.

4 Because they had tried to schedule the plea hearing for
5 a day that would have been particularly difficult for Tommy
6 because of his family history and we delayed it an extra
7 week because of that.

8 I think he was here two to three -- maybe three weeks
9 before even a plea hearing.

10 Q. As to what date you're not sure, but certainly it was a
11 month after the plea if it had not happened it would have
12 been on the trial docket; correct?

13 A. Right.

14 Q. Okay. You advised Mr. Montgomery to take this plea
15 deal, right?

16 A. I don't know if I said you should take this or if I
17 said it is an option. I don't -- I didn't put pressure on
18 him. I wanted -- you know, Ted Smith met with him separate
19 from me because I wanted to make sure that if he was going
20 to plea he wasn't just doing it. I wanted to be really -- I
21 wanted him to be really clear on his decision.

22 Q. And his ---

23 A. I knew that if he went to trial and lost he was going
24 to get life. He explained to me the reason he was taking
25 the offer was that he wanted to be able to have hope of

1 being released to his family at some point.

2 Q. Ted Smith is another public defender ---

3 A. Yes.

4 Q. --- in the Charleston office, ---

5 A. Yes.

6 Q. --- correct? You also would have advised Mr. Montgomery
7 that if he did not take this deal that it was going to trial
8 the very next month, correct?

9 A. Right.

10 Q. And the State would likely serve him notice for life
11 without parole if convicted?

12 A. It wasn't likely; it was for sure they were going to
13 serve him. Like there was no question about it. If he
14 didn't accept the offer they were going to serve life.

15 MR. DAVIS: Thank you, Your Honor. No other questions.

16 THE COURT: Mr. Johnson.

17 MR. JOHNSON: No recalls, Your Honor.

18 THE COURT: Thank you, ma'am. We can step down.

19 MR. DAVIS: Your Honor, we would ask to recall Mr.
20 Montgomery just to a couple of issues.

21 THE COURT: Yes, sir.

22 Mr. Montgomery, I want to caution you that you are
23 still under oath. Do you understand?

24 MR. MONTGOMERY: Yes, sir.

25 **DIRECT EXAMINATION MR. DAVIS ON RECALL OF TOMMY MONTGOMERY:**

1 Q. Mr. Montgomery, do you recall the date in July that
2 your case would have been docketed for trial?

3 A. Yes, sir, the date was July 18th.

4 Q. Okay. You have heard testimony from your attorney that
5 the fingerprint evidence was analyzed by an expert. Prior
6 to your guilty plea did you know that?

7 A. I don't remember.

8 Q. Okay. Were you ever told by your attorney that she
9 could request a continuance because of the late arrival of
10 the DNA evidence, the second DNA evidence that was not
11 tested?

12 A. No, sir.

13 Q. If that would have been an option what would you have
14 requested?

15 A. I would have requested that we make a continuance so we
16 could have a full investigation.

17 Q. Thank you, Mr. Montgomery.

18 MR. DAVIS: Your Honor, no other questions.

19 THE COURT: Mr. Johnson.

20 **CROSS-EXAMINATION BY MR. JOHNSON RECALLING TOMMY MONTGOMERY:**

21 Q. Mr. Montgomery, are you aware that had you requested
22 that continuance the State could have served you with life
23 without parole notice?

24 A. No, sir, I didn't.

25 Q. Okay. But that is the whole reason you plead guilty,

1 right, is to avoid that life sentence?

2 A. Yes, sir. I didn't know that if I didn't plea that
3 that would -- definitely get that. I was thinking that if I
4 went to trial and with the evidence stacked against me I
5 probably would lose, so I knew if I would have went to trial
6 I would have known that nine times out ten I would get life
7 without parole.

8 Q. And that is why you pled guilty, right?

9 A. Yes, sir.

10 Q. Okay.

11 MR. JOHNSON: No further questions, Your Honor.

12 THE COURT: Okay. You can step down.

13 MR. DAVIS: May it please the court, Your Honor.

14 Judge, some of the reasons justifying the plea are known by
15 both sides.

16 (WHEREUPON, Mr. Johnson confers with Mr. Davis.)

17 MR. DAVIS: I'm sorry, I apologize, Your Honor. I
18 apologize. So sorry. The plaintiff has no other witnesses.

19 MR. JOHNSON: The State has no further witnesses, Your
20 Honor.

21 THE COURT: Okay. Now we ---

22 MR. DAVIS: Thank you. Now if I may ---

23 THE COURT: Yes, sir.

24 MR. DAVIS: --- on the arguments, Your Honor. I
25 apologize.

1 The reasons for -- some of the reasons for Mr.
2 Montgomery accepting this plea are obvious. But what is
3 also clear is there was some -- some things not done that he
4 has testified to and some things that were even done that he
5 was not aware of.

6 And, Judge, we now certainly looking back understand
7 the risk of what might have happened. He understands that.
8 He has been asked about that several times.

9 The issue is at that time. Because that's the only --
10 what we do on a PCR rule we go back to the time especilly
11 when there is a guilty plea what led to that.

12 And certainly there's logical reasons for why he did
13 it. He told you some of them. But what we are arguing now
14 is the things that aren't on the transcript, that aren't in
15 the record. And those deal with conversations between him
16 and his attorney and what he understands that was done and
17 not done.

18 I am not belaboring the point as to what investigative
19 things and independant testing were done and not done and
20 what he was aware of. That is what he testified to, and you
21 understand that.

22 The other part of his, Judge, thought deals with the
23 fact that this offer had been open for six months, from
24 January until his plea in June.

25 A heavy concern to Mr. Montgomery in accepting this

1 plea was if he asked for more time he would lose the offer.
2 It was not clear to help that because the DNA evidence, the
3 second testing, came in late, had not been retested by the
4 independent expert -- or analyzed by the independent expert,
5 that that was a just cause for a continuance to both the
6 plea date and the trial date for that to be done. It was
7 not done.

8 That influenced him. He was afraid of that if he
9 testified. Among the other legitimate reasons he was afraid
10 if he delayed more then the State would pull it and he
11 wouldn't have this benefit. That was under pressure on him.
12 It should have been clear that there was an option.

13 Ms. Ehrlich has testified about the policy here in this
14 circuit that if you miss your plea date, this plea offer
15 that is now on the trial docket, you don't get that back
16 usually. And that was part of the undue pressure here.

17 He did not feel that this case was fully prepared to be
18 a trial even though it was imminent and he did not realize
19 that continuance was an option.

20 So while there are valid reasons for taking the plea
21 that was offered that avoided the life without parole
22 notice, there were, we have submitted, some reasons that
23 show that counsel should have been more effective in her
24 representation and explaining things to Mr. Montgomery and
25 had those things been explained that he had another option,

1 a continuance option, a trial option, depending on what that
2 investigation revealed at least he could have been more
3 fully informed about the decision. We believe he was
4 not. We believe that because of that it is a second set of
5 reasons why he plead that were improper reasons.

6 And for that reason we would ask you to undo the guilty
7 plea, overturn the conviction, allow him to begin over and
8 have a full investigation, a full understanding of his
9 options, before he decides what is in his best interest.

10 So, Your Honor, that is the relief that we are asking
11 for. Thank you so much.

12 THE COURT: Thank you, Mr. Davis.

13 Mr. Johnson.

14 MR. JOHNSON: May it please the court, Your Honor.

15 First, the State's position is that Ms. Ehrlich was
16 completely competent in her representation of Mr.
17 Montgomery, and because of that you don't even need to get
18 to the prejudiced prong.

19 But let's go back to the time of the guilty plea, Your
20 Honor. He has testified over and over that at the time he
21 pled guilty he wanted to avoid that life sentence. That is
22 what you need to focus on.

23 He took the deal that the State offered, negotiated 40
24 years to avoid the life sentence. That is the benefit of
25 the bargain that he received.

1 But he is also trying to claim that there were some
2 things that weren't done, some things that were done. Mr.
3 Ehrlich testified that she had independent evaluation -- or
4 independent analysis of the fingerprints and that had she
5 had more time she would have gotten the DNA.

6 But he knew all of that at the time he pled guilty. So
7 even if he had a continuance then the State is going to pull
8 that offer and they are going to serve him with life without
9 parole.

10 He accepted that benefit of the bargain at the time he
11 pled guilty, Your Honor. And that is what we are looking
12 at.

13 They want to talk about yeah the second DNA testing was
14 never done. They have not presented any evidence that that
15 would have changed the outcome of this guilty plea. They
16 have to present witnesses, which they have not done.

17 He is talking about this cave man, this third party.
18 He never testified. And to show prejudice you must have
19 them here to testify and present at the PCR hearing and you
20 must present competent evidence of that DNA second test that
21 would show that if you had the continuance and you had the
22 second analysis it would change the outcome of this case.
23 They failed -- they simply failed to prove any prejudice by
24 not showing up with any of those analyses.

25 If I could just -- as far as the offer is concerned

1 just to address that. Yes, it was over six months. She
2 testified that the usual -- that the policy is once you go
3 to trial or once you, you know, hold it over some time the
4 State will yank it. They have every right to. They never
5 have to offer to extend an offer.

6 And so by accepting that offer he got the benefit of
7 the bargain once again, Your Honor. He avoided life
8 sentence and therefore he can prove no prejudice let alone
9 any alleged deficiency by Ms. Ehrlich's representation.

10 We ask you to deny and dismiss this application.

11 THE COURT: Thank you, sir.

12 MR. DAVIS: Judge, just briefly. The outcome would
13 have been different. He would not have pled. That's what
14 we have shown. We have shown that the outcome would be
15 different; he would not have pled.

16 And if it had been explained to him -- Mr. Montgomery -
17 - the offer had been kept open for valid continuances before.
18 Because it had been open for six months for valid
19 continuances. Because there is another valid continuance
20 request that the offer could have been held even longer. He
21 was not aware of that.

22 Thank you, Your Honor.

23 THE COURT: Okay. Thank you, sir.

24 All right. Counsel, I am going to take this matter
25 under advisement and I will be in touch with you with

1 regards to my decision.

2 MR. DAVIS: Thank you, Your Honor.

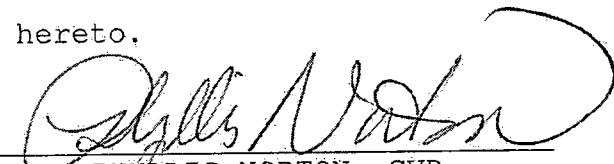
3 (WHEREUON, the hearing concluded.)

(NOTE: A transcript which has been certified by the court reporter will bear an original signature on the below certification sheet. Please contact the court reporter for additional certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned case, relative to appeal, in the Court for Charleston County, South Carolina, on July 19, 2015 and July 21, 2015.

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


PHYLLIS NORTON, CVR
(Signature in blue ink.)

Date: January 3, 2016 *gn*

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AT
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SOLSTATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Tommy Montgomery, #346324,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2013-CP-10-4035

ORDER OF DISMISSAL

FILED
2013 SEP 22 PM 12:05
JULIE J. ARMS, CLERK
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 11, 2013. Respondent made its Return on December 3, 2013. An evidentiary hearing into the matter was convened on July 23, 2015 at the Charleston County Courthouse. Rodney Davis, Esquire represented Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Megan Ehrlich, Esquire also testified. This Court had before it a copy of the records of the Charleston County Clerk of Court, records from the South Carolina Department of Corrections, the application, the State's Return and the guilty plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2011 term of the Charleston County Grand Jury for murder (2011-GS-10-7917). The Applicant was represented by Megan Ehrlich, Esquire.



The Applicant pled guilty as indicted. On June 26, 2013, the Honorable R. Markley Dennis sentenced the Applicant to confinement for a period forty (40) years. The Applicant did not appeal his convictions or sentences.

In his original Application, the Applicant failed to make allegations or claims to support his application for post-conviction relief.

In his amended Application for post-conviction relief filed on January 3, 2014, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. "Failing to fully investigate the evidence and witnesses in the case"
 - b. "Failing to obtain full discovery until June 2013 (the month of the guilty plea)"
 - c. "Failing to provide full discovery to the Applicant"
 - d. "Failing to have the fingerprint evidence independently evaluated"
 - e. "Failing to have the DNA evidence independently evaluated"

At the hearing, the Applicant proceeded on his claims of ineffective assistance of plea counsel.

SUMMARY OF TESTIMONY

At the evidentiary hearing, Applicant testified that he and Counsel met frequently and received the Rule 5 materials, but did not get all of it until six (6) days before the guilty plea. These documents included information about the murder weapon and DNA analysis. Applicant stated Counsel reviewed the evidence with him, including fingerprint evidence. There was a plea offer in January, but Applicant did not think there had been a sufficient investigation at that point. Applicant did not remember discussing his palm print on a bottle at the scene with Counsel. Applicant claims

the palm print on the bottle represented a drinking motion, not a stabbing motion. He discussed this with Counsel.

Applicant testified he was faced with the decision to pursue a trial and face life without parole or accept a guilty plea offer. Applicant also testified the plea offer was available for six (6) months, and he did not want the State to retract its offer. Applicant admitted that he chose to accept the plea because he was facing the possibility of life without parole. Applicant also admitted that although there was an option for trial, he did not believe it was a viable one. Applicant claimed Counsel did not fully investigate this case because DNA evidence was received only six (6) days before his guilty plea.

Applicant also claimed Counsel was ineffective for not investigating witnesses because no witnesses could be found to substantiate his third-party guilt claim. Applicant stated there could have been other suspects and that someone dug a grave, of which Counsel had pictures. Applicant stated the investigation went cold and does not know the other suspects' names other than "Caveman." Counsel and the defense team could not find any other suspects.

Additionally, Applicant claimed Counsel failed to have the fingerprint evidence and DNA independently tested. Applicant claims the coroner and SLED reports differed and did not notice this until after the guilty plea. Applicant testified there were no eye-witnesses to the crime and that the forensic evidence was the only evidence linking Applicant to the crime.

Applicant further alleged that the DNA evidence was not collected correctly. Applicant's DNA was obtained from him through a search warrant, which was faulty, but Counsel stated not to be surprised by a second, correct search warrant. The DNA was collected via a buccal swab. While this issue was discussed with Counsel, Applicant stated it was not discussed as to how to suppress



this evidence if there was a trial. Applicant then stated he did not think there was another legitimate option other than a guilty plea. Applicant opined it would not have been a good trial because of the lack of evidence, but that he did not want to risk life without parole. He thought a plea was the best option at the time. Applicant further stated if he had asked for more time, the State would have taken the plea offer off of the table and sought life without parole.

Applicant lastly testified when he sat down with Detective Goldstein, he was on medications and that he was under the influence of these medications when the buccal swab was obtained. Applicant claimed he was bi-polar and had post-traumatic stress disorder because he saw his father kill his mother and that he was molested from age 9 to 14.

On cross-examination, Applicant admitted he pled guilty to avoid facing the possibility of life without parole for murder. He also admitted that he waived his constitutional rights to a jury trial. He admitted there were no promises other than the negotiations and that there were no threats to get him to plead guilty. He further admitted he was satisfied with Counsel's representation.

Counsel testified the offer was on the table for five-six months. She testified she received the DNA analysis later because the State found an issue with the first search warrant and buccal swab, so they obtained a second search warrant for Applicant, and the results of test were not received until close in time to the guilty plea. Counsel stated she did not have the DNA evidence independently analyzed. Counsel also testified she hired an expert to analyze the fingerprint and palm print evidence and got an independent evaluation to help explain the evidence at trial.

Counsel then testified she continuously obtained discovery materials, including other suspects' DNA reports, although she did not know why others were suspects. Counsel stated she did not request a continuance because it was clear that Applicant wanted to plead guilty. If Applicant

would have wanted a continuance, she would have requested one. Counsel testified she had been a public defender since 2006 and was familiar with the Solicitor's policy on plea offers. She lastly testified this policy often applies to cases like this one.

On cross-examination, Counsel testified she has known Applicant since 2009 because she represented him on a prior charge. Counsel stated Applicant has significant mental health issues and hired Dr. Susan Knight to evaluate him. Dr. Knight saw him the morning of the plea and found Applicant competent.

Counsel testified she received discovery in different stages leading up to trial. She always thought this case would proceed to trial and was surprised when the State gave Applicant another option. While Applicant was not served with a notice from the State to seek life without parole, Counsel testified if Applicant had not accepted the plea offer, then he would have been served with it.

Counsel testified she hired an investigator who went to the shallow grave site and took pictures. She would have used this information at a trial. Counsel stated there were no eye-witnesses to the crime and that her investigator attempted to get information on the victim. Counsel testified she obtained an independent analysis of the fingerprints and palm print, which helped her form a strategy. Counsel admitted she did not get the second buccal swab independently analyzed because of the plea, but if there had been a trial, she would have gotten an independent analysis.

Counsel also testified she would have raised all suppression issues and the third party guilt issue if a trial had commenced. Counsel stated she had a second attorney meet with Applicant to make him understand the gravity of the situation. Counsel lastly stated she did not force or threaten Applicant to plead guilty and that it was Applicant's decision to plead guilty.

On re-direct examination, Counsel testified Applicant's trial was docketed for the July term of General Sessions, so she had Applicant transported to court a few weeks early because of his medications. Counsel stated she did not apply any pressure to Applicant to plead guilty. Counsel had Ted Smith meet with Applicant to ensure Applicant understood the situation. Applicant wanted the hope of being released one day. Counsel reiterated that if Applicant did not accept the plea offer, the State would have filed a notice to seek life without parole.

Applicant was recalled as a witness and testified his case was put on the July 18th docket, that he did not remember his fingerprints being independently analyzed and that he was not told by Counsel that he could request a continuance or else he would have.

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).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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 (1985).

This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding Counsel's testimony is credible.

This Court also finds Counsel provided effective assistance of counsel in this case. Counsel advised Applicant of all of the charges and the sentences the charges carried. Counsel negotiated with the State in Applicant's best interest. Applicant also testified he pled guilty because he did not want to risk a trial and face life without parole. Applicant admitted nobody threatened him to plead guilty, and there were no promises other than the negotiations to entice him to plead guilty. This

Court finds Applicant made the decision to plead guilty on his own accord with the help of learned counsel. Additionally, this Court finds Applicant made this decision freely and voluntarily without any threats or promises from anyone else. Furthermore, this Court finds that it was ultimately the Applicant's decision to plead guilty.

This Court also finds Counsel effectively represented Applicant with respect to the DNA and finger/palm print evidence. Counsel testified she hired an independent expert to review and aid her in understanding the finger/palm print evidence in the case and would have utilized this expert had Applicant chosen to pursue a trial. Counsel also testified that while she did not retain a DNA expert, she would have, had Applicant chosen a trial. She further testified that because the second DNA analysis from the buccal swab came in only six (6) days before the guilty plea, she did not have time to retain an expert. Nevertheless, Applicant, knowing this, chose to plead guilty because, in his words, he knew the State would take the plea offer off of the table if he did not accept it, and he did not want to risk life without parole. Not only does this Court find Counsel acted more than reasonably under the circumstances, but also that Applicant can prove no resulting prejudice due to the fact that he knew about the analyses and chose to accept the offer regardless. Thus, this allegation is denied.

Additionally, this Court finds Applicant can prove no prejudice for Counsel's alleged failure to locate witnesses to establish a third-party guilty claim. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice.

Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). While Applicant claims Counsel failed to locate witnesses on his behalf, Applicant failed to produce these witnesses at the PCR hearing, and therefore, can prove no resulting prejudice. Nevertheless, Counsel testified she and her investigator attempted to locate witnesses in this case, and the only name they were able to investigate was "Caveman." This Court finds Counsel acted in a reasonable manner given the information she was provided. Thus, this allegation is denied.

This Court further finds Counsel was effective in her representation concerning the discovery in the case. While Applicant claimed Counsel did not provide him with complete discovery until the month of the plea, Counsel testified she received the discovery continuously in stages until the plea. The major part of the discovery that was not given to Applicant until the month of the plea was the DNA analysis because, as Counsel testified, the State got a second search warrant for Applicant's DNA, and the results were not available until then. Moreover, Applicant admitted he met frequently with Counsel and received the Rule 5 materials. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby.

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



This Court also finds the Applicant has failed to prove the second prong of Strickland — that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. Therefore, these allegations are denied.

CONCLUSION

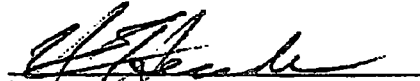
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice. This Court also finds as to all other allegations that Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

This Court notifies the 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), SCRCR, 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. Applicant's attention is directed to South Carolina Appellate Court Rule 243 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!


Roger E. Henderson
Presiding Circuit Court Judge
Ninth Judicial Circuit

September 12 2015
Chesterfield, South Carolina

2013-CP-10-4035

BMW20111006735

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

0614709

ARREST WARRANT NUMBER

M640456

DATE OF ARREST

October 3, 2011

ACTION OF GRAND JURY

TRUE BILL

Forperson of Grand Jury
Date
12/12/2011

VERDICT

Forperson of Petit Jury

Date

INDICT

DOCKET NO. 2011GS1007917

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2011

THE STATE

vs.

TOMMY ANTWAN MONTGOMERY

DOB: 1980-[REDACTED]

B/M

Indictment for

Murder

105

FILED

12/28/2011 11:34:08 AM
JULIE J. ARMSTRONG
CLERK OF COURT

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT
By *[Signature]*
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

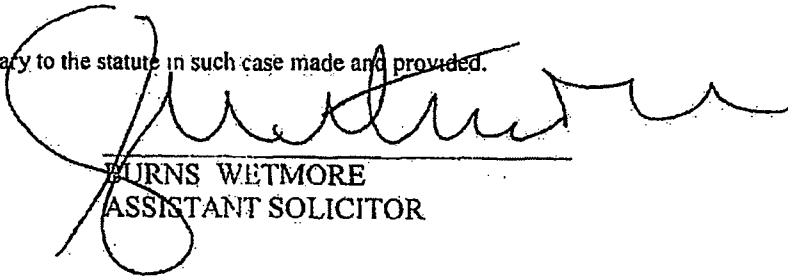
INDICTMENT

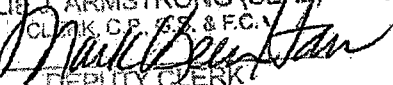
At a Court of General Sessions, convened on December 12, 2011 the Grand Jurors of Charleston County present upon their oath:

Murder

That in Charleston County on or about July 23, 2006, with malice aforethought, TOMMY ANTWAN MONTGOMERY did kill and murder Pamela Fyall by means of blunt and sharp trauma to head, neck, and chest and asphyxia due to strangulation Pamela Fyall did die in Charleston County as a proximate result thereof on July 23, 2006, in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

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


 BURNS WETMORE
 ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
 JULIE L. ARMSTRONG (SEAL)
 CLERK, C.P., S.S. & F.C.
 By 
 DEPUTY CLERK

COUNTY OF Charleston
STATE VS.Tommy Antwan Montgomery

AKA:

Race: BLACK Sex: M Age: 32DOB: 1980 SS#: ██████████

Address:

City/State/Zip: North Charleston, SC 29420-8757DL#: ██████████ SID#: SC01647860*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Murder (30 - LIFE)in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted. ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation. ☒ Negotiated Sentence. ☐ Recommendation by the State.ATTEST: 17241 Tommy Montgomery 40 yrs Meghan 75164

Weinmore, Burns

SC Bar#

Defendant.

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 40 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment

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

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

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Dec 8, 2009☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

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

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

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	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$5.00
3% to County (if paid in installments)		\$3.90
TOTAL		\$133.90

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

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

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel.
§ 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Deb Garrison

SCCA/217 (03/2011)

ATTEST: A TRUE COPY
 JULIE L ARMSTRONG (SEAL)
 CLERK, C.J. & S.C.
 By Mark
 DEPUTY CLERK

Presiding Judge
 Judge Code: 2060
 Sentence Dates: 6/26/13

108

ARREST WARRANT

M-640456

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

THE STATE

against

Tommy Antwan Montgomery

Address

North Charleston, SC 29420-8757

Phone: SSN: [REDACTED]
Sex M Race B Height 5 11 Weight 185

DL State SC DL # [REDACTED]

DOB [REDACTED] 1980 Agency ORI # SC0100100

Prosecuting Agency Charleston City Police Department

Prosecuting Officer Barry Goldstein - 0174

Offense Murder

Offense Code 0116

Code/Ordinance Sec 16-03-0010

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to the law.

(L.S.)

Signature of Judge

Date

RETURN

A copy of this arrest warrant was delivered to

defendant

on

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Personally appeared before me the affiant Barry Goldstein who

being duly sworn deposes and says that defendant Tommy Antwan Montgomery

did within this county and state on or about 7/23/2006 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Charleston)

in the following particulars

DESCRIPTION OF OFFENSE: Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address 180 Lockwood Blvd.

Charleston, SC 29403-

Affiant's Telephone (843) 577-7434

ARREST WARRANT

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

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

on or about 7/23/2006 defendant Tommy Antwan Montgomery

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

☒ County/ ☐ Municipality of Charleston as set forth below

DESCRIPTION OF OFFENSE: Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me

on 9/12/2011

Signature of Issuing Judge (L.S.)

Bonnie Lee Koontz

Judge Code 5627

Judge's Address 1720 Sam Rittenburg Blvd, Unit 11

Charleston, SC 29417-1861

Judge's Telephone (843) 766-6531

Issuing Court ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ATTEST: A TRUE COPY

JULIE J. ARMSTRONG (SEA)

CLERK, C.P. & S.C.

By Mark Beebe

DEPUTY CLERK

BAIL set by

WITNESSES

Judge Lombardi
 on 10-3-11
 Type and Amount NO BOND
 Name of Surety _____

Name _____
 Address _____
 Telephone _____



PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney _____
 Decision _____

Name _____
 Address _____
 Telephone _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (indicate jury trial, bench trial, plea, not pros. etc.)

Name _____
 Address _____
 Telephone _____

Disposition _____
 Sentence _____

Name _____
 Address _____
 Telephone _____

JURORS

Name _____
 Address _____
 Telephone _____

CODEFENDANTS

FILED
 2011 OCT 13 AM 9:46
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

ATTEST: A TRUE COPY
 JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P. & F.C.
 BY Handwritten Signature
 DEPUTY CLERK

Charleston Police Department

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AFFIDAVIT

Personally appear before me, a magistrate of this county one

Sgt. B. N. Haldeman

who first being duly sworn deposed and says that

Tommy Antwan Montgomery

Did with in this county and state on the

23 JULY 2006

violate the criminal laws of the State of South

Carolina in the following particular:

DESCRIPTION OF OFFENSE

16-3-10 Murder

The affiant states there is probable cause to believe that the defendant named did commit the crime set forth and that such probable cause is based on the following facts:

That on 7-23-06 between the hours of 04:00 A.M. and 10:45 A.M. while at Dereef Park located on Morris St. between Coming and Smith St. Charleston, S.C. the victim was discovered behind a vacant wooden structure in an expired state. That the victim was positively identified as Pamela W. Fyall, B/F, Age 43 though AFIS fingerprint comparison. That a witness located at a residence that backs up to the park heard a disturbance of some type at approximately 04:00 A.M., but could not make out what the noises were at the time of the incident.

That at approximately 10:45 A.M. the witness went to Dereef Court and discovered the victim face up with her pants partially pulled down in a deceased state. That at autopsy at the Medical University Hospital the victim's cause of death was due to a laceration to her throat with blunt trauma to her head that appeared to be intentionally committed which classify's this incident as a homicide.

That a DNA codeis comparison took place though the South Carolina Law Enforcement Division that postively matched the above named defendant to evidence found at the crime scene.

The above is true and believable based on the positive identification of DNA recovered during a crime scene examination, compared to, and positively matches the above named defendant. That the evidence was recovered in the mouth of the victim and also underneath her fingernails illustrating some type of resistance at the time of her death as described by the above named witness who will be revealed at the time of the court proceedings.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS

12th

DAY OF

September

, 2011

AFFIANT

SIGNATURE OF JUDGE

(L.S.)

COMPLAINT #:

Charleston Police Department
180 Lockwood Blvd
Charleston, SC 29403
(843) 577-7434

CPD Form OT3

ATTEST: A TRUE COPY
JULIE ARMSTRONG (SEAL)
By *[Signature]*
DEPUTY CLERK