

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Lexington County

DeAndrea G. Benjamin, Circuit Court Judge

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**RECEIVED**

APR 28 2016

**SC SUPREME COURT**

ROBERT FLETCHER HERBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001507

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SUPPLEMENTAL APPENDIX

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ATTORNEYS FOR RESPONDENT

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**SC SUPREME COURT**

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FEBRUARY 11, 2015

THE COURT: This is a hearing we heard in Lexington County back last June -- no, October -- a post-conviction relief matter, Case Number 2013-CP-32-3947. And the record was left open to call additional witnesses, I believe. Is that correct?

MR. MITCHELL: That's correct, Your Honor.

THE COURT: All right. I'll be glad to hear from you. Yes, sir?

MR. MITCHELL: Your Honor, just for the record, this is Robert Herbert v. State of South Carolina.

He filed this application November 13th of 2013. As you just said, we had this hearing began on October 15th, 2014, in Lexington County. At that hearing Mr. Herbert testified and also his counsel, Ms. Sarah Mauldin, testified.

At the end of the hearing, the State moved to hold the record open to call testimony of Mr. Matthew Buchanan as a rebuttal witness.

We're here today to reconvene today for that purpose. Mr. Buchanan is present.

I also wanted to just put on the record that there were maybe some venue issues since we're

1           having -- since we're holding this hearing in  
2           Richland County, not Lexington County, and I think  
3           Ms. Good can address that.

4           THE COURT: All right. Yes, ma'am?

5           MS. GOOD: Your Honor, I have discussed that  
6           with my client, and he does wish to waive the venue  
7           and have the continuation of the hearing here in  
8           Richland County, but I just wanted to make sure  
9           that was on the record.

10          THE COURT: All right. Let me have  
11          Mr. Herbert stand.

12          THE DEFENDANT: Yes, ma'am.

13          (Complies.)

14          THE COURT: Raise your right hand.

15          (Complies.)

16          THE COURT: Do you swear or affirm to tell the  
17          truth, the whole truth, so help you God?

18          THE DEFENDANT: Yes, I do, ma'am.

19          THE COURT: Sir, it is my understanding that  
20          you understand that this matter was initially heard  
21          in Lexington County. We were able to reschedule it  
22          today in Richland County based on the Court's  
23          schedule. It is my understanding that you wish to  
24          waive your right to have it in Lexington County?

25          THE DEFENDANT: I do. I wish to waive my

1 right, ma'am.

2 THE COURT: All right. And are you doing that  
3 freely and voluntarily?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: All right. Thank you.

6 MS. GOOD: And, Your Honor, before we proceed,  
7 I do also want to just renew my objection from last  
8 time in Lexington about holding the record open, as  
9 we believe the Government, or the State, had the  
10 opportunity to subpoena Mr. Buchanan. We amended  
11 our PCR application well before the October  
12 hearing, and we believe they should have had him  
13 there, and that any testimony would be prejudicial  
14 at this point in time.

15 THE COURT: All right. Is this the case where  
16 he had two attorneys?

17 MS. GOOD: Yes, Your Honor.

18 THE COURT: And there is -- I believe the  
19 testimony from him was that Mr. Buchanan did not  
20 discuss -- or did not discuss a plea offer or  
21 something?

22 MS. GOOD: Yes, ma'am.

23 THE COURT: All right. Yes, sir?

24 MR. MITCHELL: Thank you, Your Honor. The  
25 State calls Mr. Matthew Buchanan.

1 (Witness approaches.)

2 THE CLERK: Do you swear or affirm the  
3 testimony you are about to give in this case will  
4 be the truth, the whole truth, and nothing but the  
5 truth, so help you God?

6 THE WITNESS: I do.

7 THE CLERK: Thank you. Have a seat in the  
8 witness stand, please.

9 (Witness complies.)

10 THE CLERK: And state your full name for the  
11 record.

12 THE WITNESS: My name is Matthew Buchanan,  
13 B-U-C-H-A-N-A-N.

14 MATTHEW C. BUCHANAN,  
15 after being duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. MITCHELL:

18 Q Good afternoon, Mr. Buchanan.

19 A Good afternoon.

20 Q Thank you for being here with us today.

21 A You're welcome.

22 Q How long have you been practicing law?

23 A I've been practicing law for almost ten years now.

24 Q Where are you currently practicing?

25 A I am general counsel for the Department of

1 Probation, Parole and Pardon Services.

2 Q How are you involved in Mr. Herbert's case before  
3 the court today?

4 A I did -- I was employed at the Lexington County  
5 Probation -- Public Defender's Office as an  
6 attorney, as an Assistant Public Defender there,  
7 and I was there to -- and assigned to represent  
8 Mr. Herbert before I left that position.

9 Q Do you know when you were appointed to represent  
10 Mr. Herbert?

11 A I cannot actually give you an exact date when I was  
12 assigned the case, but it was in either -- probably  
13 July or August of 2012.

14 Q Did you meet with Mr. Herbert?

15 A Several times, yes.

16 Q When did you meet with him?

17 A My initial visit with him at the Lexington County  
18 Detention Center was on August 7th, 2012. I had a  
19 follow-up visit with him at the jail on  
20 November 9th, 2012. A subsequent visit with him on  
21 January 14th, 2013. And my last meeting with him  
22 was February 11th, 2013.

23 Q Who represented Mr. Herbert after your  
24 representation concluded?

25 A Sarah Hahn Mauldin. She got married and changed

1 her last name.

2 Q I show you what has been marked as Plaintiff's  
3 Exhibit 1.

4 MR. MITCHELL: May I approach?

5 THE COURT: Yes.

6 (Complies.)

7 BY MR. MITCHELL:

8 Q Do you have copy of this?

9 A No. I have seen this. This was provided to me  
10 earlier. But I didn't bring a copy of it today.

11 Q Do you recall -- did you discuss that plea offer  
12 dated August 24th, 2012, with Mr. Herbert?

13 A Yes, I did.

14 Q And what do you recall about those discussions?

15 A I don't have a whole lot of independent  
16 recollection. I do have some notes here. I know  
17 I -- I don't exactly recall when I addressed -- the  
18 first time I addressed it, because it looks like it  
19 was dated August 24th. I do have a note here that  
20 I explained the plea offer to him on January 14th,  
21 2013.

22 In another note on the February 11th visit  
23 with him, I spoke to him about the plea to the cap  
24 of 15 years, and I have it noted here, it is his  
25 last chance to accept. So I know I would have

1           talked to him about the consequences and the  
2           decision to either accept the plea or decline the  
3           plea.

4                     And then I have on the very next line is,  
5           trial, start, and then speedy trial motion.

6    Q       So he indicated he wanted to go to trial after one  
7           of those meetings; is that correct?

8    A       Yes, that's right. And then the rest of my notes  
9           from that day, it is about three or four pages of  
10           investigation prep materials to get ready for the  
11           trial.

12   Q       All right. Thank you. I have no further  
13           questions. Please answer any questions Ms. Good  
14           may have for you.

15                                     CROSS-EXAMINATION

16   BY MS. GOOD:

17   Q       And you said you met with him on August 7, 2012;  
18           correct?

19   A       That's correct.

20   Q       And then again on November 9th, 2012?

21   A       That's right.

22   Q       On Plaintiff's Exhibit Number 1, it is dated -- the  
23           plea offer is dated 8/24/2012; correct?

24   A       Yes.

25   Q       When did it expire?

1 A It says, The offer expires, if not accepted, by  
2 October 1st.

3 Q And you didn't meet with him from the time that you  
4 received the plea offer on August 24th until  
5 November 9th after it expired; correct?

6 A That's correct.

7 Q And you stated later that there was a speedy trial  
8 motion. Was that ever filed?

9 A That was not. And the reason why was because I was  
10 in the negotiations of taking -- accepting the  
11 position of general counsel with Probation, Parole  
12 and Pardon Services. I declined to file that  
13 motion because I did not want to saddle that, or  
14 saddle the next attorney with that speedy trial  
15 motion, which -- because I wanted to give her all  
16 the options to potentially negotiate on his behalf.

17 MS. GOOD: Beg the Court's indulgence.

18 (Pause.)

19 BY MS. GOOD:

20 Q At some point did Mr. Herbert have a discussion  
21 with you regarding retaining new counsel?

22 A It is possible. I don't see it in my notes, but I  
23 would not -- it would not surprise me if he  
24 mentioned that.

25 Q I show you what is marked Plaintiff's Exhibit

1           Number 4. Do you recognize that letter?

2           A     I don't really have any independent recollection of  
3           this. I probably did receive it.

4           Q     And it mentions in there -- that is in October of  
5           2012 -- that he was wanting to retain new counsel  
6           and send you to disciplinary counsel for not coming  
7           to communicate with him?

8           THE COURT: What is the date?

9           MS. GOOD: I think it is October 31st, Your  
10          Honor.

11          THE WITNESS: Is says October 31st or October  
12          3rd.

13          MS. GOOD: I think it is October 31st, Your  
14          Honor.

15          THE DEFENDANT: October 31st, ma'am.

16          MS. GOOD: Yes.

17          THE DEFENDANT: I also --

18          THE COURT: Hold on, sir.

19          A     Yes, October 31st, that's what it looks like.

20          Q     Did you ever put in a motion to be relieved as  
21          counsel at that point?

22          A     No, I did not. I think -- I had had him -- I had a  
23          competency motion, but I think that is probably the  
24          reason why the case -- that delayed the case. And  
25          more than likely, Solicitor -- Assistant Solicitor

1 Garrick would have extended the plea offer to at  
2 least determine his competency.

3 Q Do you have any notes showing it was extended other  
4 than just you talked to him in January and February  
5 about the plea offer?

6 A That -- yes, that -- it is the notes that I have  
7 saying plea, cap of 15, in February, which informs  
8 me that the plea offer was at least still open to  
9 that extent.

10 Q But you don't have any notes or anything from the  
11 Solicitor's Office saying it was extended?

12 A No.

13 MS. GOOD: No further questions, Your Honor.

14 THE COURT: Anything, Mr. Mitchell?

15 MR. MITCHELL: One question.

16 REDIRECT EXAMINATION

17 BY MR. MITCHELL:

18 Q On the expiration date on that plea offer, was the  
19 Solicitor's Office -- would they hold you to that  
20 date or was that kind of a fluid date?

21 A I know that they would love to hold it to us, but  
22 it is something that we can usually get extended.  
23 And a competency to stand trial motion would have  
24 no doubt extended that, I believe. My relationship  
25 with Solicitor Garrick would have -- she would have

1 extended that to me.

2 Q Thank you.

3 MR. MITCHELL: No further questions.

4 THE COURT: What was the date the competency  
5 motion was filed?

6 THE WITNESS: I don't have that in front of  
7 me, Your Honor. I don't know when exactly I would  
8 have filed that, but it is under my dates from the  
9 very first visit October -- I'm sorry, not October,  
10 August 7th. So it probably would have been filed  
11 sometime in that month.

12 THE COURT: Of 2013?

13 THE WITNESS: In 2012.

14 THE COURT: 12. And then the offer expired in  
15 October of 2013?

16 THE WITNESS: It doesn't have a date for  
17 the -- it doesn't have a year, it just says October  
18 1st, probably presumed to be October 1st, 2012.

19 THE COURT: 12. All right. And when did you  
20 leave again, I'm sorry?

21 THE WITNESS: I left -- my last day was  
22 March 1st in 2013.

23 THE COURT: All right. Anything in response  
24 to my questions?

25 MR. MITCHELL: No, Your Honor.

1 MS. GOOD: None, Your Honor.

2 THE COURT: All right, sir, you may step down.

3 THE WITNESS: Thank you, Your Honor.

4 (Witness steps down.)

5 THE COURT: Any objection to this witness  
6 being excused?

7 MS. GOOD: No, ma'am.

8 THE COURT: All right, sir, you are free to  
9 leave.

10 THE WITNESS: Thank you, Your Honor.

11 (Witness excused.)

12 MR. MITCHELL: Your Honor, the State has no  
13 further witnesses.

14 THE COURT: All right. I'll be glad to hear  
15 from you all.

16 MS. GOOD: Thank you, Your Honor. At this  
17 time we will move again, as we did last time, that  
18 Mr. Herbert be allowed to get the prior 15-year cap  
19 plea offer that was done on August 24th of 2012.

20 The testimony has shown that Mr. Buchanan met  
21 with Mr. Herbert on August 7th of 2012. The plea  
22 offer was given on August 24th, expired on October  
23 1st, and he did not meet with him again until  
24 November 9th of 2012.

25 In addition, he testified, Your Honor, that he

1 had no notes showing that it was actually extended  
2 at that point.

3 In addition, Your Honor, we would also add  
4 that Ms. Hahn, if you recall the testimony from  
5 last time, she testified she is not sure if she  
6 gave the plea offer to Mr. Herbert of concurrent  
7 time or not. In addition, she never asked for  
8 concurrent time during the plea that Mr. Herbert  
9 gave on that date.

10 And we believe all that in consideration, Your  
11 Honor, is below the reasonable responsibilities of  
12 an attorney. They have the duty to give a plea  
13 offer.

14 In addition, Ms. Hahn should have asked for  
15 concurrent time. It was very prejudicial to my  
16 client for her not to do so. And she could not  
17 give any testimony saying that she gave him that  
18 plea offer of concurrent time.

19 THE COURT: All right. Yes, sir?

20 MR. MITCHELL: Your Honor, briefly. We ask  
21 the Court to deny relief. I think the Applicant  
22 has failed to meet the burden here on failure to  
23 convey the plea offer allegations.

24 I think Mr. Buchanan's testimony is credible.  
25 I think he shows that his notes reflect that he met

1 with Mr. Herbert four times, discussed this plea  
2 with him at two of those meetings, and that at that  
3 February -- that last meeting in February, this was  
4 his last chance to accept that offer of 15 with a  
5 cap, which is the one we're talking about here. So  
6 it was obviously conveyed. I don't think -- even  
7 if you found it wasn't conveyed, he didn't suffer  
8 any prejudice by that because he indicated to  
9 counsel that he wanted to go to trial.

10 As to Ms. Mauldin, the allegations against  
11 Ms. Mauldin, we will let the record speak for  
12 itself at the prior hearing on that.

13 Thank you.

14 THE COURT: Now, help me remember this. What  
15 was his sentence again on the burglary second?

16 MR. MITCHELL: Your Honor, I believe it was a  
17 ten year sentence on the --

18 MS. GOOD: Your Honor, there was an  
19 intimidation of a witness he received ten years  
20 for; arson third degree, three years; manufacturing  
21 destructive device, two years; burglary second  
22 violent, ten years; burglary third, five years; and  
23 then a burglary second violent, ten years. That  
24 was to run consecutive to all other charges. So  
25 all the other was concurrent, and then the burg

1 second violent, ten years consecutive.

2 THE COURT: And there was a recommendation for  
3 what, now? You said the recommendation was for  
4 concurrent time?

5 MS. GOOD: Not at the time, Your Honor. I  
6 don't believe that the -- there was a change --  
7 from my notes, it looks like there was a change in  
8 the plea and there was no position on whether it  
9 was consecutive or concurrent. The judge  
10 determined it consecutive.

11 THE COURT: And the judge ran the second  
12 burglary consecutive?

13 MS. GOOD: Correct.

14 THE COURT: So I thought you said there was a  
15 recommendation that she didn't convey to her  
16 client?

17 MS. GOOD: We were saying there was a plea  
18 offer of concurrent time that she did not convey.

19 THE COURT: And when was that plea?

20 MS. GOOD: That would be the April 4th, 2013,  
21 plea offer, Your Honor, I believe. Yes. That is  
22 Exhibit Number 2.

23 THE COURT: All right. Thank you.

24 MR. MITCHELL: Your Honor, if I may?

25 THE COURT: Now, you are saying this is a

1 letter that she sent him? So was this stuff mailed  
2 to him?

3 MS. GOOD: Number 3?

4 THE COURT: Your Exhibit Number 3. Okay, this  
5 is two separate packages. Was the plea offer  
6 included in there?

7 MS. GOOD: I don't believe --

8 THE COURT: Since you have it attached.

9 MS. GOOD: Well, we made copies from the  
10 Lexington Clerk's Office so that we would have  
11 copies for today's hearing. That is the reason  
12 they are all attached together.

13 THE COURT: Okay.

14 MR. MITCHELL: Your Honor, my notes reflect  
15 that Ms. Hahn's testimony was that Mr. Herbert  
16 declined the April 2013 plea offer from the prior  
17 hearing.

18 THE COURT: All right. I'll take it under  
19 advisement and take a look at it.

20 MS. GOOD: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. MITCHELL: Thanks for accommodating us,  
23 Your Honor.

24 THE COURT: Thank you all.

25 (WHEREUPON, the proceedings were concluded.)

(END OF TRANSCRIPT)

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# SCCID

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Wanda H. Carter, Deputy Chief Appellate Defender

April 26, 2016

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**RECEIVED**  
APR 26 2016  
SC SUPREME COURT

Re: Robert Fletcher Herbert v. State of South Carolina  
Appellate Case No. 2015-001507

Dear Mr. Shearouse:

Enclosed are two copies of the supplemental appendix in the above case that I filed today with the S.C. Supreme Court.

If you have any questions concerning this matter, please contact me.

Sincerely,

Robert M. Pachak  
Appellate Defender

cc: Clay Mitchell

RMP/ccf

Enclosures

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