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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County
Honorable Thomas A. Russo, Circuit Court Judge

GREGORY PENCILLE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000412

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
08-GS-26-04686

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
 vs.)
)
 GREGORY THOMAS PENCILLE,)
)
 DEFENDANT.)
 _____)

TRANSCRIPT OF RECORD

AUGUST 9, 2010
CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, LARRY B. HYMAN, JUDGE

APPEARANCES:

BY: CANDICE A. LIVELY, ESQ.
ATTORNEY FOR STATE

BY: G. SCOTT BELLAMY
ATTORNEY FOR GREGORY THOMAS PENCILLE

BRENDA R. BABB
Circuit Court Reporter

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CLERK OF COURT

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GUILTY PLEA - AUGUST 9, 2010

3

1 MS. LIVELY: YOUR HONOR, THIS IS THE STATE OF SOUTH
2 CAROLINA V. GREGORY THOMAS PENCILLE. THIS IS INDICTMENT
3 NUMBER 2008-GS-26-4686. IT IS A TRUE BILLED INDICTMENT,
4 YOUR HONOR, FOR CRIMINAL SEXUAL CONDUCT FIRST DEGREE.

5 THE DEFENDANT STANDS BEFORE YOU ALONG WITH HIS
6 ATTORNEY SCOTT BELLAMY TO PLEAD GUILTY TO THIS OFFENSE.
7 THERE IS A RECOMMENDATION BY THE STATE, YOUR HONOR, FOR A
8 30 YEAR ACTIVE SENTENCE AND AT THE APPROPRIATE THE STATE
9 WOULD ASK TO BE HEARD ON THAT ISSUE AND AT THIS TIME I'LL
10 PASS UP THE SENTENCE SHEET WHICH INDICATES THE DEFENDANT
11 HAS SIGNED WHERE NECESSARY IN ORDER TO ENTER THIS PLEA.

12 THE COURT: ALL RIGHT, MR. BELLAMY, AGAIN YOU
13 REPRESENT MR. PENCILLE?

14 MR. BELLAMY: PENCILLE.

15 THE COURT: PENCILLE?

16 MR. BELLAMY: PENCILLE.

17 THE COURT: PENCILLE.

18 MR. BELLAMY: YES, SIR.

19 THE COURT: PENCILLE, OKAY, I'M SORRY, AGAIN I
20 APOLOGIZE, MR. PENCILLE, I JUST WANT TO MAKE SURE I GET
21 YOUR NAME RIGHT, OKAY.

22 MR. BELLAMY: YOUR HONOR, IN ADDITION I WOULD
23 WANT TO PUT ON THE RECORD THAT THERE ARE OTHER CHARGES THAT
24 WILL BE DISMISSED AS A RESULT OF THIS PLEA ---

25 THE COURT: ALL RIGHT.

GUILTY PLEA - AUGUST 9, 2010

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1 MR. BELLAMY: --- ONCE THIS PLEA WOULD BE
2 QUALIFIED AND IF THE SOLICITOR WOULD PUT THAT ON THE
3 RECORD.

4 THE COURT: ALL RIGHT, I'M GOING TO DO THAT WHEN
5 WE GET DOWN TO IT ---

6 MS. LIVELY: YES, SIR.

7 THE COURT: --- A LITTLE FURTHER INTO THIS, I
8 HAVE A POINT IN WHICH I SPECIFICALLY MAKE SURE THAT THAT'S
9 ON THE RECORD.

10 ALL RIGHT, MR. BELLAMY, AGAIN YOU REPRESENT MR.
11 PENCILLE?

12 MR. BELLAMY: YES, SIR, YOUR HONOR.

13 THE COURT: AND YOU HAVE HAD AN OPPORTUNITY TO
14 REVIEW THE DISCOVERY MATERIAL IN THIS CASE?

15 MR. BELLAMY: YES, SIR, YOUR HONOR.

16 THE COURT: AND HAVE YOU SHARED THOSE WITH YOUR
17 CLIENT?

18 MR. BELLAMY: I HAVE, YOUR HONOR.

19 THE COURT: MR. PENCILLE, IS THAT RIGHT, HAS MR.
20 BELLAMY GONE OVER THE EVIDENCE IN THIS CASE WITH YOU?

21 DEFENDANT PENCILLE: YES, YOUR HONOR.

22 THE COURT: OKAY, AND, MR. BELLAMY, HAVE YOU
23 EXPLAINED TO YOUR CLIENT THE NATURE OF THE EVENTS AND THE
24 POSSIBLE PENALTY THAT HE IS LOOKING AT?

25 MR. BELLAMY: YES, SIR, YOUR HONOR, I HAVE.

GUILTY PLEA - AUGUST 9, 2010

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1 THE COURT: ALL RIGHT, AND, MR. PENCILLE, IS
2 THAT CORRECT, HAS MR. BELLAMY ADVISED YOU THAT THIS CARRIES
3 UP TO 30 YEARS?

4 DEFENDANT PENCILLE: YES, YOUR HONOR.

5 THE COURT: OKAY, AND, MR. PENCILLE, I BELIEVE
6 THAT THERE'S SOME OTHER CHARGES THAT ARE BEING DISMISSED ON
7 YOUR PLEA TO THIS CHARGE; ARE YOU AWARE OF THAT?

8 DEFENDANT PENCILLE: YES, YOUR HONOR.

9 THE COURT: OKAY, NOW, MR. BELLAMY, AFTER YOUR
10 REVIEW OF THE EVIDENCE IN THIS CASE DO YOU FEEL THE STATE
11 HAS SUFFICIENT EVIDENCE TO CONVINCE THE JURY OF HIS GUILT
12 BEYOND A REASONABLE DOUBT?

13 MR. BELLAMY: I DO, YOUR HONOR.

14 THE COURT: MR. PENCILLE, DO YOU CONCUR WITH
15 THAT?

16 DEFENDANT PENCILLE: I DO.

17 THE COURT: ALL RIGHT, AND, MR. BELLAMY, THEN
18 YOU CONCUR WITH MR. PENCILLE'S DECISION TO ENTER THIS PLEA?

19 MR. BELLAMY: YES, SIR, YOUR HONOR, I DO.

20 THE COURT: ALL RIGHT, MR. PENCILLE, I SEE HERE
21 THAT YOU ARE 22 YEARS, EXCUSE ME, 32 YEARS OF AGE; IS THAT
22 CORRECT?

23 DEFENDANT PENCILLE: YES, SIR.

24 THE COURT: AND I LOOK AT THE SENTENCING SHEET
25 THAT TELLS ME THAT YOU'RE PRESENTLY INCARCERATED AT LEE

GUILTY PLEA - AUGUST 9, 2010

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1 CORRECTIONAL INSTITUTE; IS THAT ALSO CORRECT?

2 DEFENDANT PENCILLE: YES, YOUR HONOR.

3 THE COURT: WERE YOU ORIGINALLY FROM HORRY
4 COUNTY?

5 DEFENDANT PENCILLE: ORIGINALLY FROM NEW YORK
6 STATE.

7 THE COURT: OKAY, YOU NEVER LIVED DOWN HERE?

8 DEFENDANT PENCILLE: I LIVED DOWN HERE FOR ---

9 THE COURT: ON YOUR PREVIOUS CHARGE?

10 DEFENDANT PENCILLE: --- TEN YEARS.

11 THE COURT: OKAY, HOW FAR DID YOU GO IN SCHOOL,
12 MR. PENCILLE?

13 DEFENDANT PENCILLE: GRADUATED AND WENT TO
14 VOCATIONAL FLIGHT SCHOOL.

15 THE COURT: ALL RIGHT, WHAT SORT OF WORK DID YOU
16 DO?

17 DEFENDANT PENCILLE: A LITTLE BIT OF EVERYTHING,
18 YOUR HONOR.

19 THE COURT: WAS THERE ANYTHING SPECIAL THAT YOU
20 DID THAT YOU WERE TRAINED FOR; YOU SAID YOU WENT TO A
21 FLIGHT SCHOOL?

22 DEFENDANT PENCILLE: YES, YOUR HONOR.

23 THE COURT: ARE YOU A PILOT?

24 DEFENDANT PENCILLE: YES, SIR.

25 THE COURT: OKAY, WHAT OTHER WORK DID YOU DO?

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1 DEFENDANT PENCILLE: A LITTLE BIT OF SECURITY
2 WORK, CONSTRUCTION, I DID SOME AUTOMOTIVE WORK.

3 THE COURT: ALL RIGHT, ARE YOU MARRIED?

4 DEFENDANT PENCILLE: NO, YOUR HONOR.

5 THE COURT: HAVE YOU EVER BEEN MARRIED?

6 DEFENDANT PENCILLE: NO, SIR.

7 THE COURT: DO YOU HAVE ANY CHILDREN?

8 DEFENDANT PENCILLE: NO, SIR.

9 THE COURT: OKAY, HAVE YOU EVER BEEN TREATED FOR
10 ANY TYPE OF MENTAL ILLNESS OR ANY ADDICTION PROBLEMS?

11 DEFENDANT PENCILLE: NO, YOUR HONOR.

12 THE COURT: HAVE YOU TAKEN ANY DRUGS OR ALCOHOL
13 IN THE LAST 24 HOURS?

14 DEFENDANT PENCILLE: NO, SIR.

15 THE COURT: CAN YOU, MR. PENCILLE, TELL ME IF
16 THERE IS ANYTHING GOING ON IN YOUR LIFE THAT WOULD PREVENT
17 YOU FROM FULLY COMPLETELY UNDERSTANDING WHAT YOU ARE DOING
18 HERE TODAY AND I WANT TO KNOW ARE YOU HAVING A PHYSICAL
19 PROBLEM, AN EMOTIONAL PROBLEM, A MENTAL PROBLEM, ANYTHING
20 GOING ON THAT WOULD KEEP YOU FROM UNDERSTANDING WHAT YOU'RE
21 DOING?

22 DEFENDANT PENCILLE: I DON'T BELIEVE SO, SIR.

23 THE COURT: ALL RIGHT, SIR, NOW I HAVE AN
24 INDICTMENT HERE, MR. PENCILLE, THAT ALLEGES THAT ON OR
25 ABOUT JUNE THE 3RD OF 2004 YOU DID ENGAGE IN SEXUAL BATTERY

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8

1 WITH ONE L. MILLER WHILE USING AGGRAVATED FORCE TO
2 ACCOMPLISH SEXUAL BATTERY AND WHILE THE VICTIM WAS ALSO THE
3 VICTIM OF FORCIBLE CONFINEMENT, KIDNAPPING, OR OTHER
4 SIMILAR OFFENSE; ARE YOU FAMILIAR WITH THAT CHARGE?

5 DEFENDANT PENCILLE: I BELIEVE SO, YES, SIR.

6 THE COURT: OKAY, ALL RIGHT, SIR, AND I SEE HERE
7 THAT YOU ARE ACCORDING TO THE SENTENCING SHEET ENTERING A
8 PLEA TO CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE; IS
9 THAT CORRECT?

10 DEFENDANT PENCILLE: YES, YOUR HONOR.

11 THE COURT: ALL RIGHT, IF YOU WOULD, MS. LIVELY,
12 GIVE ME THE FACTS OF THE CASE?

13 MS. LIVELY: YES, SIR, YOUR HONOR, THIS
14 PARTICULAR CASE OCCURRED IN THE NORTH MYRTLE BEACH SECTION
15 OF HORRY COUNTY JUNE 3RD, 2004. THE VICTIM IN THIS MATTER
16 WAS ACTUALLY WALKING ALONG THE BEACH AND WAS HEADING BACK
17 TO THE VACATION HOME WHERE OTHER FAMILY MEMBERS AND FRIENDS
18 WERE STAYING. THE DEFENDANT HAD APPROACHED HER A COUPLE OF
19 TIMES WHILE SHE WAS ON THE BEACH AND AT ONE TIME WHENEVER
20 HE DID APPROACH HER HE PLACED HIS HAND OVER HER MOUTH AND
21 BEGAN TO FONDLE HER BREASTS AND HER VAGINAL AREA. HE
22 FORCED HER UNDER A NEARBY CONDO AT WHICH TIME HE THEN
23 REMOVED HER CLOTHING AND ASSAULTED HER. HE DIGITALLY
24 PENETRATED HER VAGINA AND AS IT APPEARED ACCORDING TO THE
25 VICTIM THAT HE WAS GOING TO ATTEMPT TO PENETRATE HER WITH

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9

1 HIS PENIS SHE CLAIMED TO HAVE SOME TYPE OF AN STD TO AVOID
2 THAT ASSAULT. THE VICTIM STATED THEN THAT HE SUCKED HER
3 BREAST AND LEFT.

4 A SEXUAL ASSAULT KIT WAS COMPLETED AT THE
5 HOSPITAL. HER BREAST AREA WAS SWABBED AND LATER ON A CODIS
6 HIT WAS MADE THROUGH THE SOUTH CAROLINA LAW ENFORCEMENT
7 DIVISION LEADING THE LAW ENFORCEMENT AGENCY OF NORTH MYRTLE
8 BEACH BACK TO THIS DEFENDANT.

9 THE COURT: ALL RIGHT, AND IS THAT WHAT
10 OCCURRED, MR. PENCILLE?

11 DEFENDANT PENCILLE: YES, YOUR HONOR.

12 THE COURT: ALL RIGHT, AND IS THAT WHY YOU'RE
13 PLEADING GUILTY?

14 DEFENDANT PENCILLE: YES, SIR.

15 THE COURT: AND ARE YOU PLEADING FREELY AND
16 VOLUNTARILY?

17 DEFENDANT PENCILLE: YES, YOUR HONOR.

18 THE COURT: MR. PENCILLE, DO YOU UNDERSTAND THAT
19 YOU DO NOT HAVE TO PLEAD GUILTY; YOU HAVE AN ABSOLUTE RIGHT
20 TO A JURY TRIAL?

21 DEFENDANT PENCILLE: YES, YOUR HONOR.

22 THE COURT: AND HAS MR. BELLAMY EXPLAINED TO YOU
23 HOW A JURY TRIAL WORKS?

24 DEFENDANT PENCILLE: YES, YOUR HONOR.

25 THE COURT: DO YOU UNDERSTAND THAT IF YOU HAVE A

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10

1 JURY TRIAL YOU WOULD HAVE MANY MANY RIGHTS THAT ARE
2 ATTACHED TO THAT JURY TRIAL AND IF YOU WAIVE YOUR JURY
3 TRIAL, WHICH IS PRECISELY WHAT YOU DO WHEN YOU PLEAD
4 GUILTY, YOU GIVE UP THOSE RIGHTS AS WELL AS YOUR GENERAL
5 RIGHT TO A JURY TRIAL?

6 DEFENDANT PENCILLE: YES, YOUR HONOR.

7 THE COURT: I WANT TO POINT OUT SOME OF THE MANY
8 RIGHTS THAT YOU HAVE BY WAY OF ILLUSTRATION ONLY; IT'S
9 CERTAINLY NOT A CONCLUSIVE LIST. AS I SAID THERE ARE MANY
10 RIGHTS THAT ARE ATTACHED. SOME OF THE MORE IMPORTANT ONES
11 IN MY VIEW ARE THE RIGHT TO REMAIN SILENT. IN THE TRIAL NO
12 ONE CAN MAKE YOU TESTIFY UNLESS YOU CHOSE TO. IF YOU
13 CHOSE TO REMAIN SILENT YOU WOULD EVEN HAVE THE RIGHT TO
14 REQUIRE ME TO TELL THE JURY THEY COULD NOT USE THAT AGAINST
15 YOU.

16 YOU'D ALSO HAVE THE RIGHT TO BE REPRESENTED BY
17 MR. BELLAMY WHO COULD CHALLENGE OR CHALLENGE ALL THE
18 STATE'S EVIDENCE AND COULD PUT UP EVIDENCE THAT MIGHT BE
19 HELPFUL TO YOU REGARDLESS OF WHETHER YOU YOURSELF
20 TESTIFIED. YOU COULD STILL REMAIN SILENT. YOU COULD PUT
21 UP OTHER WITNESSES; DO YOU UNDERSTAND THAT?

22 DEFENDANT PENCILLE: YES, SIR.

23 THE COURT: AND, OF COURSE, YOU HAVE THE RIGHT
24 TO REQUIRE THE STATE TO PROVE YOUR GUILT TO EACH AND EVERY
25 JUROR BEYOND A REASONABLE DOUBT; DO YOU UNDERSTAND THAT?

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1 DEFENDANT PENCILLE: YES, SIR.

2 THE COURT: THOSE ARE ALL RIGHTS THAT ARE
3 ASSOCIATED WITH A JURY TRIAL BUT THE POINT THAT I AM TRYING
4 TO MAKE TO YOU IS THAT IF YOU IN FACT WAIVE YOUR RIGHT TO A
5 JURY TRIAL YOU'RE GIVING UP A LOT OF RIGHTS; DO YOU
6 UNDERSTAND THAT?

7 DEFENDANT PENCILLE: YES, SIR.

8 THE COURT: KNOWING THAT DO YOU STILL WISH TO
9 ENTER A PLEA OF GUILTY?

10 DEFENDANT PENCILLE: YES, YOUR HONOR.

11 THE COURT: ALL RIGHT, NOW I HAVE ALREADY
12 DISCUSSED WITH YOU THE POSSIBLE PENALTY AND THAT'S UP TO 30
13 YEARS AND THAT'S WHAT THE STATE IS ASKING. TELL ME WHAT,
14 MS. LIVELY, HAS BEEN OFFERED TO THIS DEFENDANT BY WAY OF
15 CONSIDERATION FOR HIS ENTRY OF A GUILTY PLEA? NOW I KNOW
16 THAT YOU HAVE MADE REFERENCE TO DISMISSAL OF SOME CASES;
17 TELL ME ABOUT THAT.

18 MS. LIVELY: ABSOLUTELY, YOUR HONOR. WHEN THIS
19 CASE CAME TO US THROUGH THE CODIS OF SLED IT ACTUALLY
20 BROUGHT TWO COLD CASES TO OUR OFFICE, ONE OF THEM OCCURRING
21 BACK IN 2001 WITH THE HORRY COUNTY P.D. WHICH WAS
22 INDICTMENT NUMBERS 2009-GS-26-5014 AND 5015. BOTH OF THOSE
23 WERE RESPECTIVELY CSC FIRST DEGREE AND THEN KIDNAPPING SO
24 THOSE TWO WILL BE NOL PROSSED IN EXCHANGE FOR HIS PLEA OF
25 GUILTY TO THIS CHARGE AS WELL AS ---

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1 THE COURT: LET ME, I MUST HAVE MISUNDERSTOOD
2 YOU. THERE ARE TWO OTHERS THAT ARE BEING DISMISSED, SO
3 THERE WERE THREE TOTAL THAT CAME UP ON THE CODIS?

4 MS. LIVELY: THERE WERE, NO, I'M SORRY, I'LL
5 CLARIFY. THERE WERE TWO DIFFERENT CASES OF TWO SEPARATE
6 VICTIMS CASES THAT CAME UP ON THE CODIS HITS, OKAY. EACH
7 ONE OF THOSE CASES HAD A CHARGE OF CSC FIRST DEGREE AND
8 KIDNAPPING.

9 THE COURT: ALL RIGHT.

10 MS. LIVELY: OKAY, THE ONE THAT WE'RE GOING
11 FORWARD ON TODAY IS THE VICTIM LAURA MILLER AND THAT IS THE
12 CSC FIRST DEGREE HE'S PLEADING TO THE KIDNAPPING ON THAT
13 PARTICULAR CASE WITH THAT PARTICULAR VICTIM IS GOING TO BE
14 A NOL PROSSED AS WELL.

15 THE COURT: OKAY.

16 MS. LIVELY: OKAY, SO THAT IS ONE OF THEM, THAT
17 ONE BEING THE CASE THAT IS ATTACHED TO THIS PARTICULAR
18 VICTIM, KIDNAPPING 2008-GS-26-4687.

19 THE COURT: ALL RIGHT, I THINK I UNDERSTAND YOU
20 NOW. THERE'S GOING TO BE OTHER THAN WHAT HE'S PLEADING TO
21 THERE WILL BE ONE CSC FIRST DEGREE DISMISSED AND TWO
22 KIDNAPPINGS, ONE OF WHICH WAS ASSOCIATED WITH THIS CRIME?

23 MS. LIVELY: YES, SIR, YOUR HONOR.

24 THE COURT: ALL RIGHT, SO WHAT WE'RE TALKING
25 ABOUT ARE ALL THE CASES THAT ARE PRESENTLY PENDING IN HORRY

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13

1 COUNTY?

2 MS. LIVELY: THAT WE ARE AWARE OF FROM THE CODIS
3 HITS.

4 THE COURT: THAT'S PRESENTLY PENDING?

5 MS. LIVELY: PRESENTLY PENDING, CORRECT.

6 THE COURT: OKAY, ALL RIGHT, MR. PENCILLE, THE
7 SOLICITOR TELLS ME THAT WHAT SHE HAS OFFERED YOU AS PART OF
8 THE CONSIDERATION FOR YOUR ENTERING THIS PLEA IS THAT THE
9 THREE CASES THAT SHE HAS DESCRIBED HERE ARE GOING TO BE
10 DISMISSED AGAINST YOU; IS THAT YOUR UNDERSTANDING?

11 DEFENDANT PENCILLE: TWO CASES, YOUR HONOR, YES.

12 THE COURT: WELL THERE'S TWO KIDNAPPINGS AND ONE
13 CRIMINAL SEXUAL CONDUCT FIRST DEGREE?

14 DEFENDANT PENCILLE: YES, SIR.

15 THE COURT: OKAY, THOSE THREE ARE BEING
16 DISMISSED; IS THAT YOUR UNDERSTANDING?

17 DEFENDANT PENCILLE: YES, SIR.

18 THE COURT: OKAY, NOW HAS ANYBODY PROMISED YOU
19 ANYTHING ELSE IN ORDER TO GET YOU TO PLEAD GUILTY?

20 DEFENDANT PENCILLE: NO, YOUR HONOR.

21 THE COURT: OKAY, IS THAT RIGHT, MR. BELLAMY?

22 MR. BELLAMY: THAT WOULD BE CORRECT.

23 THE COURT: THAT'S THE FULL DEAL?

24 MR. BELLAMY: YES, SIR, NOW THERE WAS AN ISSUE
25 OF LIFE WITHOUT PAROLE, THE SOLICITOR POTENTIALLY SEEKING -

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14

1 --

2 THE COURT: ALL RIGHT, WELL THAT'S WHAT I WANTED
3 TO MAKE SURE, YOU ARE WITHDRAWING, YOU SERVED HIM WITH
4 NOTICE TO SEEK LIFE WITHOUT PAROLE?

5 MS. LIVELY: CORRECT.

6 THE COURT: YOU ARE WITHDRAWING THAT?

7 MS. LIVELY: IN EXCHANGE FOR THIS PLEA, YES,
8 SIR.

9 THE COURT: ALL RIGHT, SO HE'S PLEADING TO ONE
10 CSC FIRST WITH ESSENTIALLY A 30-YEAR CAP?

11 MS. LIVELY: YES, SIR, 30 YEARS.

12 THE COURT: THAT'S THE MAX?

13 MS. LIVELY: YES, SIR.

14 THE COURT: ALL RIGHT, INSTEAD OF LIFE WITHOUT
15 PAROLE?

16 MS. LIVELY: CORRECT.

17 THE COURT: OKAY, NOW IS THAT YOUR
18 UNDERSTANDING, MR. PENCILLE?

19 DEFENDANT PENCILLE: YES, SIR.

20 THE COURT: AND DO YOU, CAN YOU THINK OF
21 ANYTHING ELSE THAT'S BEEN PROMISED TO YOU?

22 DEFENDANT PENCILLE: NO, YOUR HONOR.

23 THE COURT: ALL RIGHT, NOW TELL ME ABOUT MR.
24 BELLAMY, ARE YOU SATISFIED WITH HIS REPRESENTATION?

25 DEFENDANT PENCILLE: YES, SIR.

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15

1 THE COURT: HAS HE DONE EVERYTHING THAT YOU
2 WOULD HOPE THAT HE WOULD DO FOR YOU?

3 DEFENDANT PENCILLE: YES, SIR.

4 THE COURT: NOW ONE OF THE THINGS I HAVE TO
5 DETERMINE, MR. PENCILLE, IS WHETHER OR NOT YOU ARE MAKING
6 THIS PLEA FREELY AND VOLUNTARILY, KNOWINGLY AND
7 INTELLIGENTLY. THE ONLY WAY YOU CAN MAKE IN MY VIEW A
8 KNOWING AND INTELLIGENT PLEA IS TO HAVE ALL THE INFORMATION
9 YOU THINK THAT IS PERTINENT TO YOUR DECISION MAKING
10 PROCESS, THAT IS YOUR DECISION TO ENTER THIS PLEA. IN THAT
11 REGARD HAS YOUR ATTORNEY PROVIDED WITH YOU WITH EVERYTHING
12 YOU THINK HE POSSIBLY COULD DO?

13 DEFENDANT PENCILLE: YES, SIR.

14 THE COURT: ALL RIGHT, HAS ANYONE THREATENED YOU
15 OR INTIMIDATED YOU IN ANY WAY TO MAKE YOU PLEAD GUILTY?

16 DEFENDANT PENCILLE: NO, SIR.

17 THE COURT: ARE YOU PLEADING FREELY AND
18 VOLUNTARILY?

19 DEFENDANT PENCILLE: YES, SIR.

20 THE COURT: HAS ANYONE DONE ANYTHING THAT YOU
21 THOUGHT WAS INAPPROPRIATE IN ORDER TO COERCE YOU INTO
22 PLEADING GUILTY?

23 DEFENDANT PENCILLE: NO, SIR.

24 THE COURT: OKAY, HAVE YOU HAD ALL THE TIME YOU
25 NEED TO THINK ABOUT THIS?

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1 DEFENDANT PENCILLE: YES, SIR.

2 THE COURT: DO YOU NEED ANY MORE TIME TO TALK
3 WITH YOUR FAMILY, YOUR ATTORNEY, ANYONE ELSE?

4 DEFENDANT PENCILLE: NO.

5 THE COURT: DO YOU BELIEVE THIS IS THE BEST
6 THING FOR YOU?

7 DEFENDANT PENCILLE: YES, SIR.

8 THE COURT: OKAY, DO YOU UNDERSTAND, MR.
9 PENCILLE, THAT EVEN THOUGH THIS IS A GUILTY PLEA YOU STILL
10 HAVE A RIGHT TO APPEAL?

11 DEFENDANT PENCILLE: YES, SIR.

12 THE COURT: YOUR RIGHT TO APPEAL IS SPECIFICALLY
13 CONDITIONED UPON YOUR FILING A NOTICE OF INTENT TO APPEAL
14 WITHIN THE NEXT TEN DAYS AND I'M SURE YOU DON'T KNOW HOW TO
15 DO THAT OR WHERE TO DO IT BUT MR. BELLAMY KNOWS, RIGHT, MR.
16 BELLAMY?

17 MR. BELLAMY: YES, SIR, YOUR HONOR.

18 THE COURT: AND HE WOULD DO THAT FOR YOU, RIGHT,
19 MR. BELLAMY?

20 MR. BELLAMY: YES, SIR, YOUR HONOR,

21 THE COURT: ALL RIGHT, SIR, DO YOU UNDERSTAND
22 THAT?

23 DEFENDANT PENCILLE: YES, SIR.

24 THE COURT: DO YOU UNDERSTAND WHAT AN APPEAL IS?

25 DEFENDANT PENCILLE: YES, SIR.

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17

1 THE COURT: OKAY, ALL RIGHT, I FIND THAT THERE
2 IS A SUBSTANTIAL FACTUAL BASIS FOR THE PLEA. I FIND THAT
3 IT'S MADE FREELY AND VOLUNTARILY, KNOWINGLY AND
4 INTELLIGENTLY AFTER THE ADVICE FROM A VERY COMPETENT
5 ATTORNEY WITH WHOM THE DEFENDANT SAYS HE IS SATISFIED AND I
6 WILL ACCEPT HIS PLEA.

7 NOW ANYTHING FURTHER FROM THE STATE?

8 MS. LIVELY: YES, SIR, YOUR HONOR, BRIEFLY.

9 THE COURT: ALL RIGHT.

10 MS. LIVELY: WHENEVER THESE CASES WERE ASSIGNED
11 TO ME WE WENT THROUGH, WE BEING MYSELF AS WELL AS MY VICTIM
12 ADVOCATE AND LAW ENFORCEMENT, WENT THROUGH EXTENSIVE
13 RESEARCH REGARDING THIS DEFENDANT'S M.O. AND HIS ACTUAL,
14 THE CONCERNS THAT WE WOULD HAVE OURSELVES A SERIAL RAPIST
15 ON OUR HANDS AND I UNDERSTAND THAT I AM, YOU KNOW, I'M
16 OBVIOUSLY DISMISSING THE CHARGES IN EXCHANGE FOR HIM
17 PLEADING GUILTY TO THIS CHARGE AND RECEIVING A 30-YEAR
18 SENTENCE, WHICH I'M HOPING FOR AT THIS TIME BECAUSE BASED
19 UPON ALL THE INFORMATION THAT WAS PROVIDED TO ME THROUGH
20 LAW ENFORCEMENT AS WELL AS CONCERNS THAT THERE MAY HAVE
21 BEEN OTHER CASES OUT THERE WHICH I'M NOT ASKING THE COURT
22 TO CONSIDER, I'M EXPLAINING WHY I DID WHAT I DID, THAT HE
23 TRULY IS A PREDATOR.

24 THE CASE FROM 2005 WHERE HE WAS CONVICTED OR
25 WHERE HE PLED GUILTY TO THE KIDNAPPING, IT WAS A YOUNG

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18

1 GIRL, I BELIEVE SHE WAS ONLY 12 AT THE TIME, AND THEN
2 BECAUSE OF THAT WE WERE ABLE TO GET HIS DNA WHICH LED TO
3 THESE OTHER TWO CASES, ONE FROM 2001 AND ONE FROM 2004.
4 WHO KNOWS IF THERE ARE OTHERS OUT THERE BUT THE CONCERN FOR
5 THE STATE WOULD BE PROTECTING THE COMMUNITY AND, YOU KNOW,
6 WE COULD TAKE HIM TO TRIAL ON THIS, HAVE HIM GET LIFE
7 WITHOUT PAROLE IN EXCHANGE FOR PUTTING THE VICTIMS THROUGH
8 HAVING TO TESTIFY AND WE BELIEVE THAT THIS IS A GOOD
9 RESOLUTION. HOWEVER WE DO HAVE CONCERNS ABOUT THIS PERSON
10 EVER GETTING OUT OF PRISON BUT WE BELIEVE THIS IS A FAIR
11 RESOLUTION AND WE'RE JUST ASKING THE COURT TO PLEASE
12 CONSIDER THE GRAVITY OF THESE MATTERS, THAT THERE IS
13 ANOTHER VICTIM. I'VE TALKED TO HER; SHE WAS READY TO COME
14 DOWN HERE AND TESTIFY IF WE NEEDED TO. HE WOULD HAVE BEEN
15 LOOKING AT LIFE WITHOUT PAROLE, THAT I BELIEVE THAT THIS
16 WOULD BE THE BEST SENTENCE FOR THIS PARTICULAR TYPE OF
17 CASE. I DON'T KNOW IF MS. UNGERMAN, IT ACTUALLY WAS MS.
18 MILLER, SHE'S NOW MS. UNGERMAN, WISHES TO ADDRESS THE COURT
19 AT THIS TIME, BUT I'VE SPOKEN WITH MS. UNGERMAN AND KNOW
20 HOW DIFFICULT IT IS FOR HER TO BE HERE.

21 THE COURT: SHE IS PRESENT FOR THE RECORD?

22 MS. LIVELY: SHE IS PRESENT FOR THE RECORD AND
23 SHE IS, SHE DROVE DOWN YESTERDAY TO BE HERE FOR THE PLEA
24 THIS MORNING, OR FOR NOW, BUT ALL ALONG DEALING WITH THIS
25 AND SPEAKING ABOUT THAT TRAUMATIC EVENT IS JUST

GUILTY PLEA - AUGUST 9, 2010

19

1 OVERWHELMING FOR HER, SO, BUT SHE IS HERE AND WISHES TO SEE
2 THIS MATTER CONCLUDED.

3 THE COURT: DOES SHE WISH TO ADDRESS THE COURT?

4 MS. LIVELY: NO, YOUR HONOR, IT'S MY
5 UNDERSTANDING SHE DOES NOT WISH TO ADDRESS THE COURT. SHE
6 WANTED TO BE HERE TO SHOW THE COURT HOW IMPORTANT THIS WAS
7 TO HER BUT THAT ACTUALLY SPEAKING AND BEING IN THE SAME
8 COURTROOM WITH THIS DEFENDANT IS EXTREMELY DIFFICULT FOR
9 HER.

10 THE COURT: I CAN UNDERSTAND.

11 MS. LIVELY: BUT THAT WOULD BE IT FOR THE STATE,
12 YOUR HONOR.

13 THE COURT: ALL RIGHT, MR. BELLAMY?

14 MR. BELLAMY: MAY IT PLEASE THE COURT, YOUR
15 HONOR, GREGORY IS 32 YEARS OLD. HE IS STANDING HERE
16 ACCOMPANIED WITH HIS MOTHER AND FATHER WHO ARE HERE IN THE
17 COURTROOM. WE CERTAINLY DON'T CONDONE ANYTHING THAT HAS
18 GONE ON AND ON BEHALF OF MY CLIENT AND HIS FAMILY WE
19 APOLOGIZE TO THE YOUNG LADY HERE TODAY FOR ANY AND
20 EVERYTHING THAT SHE HAS HAD TO ENDURE AND GO THROUGH COMING
21 HERE TODAY AND EVERYTHING THAT'S HAPPENED.

22 JUDGE, MY CLIENT IS HERE, HE'S 32, AND PRIOR TO
23 WHAT HE'S INCARCERATED BACK IN '05 HE HAD NO CRIMINAL
24 RECORD UP UNTIL THAT POINT. I BELIEVE HE WOULD HAVE BEEN
25 ABOUT 27 OR 28 YEARS OLD AT THAT TIME, JUDGE. HE HAS SOME

GUILTY PLEA - AUGUST 9, 2010

20

1 EDUCATION. HE AS HE SAID IS A PILOT AND HAS SOME TRAINING
2 IN OTHER AREAS. HE HAD BEEN LIVING HERE IN MYRTLE BEACH
3 FOR APPROXIMATELY 10 YEARS AT THE TIME.

4 I DID NOT REPRESENT HIM PREVIOUSLY IN THE OTHER
5 MATTER, OBVIOUSLY REPRESENTING HIM HERE WHEN WE GOT THE
6 INFORMATION AND SHORTLY, I'D SAY WITHIN 30 DAYS OF THE
7 WARRANTS BEING SERVED ON HIM MOTHER AND FATHER, CAME IN AND
8 HIRED ME AND I, OF COURSE, THEN WENT AND VISITED MR.
9 PENCILLE HERE IN PRISON.

10 AT NO TIME, JUDGE, WAS THIS GOING TO BE A TRIAL.
11 THIS HAS BEEN ALMOST TWO YEARS NOW, I BELIEVE OCTOBER WILL
12 BE TWO YEARS, IT WAS OCTOBER OR NOVEMBER OF '08. THIS
13 CASE CERTAINLY WAS NOT ON THE FRONT BURNER BECAUSE OF HIS
14 BEING HOUSED IN THE DEPARTMENT OF CORRECTIONS AND THOSE
15 SORT OF THINGS BUT THERE WAS SOME GETTING THE DISCOVERY AND
16 THEY HAD TO DO THE CONFIRMATION ON THE DNA AND CERTAINLY
17 FROM MY STANDPOINT WE WANTED TO MAKE SURE THAT EVERYTHING
18 WAS IN ORDER BEFORE WE GOT IN THE SITUATION OF DOING A PLEA
19 BUT WE ARE HERE ENTERING A PLEA, YOUR HONOR. THE MAXIMUM
20 PENALTY IS UP TO 30. AS YOUR HONOR KNOWS THIS IS AN 85
21 PERCENT CRIME SO VIRTUALLY DAY PER DAY.

22 WE WOULD ASK, JUDGE, OBVIOUSLY HE'S 32, WE WOULD
23 ASK THE COURT FOR SOME CONSIDERATION FOR NOT REQUIRING THE
24 STATE AND THESE VICTIMS AND THESE LADIES TO COME FORWARD
25 AND GO THROUGH AND ENDURE THIS, SOME CONSIDERATION OF A

GUILTY PLEA - AUGUST 9, 2010

21

1 LITTLE BIT LESS THAN THE MAXIMUM. WE CERTAINLY UNDERSTAND
2 THE SERIOUS NATURE OF THE CHARGES AND THE BENEFITS HE HAS
3 RECEIVED UP UNTIL THIS POINT BUT I GUESS FROM MY STANDPOINT
4 MY CLIENT, AND CERTAINLY HIS FAMILY, THAT AT SOME POINT
5 THAT HE HAS SOME AMOUNT OF LIFE TO LIVE IN FREEDOM. MIGHT
6 NOT BE MUCH BUT WITH THE 85 PERCENT AND THE SENTENCE RANGE
7 THAT WE'RE DEALING WITH WE WOULD ASK THE COURT TO CONSIDER
8 COMING UNDER THAT IN LIGHT OF THE FACT THAT IT IS THE
9 MAXIMUM AMOUNT OF 30 AND THAT HE IS HERE TENDERING A PLEA,
10 NOT REQUIRING THE STATE TO GO THROUGH SOME OF THE EVIDENCE
11 OF BRINGING THESE LADIES HERE TO GO THROUGH THIS PROCESS.

12 JUDGE, I THINK HE MAY WANT TO ADDRESS THE COURT
13 BRIEFLY, BUT I BELIEVE HIS FATHER WOULD LIKE TO BRIEFLY
14 ADDRESS THE COURT ---

15 THE COURT: VERY WELL.

16 MR. BELLAMY: --- AT THIS TIME.

17 THE COURT: CERTAINLY, MR. PENCILLE?

18 MR. PENCILLE: RICHARD PENCILLE.

19 THE COURT: PENCILLE, OKAY.

20 FAMILY MEMBER: PENCILLE, CORRECT. I'D JUST
21 LIKE THE COURT TO KNOW THAT HIS MOTHER AND FATHER DO
22 SUPPORT HIM. WE DON'T KNOW FROM THE CIRCUMSTANCES THAT
23 BROUGHT THIS ON. WE FEEL VERY VERY BAD FOR THE VICTIM. WE
24 WOULD LOVE TO SEE HIM GET AN OPPORTUNITY A LITTLE LESS THAN
25 30 YEARS, IF POSSIBLE, A LITTLE LESS THAN 30 YEARS SO THAT

GUILTY PLEA - AUGUST 9, 2010

22

1 HE WILL HAVE THE CHANCE TO AT LEAST HAVE A CHANCE AT LIFE
2 AND THIS IS ALL WE CAN ASK FOR, THANK YOU.

3 THE COURT: OKAY, THANK YOU.

4 MR. BELLAMY: YOUR HONOR, I WOULD STATE JUST
5 BRIEFLY IN TERMS OF APPARENTLY THE EVENT AS DESCRIBED BY
6 THE SOLICITOR THERE WAS THE ASSAULT AND APPARENTLY SOME
7 CONVERSATION ABOUT AN STD AND APPARENTLY AT THAT POINT MY
8 CLIENT LEFT. HE WAS NOT ARMED. THERE WAS NO, AND
9 OBVIOUSLY THE EMOTIONAL INJURY IS WHAT WE'RE DEALING WITH,
10 BUT THERE WAS NO WEAPON USED OR ANYTHING OF THAT NATURE. I
11 WOULD ASK THE COURT TO CONSIDER THAT THAT HE DID WALK AWAY
12 AND THAT HE IS HERE PLEADING GUILTY AND SAVING THE STATE
13 AND THESE YOUNG LADIES THE DIFFICULTY OF COMING TO TRIAL
14 AND I THINK HE MAY WANT TO BRIEFLY ADDRESS THE COURT IF THE
15 COURT WOULD DEEM THAT APPROPRIATE.

16 THE COURT: ALL RIGHT, MR. PENCILLE, I'LL BE
17 GLAD TO HEAR FROM YOU.

18 DEFENDANT PENCILLE: I WOULD JUST LIKE TO ASK
19 FOR AS MUCH MERCY AS POSSIBLE FROM YOU. I'D LIKE TO
20 APOLOGIZE TO MY PARENTS FOR HAVING TO PUT THEM THROUGH THIS
21 STRESS. IT KEEPS PILING ON THEM AND I NEVER INTENDED ANY
22 OF THIS TO HAPPEN OR THEM TO BE AFFECTED BY IT SO I JUST,
23 I, I WOULD LIKE TO HAVE A CHANCE AT A NORMAL LIFE ONE DAY
24 AND JUST ASK FOR YOUR MERCY AS, AS MUCH AS YOU CAN GRANT.

25 THE COURT: OKAY, ANYTHING FURTHER FROM THE

GUILTY PLEA - AUGUST 9, 2010

23

1 STATE?

2 MS. LIVELY: YOUR HONOR, I APOLOGIZE AND MS.
3 UNGERMAN DID STATE THAT SHE WOULD LIKE TO MAKE A BRIEF
4 STATEMENT.

5 THE COURT: MS. UNGERMAN?

6 MS. LIVELY: IF THE COURT WILL ALLOW HER TO DO
7 SO.

8 THE COURT: CERTAINLY.

9 MS. LIVELY: STATE YOUR NAME?

10 MS. UNGERMAN: I'M LAURA UNGERMAN.

11 THE COURT: UNGERMAN, OKAY.

12 MS. UNGERMAN: YES, SIR, I DO UNDERSTAND THAT
13 PEOPLE DESERVE A RIGHT TO MAKE THE BEST OF THEIR LIFE AND
14 DO WHAT THEY CAN AND DEAL WITH CIRCUMSTANCES THAT MAY ARISE
15 OUT OF THEIR CONTROL. IT WAS JUST A, YOU KNOW, SMALL
16 ENCOUNTER THAT HAPPENED WITH ME. IT WAS OUT OF MY CONTROL
17 AND I'M MAKING THE BEST OF MY LIFE IN LIGHT OF THAT. I
18 DON'T GO OUT AND HARM OTHER PEOPLE WEAPON OR NOT. I DON'T
19 FIND SOMEONE SMALLER THAN MYSELF AND FORCE THEM TO DO
20 SOMETHING THAT THEY'RE NOT OKAY WITH. I DON'T TERRIFY
21 PEOPLE AND THAT'S WHAT IT WAS, IT WAS TERRORISM.

22 IT TOOK ME YEARS TO TRUST PEOPLE. IT TOOK ME, I
23 STILL DON'T GO ON PARKING DECKS OR ELEVATORS BY MYSELF AND
24 MAYBE IT'S JUST MADE ME MORE OF AWARE OF A PERSON AND I
25 THINK THAT'S A GOOD THING FOR ANY WOMAN IS JUST TO BE MORE

GUILTY PLEA - AUGUST 9, 2010

24

1 AWARE OF HER SURROUNDINGS. I DON'T TRUST PEOPLE THE SAME
2 ANYMORE BUT I THINK THAT I'M JUST A LITTLE BIT LESS NAIVE.
3 I JUST THOUGHT THE BEST IN PEOPLE. I THOUGHT THIS MAN WAS
4 MAYBE JUST KIND OF CREEPY AND MAYBE WAS HITTING ON ME AND I
5 COULD JUST, YOU KNOW, I DIDN'T THINK ANYTHING MORE OF IT OR
6 I WOULD HAVE JUST WALKED AWAY AS QUICKLY AS POSSIBLE. I
7 WOULDN'T HAVE TRIED TO CHIT CHAT MY WAY OUT OF IT BUT TO
8 DOWNPLAY IT I THINK IS UNFAIR AND SAY THAT HE WAS UNARMED
9 AND NOTHING REALLY CAME OUT OF IT. THAT'S NOT FAIR AND
10 OBVIOUSLY IT WASN'T A ONE TIME THING AND I GUESS
11 SPECULATION DOESN'T MATTER BUT AS FAR AS WHAT THE COURTS
12 ALREADY KNOW ABOUT, THEY ALREADY KNOW ABOUT SEVERAL OTHER
13 WOMEN THAT HE HAS DONE THIS TO, A CHILD THAT HE HAS DONE
14 THIS TO. I MEAN I AM MORE THAN WILLING TO TESTIFY SO THE
15 FACT THAT HE IS PLEADING GUILTY AND GETTING CHARGES THAT HE
16 DID TO ME DISMISSED BECAUSE HE'S BEING HONEST AND PLEADING
17 GUILTY I THINK IS RIDICULOUS BUT I UNDERSTAND THAT THERE'S
18 A SYSTEM IN PLACE FOR A REASON AND I'M WILLING TO DEAL WITH
19 THAT AND I WILL GO HOME FEELING OKAY BECAUSE HE WILL BE
20 JAIL FOR MORE TIME BUT I THINK IT IS LAUGHABLE THAT HE
21 SHOULD BE ABLE TO HAVE ANY MORE LIFE OUT TO BE ABLE TO MAKE
22 THE BEST OF HIS LIFE BECAUSE WE'VE ALL OBVIOUSLY SEEN WHAT
23 HE'S DONE WITH THE LIFE THAT HE'S HAD SO FAR ON THE
24 OUTSIDE. SO I WOULD JUST LIKE TO SAY THAT.

25 THE COURT: THANK YOU, MA'AM.

GUILTY PLEA - AUGUST 9, 2010

25

1 MS. LIVELY: THAT'S ALL FROM THE STATE, YOUR
2 HONOR.

3 THE COURT: ALL RIGHT, ANYTHING FURTHER FROM THE
4 DEFENSE?

5 MR. BELLAMY: NO, YOUR HONOR.

6 THE COURT: ALL RIGHT, MR. PENCILLE, YOU HAVE
7 RECEIVED A SUBSTANTIAL AMOUNT OF MERCY FROM THE STATE AND
8 YOU WERE LOOKING AT LIFE WITHOUT PAROLE. ALL THEY HAD TO
9 DO WAS JUST TRY YOU FOR THIS AND THEY'VE GOT A DNA MATCH,
10 I'M THINKING A DNA MATCH ON ANOTHER CASE AS WELL, PLUS A
11 PRIOR THAT COULD HAVE BEEN USED AGAINST YOU IF YOU TRIED TO
12 TESTIFY IN THIS CASE. I DON'T THINK A WHOLE LOT ABOUT THE
13 FACT THAT YOU PLED GUILTY. MR. BELLAMY HAD A REALLY TOUGH
14 CASE HERE. I DON'T THINK THERE WAS REALLY MUCH YOU COULD
15 DO BUT NEGOTIATE THIS THING. HE'S DONE A GREAT JOB DOING
16 THAT FOR YOU I CAN ASSURE OF THAT.

17 THE SENTENCE OF THE COURT IS YOU BE CONFINED TO
18 THE STATE DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 30
19 YEARS. I'M GOING TO RUN THAT CONCURRENT WITH THE SENTENCE
20 THAT YOU ARE PRESENTLY SERVING. I'LL GIVE YOU CREDIT FOR
21 THE TIME THAT YOU WERE CHARGED WITH THIS, OKAY?

22 MS. LIVELY: YOUR HONOR, MAY WE BE CLEAR ON THE
23 RECORD AS TO WHAT THE TIMING IS IN REGARDS TO GIVING HIM
24 CREDIT BECAUSE ---

25 THE COURT: 2008.

GUILTY PLEA - AUGUST 9, 2010

26

1 MS. LIVELY: YES, IT WAS ---

2 THE COURT: LAST YEAR WHENEVER HE WAS CHARGED
3 WITH THIS.

4 MS. LIVELY: HE WAS, THE WARRANTS WERE SERVED ON
5 HIM OCTOBER 9TH OF 2008.

6 THE COURT: THAT'S IT.

7 MS. LIVELY: OKAY, I WANTED TO MAKE SURE, THANK
8 YOU.

9 THE COURT: THANK YOU.

10 END OF REQUESTED TRANSCRIPT.....

11

12

13

14

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25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

I DO FURTHER CERTIFY THAT I AM NEITHER KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

March 29, 2012

Brenda R. Babb
BRENDA R. BABB, CVR

OFFICIAL REPORTER

4

28

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF HORRY) INDICTMENT NO: 2008GS2604686

STATE OF SOUTH CAROLINA,)
vs.) **MOTION TO RECONSIDER**
GREGORY T. PENCILLE) **SENTENCE**

NOW COMES THE DEFENDANT, by and through his attorney, G. Scott Bellamy and moves the Court for a Motion to re-consider sentencing. The guilty plea of the above Defendant was held August 10, 2010 before the Honorable Larry B. Hyman.

Respectfully submitted,

G. Scott Bellamy

G. Scott Bellamy, Attorney for Defendant
1206 Third Avenue
Conway, SC 29526
(843)-248-3172

Conway, South Carolina

August 10, 2010

FILED
HORRY COUNTY
2010 AUG 10 PM 3:28
KELANIE HUGGINS-WARD
CLERK OF COURT

TRANSFERRED
TO

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

FEB 21 2012

IN THE COURT OF GENERAL SESSIONS

FIFTEENTH JUDICIAL CIRCUIT

SOLICITOR'S OFFICE

The State of South Carolina,)
)
 v.)
)
 Gregory T. Pencille,)
)
 Defendant.)

Indictment No. 2008-GS-26-04686

**MOTION FOR HEARING ON MOTION
TO RECONSIDER SENTENCE**

COMES NOW, the above Defendant, Gregory Thomas Pencille, who moves this Court to hold a Hearing on the MOTION FOR RECONSIDERATION that was filed on August 10, 2010.

On August 9, 2010, Defendant appeared before the Honorable Larry B. Hyman, Judge of the Court of General Sessions, to enter a plea of guilty to a charge of CSC, 1st Degree. At that time, the Defendant was represented by G. Scott Bellamy, Esq., and the State was represented by Candice Lively, Esq., Assistant Solicitor for Horry County.

At the conclusion of the Guilty Plea Trial, this Court sentenced Defendant to a term of thirty-years (30) confinement in the custody of the South Carolina Department of Corrections ("SCDC") and the Sentence Sheet was altered to reflect that the Defendant would be required to wear a GPS Monitor upon serving his thirty (30) year sentence.

On August 10, 2010, Defendant's counsel filed and served upon the Solicitor, a one (1) Page document captioned as a "MOTION TO RECONSIDER SENTENCE" while simultaneously filing a NOTICE OF APPEAL.

After Defendant returned to the custody of the SCDC and reviewed his sentencing sheet, he learned of the requirement that he be required to wear a GPS Monitor.

Because the Defendant entered a plea of guilty to CSC, 1st Degree

and not CSC w/minor 1st or Lewd Act as stated on the Sentence Sheet, the Defendant should not be required to wear a GPS device. Further and because the plea was allegedly entered as a part of a plea agreement, the requirement that he wear a GPS Monitoring device was not a part of that agreement and the box on the sentencing sheet indicating that a GPS monitor was a part of the sentence was checked after the Defendant signed the sheet and without his knowledge and consent.

In addition, the Defendant seeks a hearing because he contends that this Court relied on false and/or misleading information that was provided by the Assistant Solicitor in making its decision to sentence the Defendant to the full thirty (30) year cap.

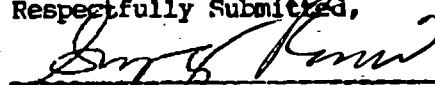
The Defendant respectfully moves this Honorable Court to hold a hearing into the matter so as to allow the Defendant a fair opportunity to show to this Court's satisfaction, that to take into consideration, the information provided to this Court by the Assistant Solicitor in handing down the sentence, is manifestly unfair and unfairly prejudiced the Defendant.

The Defendant was led to believe that the Assistant Solicitor was only to inform his Honor of the thirty year cap and she did more than that.

~~WHEREFORE~~, Defendant PRAYS that this Court hold a hearing into the matters raised herein, resentence the Defendant in accordance with any alleged Plea Agreement entered into between Defendant and the State, and that this court GRANT any such other and further relief this Court deems fair and just.

February 9, 2012
Bishopville, South Carolina

Respectfully Submitted,


Gregory T. Pencille, #312332
Lee Corr., Inst., RID-233
990 Wisacky Highway
Bishopville, SC 29010-1775

DEFENDANT, Pro Se

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF GENERAL SESSIONS
08-GS-26-04686

State of South Carolina,)
)
vs.)
)
Gregory Pencille,)
)
Defendant.)
_____)

TRANSCRIPT OF RECORD

March 14, 2012
Conway, South Carolina

Before:

The Honorable, Larry B. Hyman, Judge

Appearances:

BY: Candice A. Lively, Esq.
Attorney for State

BY: G. Scott Bellamy, Esq.
Attorney for Gregory Pencille

Brenda R. Babb
Circuit Court Reporter

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Motion to Reconsider/Relieve Counsel - March 14, 2012 3

1 The Court: What do we have?

2 Mr. Bellamy: This is Mr. Gregory Pencille who
3 was a client of mine that I represented before Your Honor,
4 I believe back in 2010, I believe August 9th, 2010 when he
5 appeared before Your Honor and pled guilty to CSC ---

6 The Court: I remember, Mr. Pencille, how are
7 you, good to see you.

8 Mr. Bellamy: There was a recommendation by the
9 State in the case of, I believe, a cap of thirty years
10 after the sentencing of the guilty plea and hearing from
11 both sides, Your Honor, sentenced him to thirty years to
12 run concurrent with a sentence he was presently serving at
13 the Department of Corrections of twelve years, and to back
14 date his time back to October of 2008.

15 The Court: Okay.

16 Mr. Bellamy: There is just for the record and
17 my client pointed this out to me, there is a box checked on
18 the sentencing sheet indicating mandatory gps which would
19 be appropriate if it was CSC with a minor or lewd act. It
20 was scriveners error ---

21 The Court: This was with adults as I remember
22 it.

23 Mr. Bellamy: Yes, it was a scriveners error on
24 behalf, I didn't catch it ---

25 The Court: Well I can correct that.

Motion to Reconsider/Relieve Counsel - March 14, 2012

4

1 Mr. Bellamy: --- but we can correct that part,
2 he raised that issue, so that if Your Honor would do that
3 we ask that that be amended in the sentencing sheet to
4 reflect, to not be reflected as mandatory gps.

5 Now beyond that, Judge, he is here and he has
6 filed a motion to have me relieved and have another lawyer
7 appointed to represent him.

8 The Court: How is that you are, were you
9 retained?

10 Mr. Bellamy: Yes, sir, Your Honor.

11 The Court: Okay, all right.

12 Mr. Bellamy: And after, well in just procedure
13 to his guilty he asked me to file a notice of intent to
14 appeal and a motion to reconsider. I told him I didn't
15 know if the place would be appropriate at the same time,
16 but I did file both of those. I believe his appeal has
17 been dismissed and I'm not sure exactly what he's asking
18 for ---

19 The Court: Does he have a pending charge?

20 Mr. Bellamy: No, he has no, all charges ---

21 The Court: What would the purpose of appointing
22 an attorney be?

23 Mr. Bellamy: Well, Your Honor, I'll let him
24 state it.

25 The Court: Okay.

Motion to Reconsider/Relieve Counsel - March 14, 2012 5

1 Mr. Bellamy: I asked him today, you know,
2 exactly what he wanted and there's some things that I think
3 he wants to tell Your Honor. I've advised him that I don't
4 think they're appropriate to this kind of a motion.

5 The Court: All right, Mr. Pencille, I'll be
6 glad to hear from you.

7 You want to relieve Mr. Bellamy from further
8 representation?

9 Defendant Pencille: Oh, yes, Your Honor.

10 The Court: Okay, Mr. Bellamy, you're relieved.

11 Mr. Bellamy: Thank you.

12 Defendant Pencille: What I had asked for the
13 relief of counsel was for counsel to be present today for
14 the motion to reconsider and upcoming appeal if it proceeds
15 that far. Some of the issues that I had with the hearing
16 were Ms., Ms. Lively's accusations ---

17 The Court: Are you proceeding pro se?

18 Defendant Pencille: I would, I'm completely at
19 a loss for words at the moment for procedures. I'm not a
20 lawyer by any means so --

21 The Court: Obviously.

22 Mr. Bellamy: Your Honor, if I could help him
23 just sort of shorten this up. I think some of the issues
24 that he's raised have to do with statements made by the
25 Solicitor at the sentencing after the plea ---

Motion to Reconsider/Relieve Counsel - March 14, 2012

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1 The Court: All right, do you want Mr. ---

2 Mr. Bellamy: --- relating to other charges.

3 The Court: --- Mr. Bellamy to represent you or
4 continue on representing you for the purposes of this
5 hearing?

6 Defendant Pencille: Is that appropriate?

7 Mr. Bellamy: He's asking you if you would, I'll
8 be willing to stand up and aid in this process, Judge.

9 Defendant Pencille: There would be a lack of
10 trust but as long as, you know, it's worded properly or,
11 or, you know --

12 Mr. Bellamy: I think what he, he, he believes
13 that the Solicitor brought up unrelated matters which he
14 was not charged with and matters that he was charged with
15 that would either be dismissed. In other words, the
16 Solicitor referenced that there could have been some other
17 rapes unsolved and he may be ---

18 The Court: I remember this case now and, sir,
19 didn't the Solicitor need to place on the record all the
20 other charges because as I recall you were served with
21 notice that the State was seeking life without parole ---

22 Defendant Pencille: Yes, Your Honor.

23 The Court: --- and at the eleventh hour there
24 was an agreement that you would plead guilty and all these
25 other charges would be dismissed; isn't that right?

Motion to Reconsider/Relieve Counsel - March 14, 2012

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1 Defendant Pencille: Yes, sir.

2 The Court: Well how other than by placing that
3 on the record would you be assured of getting the benefit
4 of your bargaining, so to speak, that is the State, you
5 could be assured that the State would be barred from
6 further prosecution of those cases?

7 Defendant Pencille: I understand that, what,
8 what had happened or what caught me kind of in the, in the
9 dark is I was here for two incidents, one in '01 and one in
10 '04, which were a total of four charges. Three were
11 dropped in the plea agreement, one I pled to.

12 The Court: Right.

13 Defendant Pencille: I was under the impression
14 that I was pleading to kidnaping. Right before I came into
15 the plea agreement it had been changed to CSC which we have
16 on the sentencing sheet.

17 The Court: I think the kidnaping had been
18 dropped off of it, hadn't it?

19 Defendant Pencille: It had, but what it was
20 supposed to have been was kidnaping instead of CSC, and
21 then I was told at the last minute that Ms. Lively would
22 not agree to ---

23 The Court: Well you certainly wouldn't want to
24 do that, would you? The kidnaping carried up to life; is
25 that right, at that time or is it just thirty years?

Motion to Reconsider/Relieve Counsel - March 14, 2012

8

1 Defendant Pencille: No, it was thirty.

2 The Court: Thirty years.

3 Ms. Lively: They both carried up to thirty,
4 Your Honor.

5 The Court: Okay, both of them were thirty years
6 sentences.

7 Ms. Lively: Yes, sir.

8 Defendant Pencille: But the issue that I had
9 was in her arguments addressed to you she had mentioned
10 several other incidents that were unsolved crimes in the
11 Myrtle Beach and North Myrtle Beach area that I have no
12 discovery on, I have no knowledge of, and she addressed
13 that.

14 The Court: They were dismissed, were they not?

15 Defendant Pencille: There is no such thing, she
16 made them up.

17 Mr. Bellamy: Judge, if I might clarify.

18 There's obviously a lot of unsolved cases right now where
19 the rape cases they don't have suspect and they haven't
20 been able to link anybody and I think her references were
21 that because of the nature of this case going back almost
22 ten years on a CODIS hit that there were other unsolved
23 cases that he could have been involved in; that nobody had
24 been arrested on; and that was a very brief portion of what
25 she stated.

Motion to Reconsider/Relieve Counsel - March 14, 2012 9

1 The Court: That would have made no difference.

2 Mr. Bellamy: And I think Your Honor may have
3 addressed that, I don't have the transcript, but may have
4 said ---

5 Defendant Pencille: I have the transcript right
6 here.

7 Mr. Bellamy: And I don't know but that's what
8 he's trying to say is that there was uncharged or unsolved
9 crimes that the Solicitor ---

10 The Court: Well that would certainly have been
11 an inappropriate to tell a jury but I was the sentencing
12 judge, not the jury.

13 Mr. Bellamy: Your Honor, I've explained to my
14 client that at a sentencing hearing the rules of evidence
15 as that apply in a trial aren't, do not apply in
16 sentencing; that Your Honor is able to hear whatever you
17 think is relevant and ferret it out and that's your job and
18 that you can decide what's relevant and not, and I think
19 that's what his objection here is today or statement.

20 The Court: And the relief he's seeking is --

21 Mr. Bellamy: Well I don't, I don't know. I
22 guess to ask you to reconsider your sentence based on the
23 fact that those things shouldn't have been stated to you.

24 The Court: Is that what you're asking me to do?

25 Defendant Pencille: Yes, the way she had made

Motion to Reconsider/Relieve Counsel - March 14, 2012 10

1 it sound in the courtroom was there was several cases that
2 I was a believed suspect or ---

3 The Court: I don't even recall that but it
4 seems to me that there was a reference to one other case in
5 which there was a CODIS hit on.

6 Ms. Lively: Yes, sir, there was one from, the
7 one he pled to, I believe ---

8 The Court: Cause I remember that he had more
9 than just the victim of the one he was pleading to.

10 Ms. Lively: Yes, sir.

11 The Court: Wasn't there another lady that was
12 also in here that had been a victim of another one?

13 Ms. Lively: Yes, sir.

14 The Court: In which there was a CODIS hit?

15 Ms. Lively: Correct, there were two CODIS hits.

16 The Court: And so both ladies were here?

17 Ms. Lively: I believe one, the one that was
18 here with her, either friend or sister, was the one on the
19 charge he was pleading to but the one, the other one I had
20 notified her the plea and she had just told me to make a
21 statement on her behalf. She didn't actually come cause
22 she's out of state.

23 The Court: I remember the two.

24 Ms. Lively: But that's right.

25 The Court: Two ladies.

Motion to Reconsider/Relieve Counsel - March 14, 2012 11

1 Ms. Lively: Yes, sir, there were two women
2 here. You're exactly right, Your Honor, and the only
3 concern I have, the first thing we needed to know is
4 exactly what Mr. Pencille was looking for today. I did not
5 tell the victim to come back for a re-sentencing cause I
6 really, like I said, even Mr. Bellamy wasn't sure what the
7 motion was for because I've received several papers from
8 Mr. Pencille asking him to be, asking Mr. Bellamy to be
9 relieved on top of motion for reconsideration and some
10 other stuff, so ---

11 The Court: All right, let me try to find out,
12 Mr. Pencille, you are here today on a motion to reconsider
13 because you believe the Court received improper information
14 during your sentencing hearing?

15 Defendant Pencille: Yes, sir.

16 The Court: Is that it, you got any authority
17 that would indicate that what she said was improper?

18 Defendant Pencille: Other than the fact I was
19 never informed or mentioned of any other crimes or
20 incidents that, that I should have been connected to.

21 The Court: Well I can tell you what she said,
22 if she said that, would not have been of any consequence to
23 me; that what your sentence was based on was the fact that
24 you had prior convictions, this was a life without parole
25 situation, the Solicitor had taken life without parole off

Motion to Reconsider/Relieve Counsel - March 14, 2012 12

1 of the table. I believe you were in your twenties at the
2 time; is that right?

3 Defendant Pencille: 10/32.

4 The Court: Okay, late twenties or early
5 thirties, and that there was a recommendation of a, a
6 thirty-year cap.

7 Defendant Pencille: That's right.

8 The Court: Now the only thing that concerned me
9 was the taking of life off the table, life without parole,
10 the reduction of the charges to one count, dropping of the
11 kidnaping charge. How many charges were there, were there
12 four?

13 Ms. Lively: There were four, Your Honor.

14 The Court: Two kidnappings, two CSC first?

15 Ms. Lively: CSC first, yes, sir.

16 The Court: Mr. Pencille, I can tell you right
17 now that the sentence was the same sentence I would have
18 given you regardless of whether there was any mention of
19 any other offenses. Those things don't have, are of no
20 consequence to me. You were not indicted for them.
21 There's no evidence that tie you to them, has nothing to do
22 with the sentence you got. The sentence you got had to do
23 with three very serious charges being dropped, your prior
24 criminal record, and the fact that life without parole was
25 taken off the table. That's where your sentence came from.

Motion to Reconsider/Relieve Counsel - March 14, 2012 13

1 Ms. Lively: And, Your Honor, I can address the
2 statement that was made during the plea. I do have the
3 transcript and clearly whenever you were giving me the
4 opportunity to speak I wanted to address why the thirty
5 years actually what the State was asking for, is that based
6 upon all the information, this is a quote that I was
7 provided to me through law enforcement as well as concerns
8 that there may have been other cases out there, which I'm
9 not asking the Court to to consider. I'm explaining why I
10 did what I did and that I believe he's a predator, and that
11 was a part of my information I was provided to you and I
12 even told you I'm not asking you to consider that but I was
13 explaining to you the strong opinion I had in regards to
14 the thirty-year sentence.

15 The Court: Well I can tell you I did not
16 consider any other offenses.

17 Ms. Lively: Yes, sir.

18 The Court: There was no allegations of any
19 specific offenses, no details of any other offenses. I did
20 not consider that as you, and you did not ask me to do
21 that.

22 Ms. Lively: Yes, sir.

23 The Court: Again my sentence was based upon the
24 reduction in charges, the reduction in exposure,
25 substantial reduction in exposure, and your prior criminal

Motion to Reconsider/Relieve Counsel - March 14, 2012 14

1 record. That's what your sentence was based on,
2 consequently I would respectfully deny your motion for
3 reconsideration, thank you, sir.

4 End of requested transcript - - - -

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CERTIFICATE OF REPORTER

I, the undersigned Brenda R. Babb, official court reporter the South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of General Sessions for Horry County, South Carolina.

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

July 28, 2012

Brenda R. Babb

Brenda R. Babb, CVR
OFFICIAL REPORTER

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) OF THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) INDICTMENT #: 2008GS2604686
) WARRANT #: J740369
STATE OF SOUTH CAROLINA) CASE #: 08H04414
)
VS.) ORDER AMENDING SENTENCE SHEET
) AND DENYING DEFENDANT'S MOTION
GREGORY THOMAS) TO RECONSIDER SENTENCE
PENCILLE)
)
DEFENDANT,)
)

2012 APR -3 PM 1:45
JANIE HUBBARD
CLERK OF COURT

FILED
Horry County
2012 APR -3 PM 3:45
JANIE HUGGINS-WARD
CLERK OF COURT
Motion

THIS MATTER COMES before the Court pursuant to Defendant's Motion for Reconsideration of his Sentence, for an amendment to the sentence sheet and for an Order Relieving his attorney, Scott Bellamy. Present at the call of the case were the Defendant Gregory Pencille, his attorney of record, Scott Bellamy and Candice A. Lively, Assistant Solicitor. On August 9, 2010, the Defendant pled guilty and was sentenced on the charge of Criminal Sexual Conduct First Degree, warrant number J740369, to 30 years, Violent, Most Serious and Mandatory GPS, by the undersigned judge, who now wishes to amend the sentence by removing the designation of the Mandatory GPS requirement for this Defendant.

Furthermore, the Court heard Defendant's argument to reconsider his sentence based upon his claim that the Court was unduly influenced by mention of uncharged criminal offenses in statements made by Assistant Solicitor Lively during the sentencing hearing. A transcript was provided from the sentencing hearing and clearly the statement made by Assistant Solicitor Lively was to briefly address law enforcement concerns regarding the history of this defendant but that she did not expect the Court to take that into consideration in sentencing. The Court reiterated to the defendant in regards to his motion for reconsideration that it did not consider any claim of additional unsolved crimes against this defendant for purposes of his sentence. The Court stated the only matters it considered were the seriousness of the charge, the fact that defendant was serving time for a prior conviction for Kidnapping, that the State was dismissing all remaining Criminal Sexual Conduct First Degree and Kidnapping cases pending against him in exchange for the plea, and the presence of the victim at the sentencing hearing. Those matters were the sole considerations by the Court and supported the imposition of the 30 year sentence for Defendant's crime. Therefore, the Defendant's Motion for Reconsideration is denied.

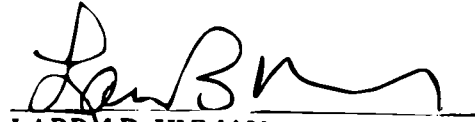
Defendant Pencille asked this Court to relieve his attorney of record, Scott Bellamy, from representing him in any additional post conviction relief matters and Attorney Bellamy consented to his removal. Therefore, Defendant's motion to relieve his attorney is granted.

IT IS THEREFORE ORDERED that the sentence of Gregory Thomas Pencille be

amended to read:

No Mandatory GPS; and it is hereby
ORDERED, that Defendant's Motion to Reconsider is hereby denied; and it
is hereby
ORDERED, that Defendant's Motion to Relieve attorney Scott Bellamy is
granted;

AND IT IS SO ORDERED.


LARRY B. HYMAN
PRESIDING JUDGE
FIFTEENTH JUDICIAL CIRCUIT

4-3-2012
Date
Conway, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

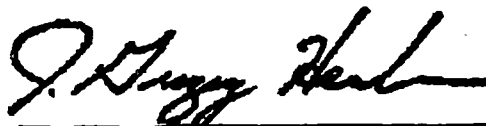
INDICTMENT

At a Court of General Sessions, convened on November 20, 2008, the Grand Jurors of Horry County present upon their oath:

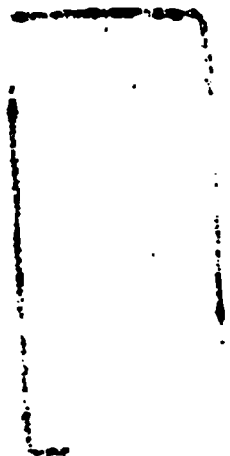
CRIMINAL SEXUAL CONDUCT**First Degree****CDR: 0160 16-03-0652**

That **GREGORY THOMAS PENCILLE** did in Horry on or about June 3, 2004, engage in sexual battery with L. Miller, while using aggravated force to accomplish the sexual battery and while the victim was also the victim of forcible confinement, kidnapping, or any other similar offense or act, in violation of Section 16-03-0652, S. C. 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.



J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR



STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Harry

VS.

Gregory Thomas Pencille

AKA:

Age: W Sex: M Age:

Address: Lee Correctional Institute

City, State, Zip:

DL#: 999999999999 SID#:

CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
FO: Criminal Sexual Conduct - 1st Degree

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2008GS2604686

A/W#: J740369

Date of Offense: 6/3/2004

S.C. Code §: 16-03-0652

CDR Code #: 0160

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

in violation of § 16-03-0652 of the S.C. Code of Laws, bearing CDR Code # 0160

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS(CSC

w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials) 30

The plea is: ☐ Without Negotiations or Recommendation. ☐ Negotiated Sentence, ☒ Recommendation by the State. 4r.

ATTEST: [Signature] 12123 [Signature] [Signature]
Elvly, Candice SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
or a determinate term of 30 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 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: for sentence currently serving
☒ 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. since Oct 2008

☐ 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

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

Fine: _____

14-1-206 (Assessments 107.5 %)	\$	
14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
14-1-211(A)(2) (DUI Surcharge)	\$100	\$
56-5-2995 (DUI Assessment)	\$12	\$
56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
14-1-212 (Low 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
44-53-450(C) (Conditional Discharge)	\$350	\$
% to County (if paid in installments)	\$	\$ 3.90
TOTAL	\$	\$ 153.90

Clerk of Court/ Deputy Clerk Tulane Higgins - Hard

R. J. Rabb

PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Condition Discharge. § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition

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

Presiding Judge

Judge Code: 2152

8/9/10

WITNESSES

Ant Abercrombie North Myrtle Beach Police
Department

1
5

ARREST WARRANT NUMBER

740369

DR: 0160 16-03-0652

DOA: 10/9/2008

ACTION OF GRAND JURY

Amie C. Wilburn
Foreperson of Grand Jury
Date: NOV 20 2008

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-03-20-01002

The State of South Carolina

County of Horry

Candice Lively

08H04414

COURT OF GENERAL SESSIONS

NOVEMBER, 2008 TERM

THE STATE

vs.

Gregory Thomas Pencille

W/M

Bennettsville, SC 29512

ATTORNEY:

Indictment for

CRIMINAL SEXUAL CONDUCT

J. Gregory Hembree, Solicitor

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA)

County of HORRY)Gregory Pencille, #312332)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

13 CP 26 7463

APPLICATION FOR

POST-CONVICTION RELIEF

HORRY COUNTY
13 NOV - 8 PM 2:42
MELANIE HUGGINS-WARD
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear 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 Lee Correctional Institution, 990 Wisacky Highway, Bishopville,
SC 29010-1775
2. Name and location of Court which imposed sentence Court of General Sessions for
Horry County, 1201 Second Avenue, Conway, SC 29526
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-26-04686; Criminal Sexual Conduct, First Degree
 - (b) NOT APPLICABLE

- (c) NOT APPLICABLE
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 9, 2010; 30 years confinement beginning October 9, 2008 and to run
- (b) concurrent with sentence already serving.
- (c) NOT APPLICABLE
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty Finding made after entry of Guilty Plea
- (b) after a plea of not guilty NOT APPLICABLE
- (c) after a plea of nolo contendere NOT APPLICABLE
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes, NOTICE OF APPEAL FILED AFTER MOTION FOR RECONSIDERATION DENIED
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeal
- ii. NOT APPLICABLE
- iii. NOT APPLICABLE
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. NOT APPLICABLE
- iii. NOT APPLICABLE
- (c) the date of each such result:
- i. Dismissed June 5, 2013; Notice received 6/07/13; remittitur sent down on 6/21/13
- ii. NOT APPLICABLE
- iii. NOT APPLICABLE
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. STATE v. GREGORY PENCILLE; Unpublished opinion No. 2013-UP-235
- ii. Appellate Case No. 2012-212050
- iii. NOT APPLICABLE
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) NOT APPLICABLE
- (b) NOT APPLICABLE

- (c) NOT APPLICABLE
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) PLEASE SEE PAGE(S) 3(a) et seq.
- (b) PLEASE SEE PAGE(S) 3(a) et seq.
- (c) PLEASE SEE PAGE(S) 3(a) et seq.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) PLEASE SEE PAGE(S) 3(b) et seq.
- (b) PLEASE SEE PAGE(S) 3(b) et seq.
- (c) PLEASE SEE PAGE(S) 3(b) et seq.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES
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. MOTION FOR RECONSIDERATION OF SENTENCE
- ii. NOT APPLICABLE
- iii. NOT APPLICABLE
- iv. NOT APPLICABLE
- (b) the name and location of the Court in which each was filed:
- i. COURT OF GENERAL SESSIONS for Horry County, Conway, South Carolina
- ii. NOT APPLICABLE
- iii. NOT APPLICABLE
- iv. NOT APPLICABLE

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

I. The Guilty Plea is invalid in that it was taken in violation of the Fourteenth Amendment where it was not entered knowingly, voluntarily and intelligently, and entered because of the Ineffective Assistance of Counsel as alleged and shown below:

(a) Counsel failed to object to Petitioner not being informed of his Constitutional rights to confront the accused and any witnesses against him and that he was waiving those rights by pleading guilty, when Petitioner was not aware of those rights.

(b) Counsel failed to object to the fact that Petitioner was not adequately informed of the nature of the charge(s) that he was facing and Petitioner did not otherwise know and/or understand the true nature of the charge(s) against him.

(c) Counsel failed to object to changes and additions being made to the sentencing sheet after Petitioner signed the sheet at his counsel's request.

(d) Counsel failed to inform Petitioner that the Solicitor would be permitted to argue for the trial judge to sentence Petitioner to thirty (30) years, as opposed to stating only that there was to be a cap of thirty (30) years and misled Petitioner as to the nature of any alleged plea bargain.

(e) Counsel was ineffective in failing to ensure that Petitioner was provided with a written plea agreement after Petitioner requested same on more than one (1) occasion and in failing to advise Petitioner to accept the first plea offer.

(f) Petitioner was not provided with any reasonable choice to entering a guilty plea whereas his trial counsel refused to make any type of an investigation into the matter after being repeatedly informed that Petitioner had consensual sex with the alleged victim.

(g) Counsel failed to inform Petitioner that a plea of guilty under the law, is an admission to all of the facts to the offense for which he was pleading guilty.

(h) The trial judge improperly participated in the proceedings and was bias whereas the trial judge asked questions to elicit responses from Petitioner that would assist trial counsel in preparing a defense to later assertions of his ineffectiveness instead of simply assuring that the guilty plea was knowing, voluntary and intelligent.

(i) The trial judge improperly participated in the proceedings and was bias whereas the trial judge virtually guaranteed Petitioner that he would have an appeal and a lawyer to perfect the appeal even though he was pleading guilty, however, no appeal was forthcoming or the lawyer never ensured that Petitioner's appeal was a reality.

II. Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel.

(a) Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel because of the combined actions and inactions of counsel as state and/or contemplated in this Petition and any other amended or supplemental Petition.

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

I. The Guilty Plea is invalid in that it was taken in violation of the Fourteenth Amendment where it was not entered knowingly, voluntarily and intelligently, and entered because of the Ineffective Assistance of Counsel.

(a) Counsel failed to object to Petitioner not being informed of his Constitutional rights to confront the accused and any witnesses against him and that he was waiving those rights by pleading guilty, when Petitioner was not aware of those rights.

(1) Petitioner was never informed of his Constitutional right to confront his accuser and the witnesses against him by the trial judge.

(2) Petitioner did not know of his rights to confront and cross-examine the accuser and the witnesses against him and his counsel failed to ensure that he was fully informed of these rights or object to the trial judge's failure to explain these rights during the plea colloquy.

(3) Had the trial judge or defense counsel informed and explained to petitioner, prior to or during the plea, that he possessed the right to confront and cross-examine his accuser and the witnesses against him if he proceeded to trial by jury, he would not have entered a guilty plea and would have insisted on going to trial.

(4) Petitioner informed counsel from the very first day he met with counsel, that he was not guilty of committing any offenses against the alleged victim [Ms. Miller] and that any sexual encounter between he and Ms. Miller was entirely consensual.

(5) Had Petitioner properly been informed by his attorney, that counsel could and would, put his accuser [Ms. Miller] on the witness stand to look Petitioner in the eye while she attempted to make her false allegations against him and that counsel could cross-examine her to impeach her testimony, Petitioner would not have entered a guilty plea and would have insisted on going to trial and then appeal any adverse verdict.

(6) Petitioner was prejudiced in that he did not possess sufficient information concerning the rights he was waiving by entering a guilty plea and therefore involuntarily waived constitutional rights that he would not otherwise have waived, i.e., his right to a jury trial, to confront his accuser, and to confront the witnesses against him.

(b) Counsel Failed to object to the fact that Petitioner was not adequately informed of the nature of the charge(s) that he was facing and Petitioner did not otherwise know and/or understand the true nature of the charge(s) against him.

(1) Petitioner was not informed and was otherwise unaware, of the nature of the charges against him to which he was being asked to plead guilty.

(2) Petitioner was informed at first that he was facing a charge of Criminal Sexual Conduct ("CSC") and was not made aware that the state would have to prove beyond a reasonable doubt, that he had committed "aggravated force" and "sexual battery" against Ms. Miller as he denies that he did so.

(3) After the charge was pending for about six (6) months, Petitioner was informed that he was facing kidnapping charges and was not told of the elements of that charge.

(4) Petitioner did not know the elements of the charge of kidnapping and no one explained those elements to him.

(5) Just prior to the plea colloquy, Petitioner was told by his counsel that the charge would be CSC, but he was not informed of the alleged facts that allegedly converted the lawful act of engaging in consensual sex with any victim, into an unlawful act.

(6) Petitioner did not use "aggravated force" on Ms. Miller and did not commit a "sexual battery" within the meaning of the statute, whereas Ms. Miller consented to have sexual relations with Petitioner.

(7) Had Petitioner's counsel or the trial judge explained the lawful definition of "Aggravated Force" and/or "Sexual Battery," as well as the illegal acts of which it was claimed Petitioner committed [the nature of the charges] to him in terms he could understand, he would not have entered a guilty plea, would have insisted on going to trial and would have appealed any adverse ruling and/or verdict.

(8) Petitioner DENIES any and all allegations that he did in any way, shape or for, unlawfully engage in any type of sexual contact with Ms. Miller.

(c) Counsel failed to object to changes and additions being made to the sentencing sheet after Petitioner signed the sheet at his counsel's request.

(1) While Petitioner was being held in the holding cell of the court room on the day of the plea, counsel brought him a sentencing sheet for him to sign.

(2) Petitioner reviewed the sentencing sheet, saw that it contained a charge of CSC in the First Degree and questioned his lawyer because he had not agreed to plead to any such charge.

(3) After a discussion and counsel's assertions that he could "take it or leave it," Petitioner signed the sentencing sheet.

(4) Prior to signing the sentencing sheet, nothing was checked on the sheet to indicate that Petitioner was to wear a GPS monitor as a part of his sentence and Petitioner did not agree to the inclusion of a requirement that he wear a GPS monitor at any time.

(5) After the plea and after Petitioner was returned to the SCDC, he was reviewing his sentencing sheet and noticed the addition of the requirement that he wear a GPS monitor, which would put him within the jurisdiction of the Probation and Parole Department.

(6) Petitioner did not agree to wear a GPS Monitor at any time, does not agree to do so now, and wearing a GPS Monitor is not part of any agreement or proposed agreement.

(7) Based upon information and belief, the requirement that Petitioner wear a GPS monitor is not a lawful requirement as applied to him for the charge of CSC in the First Degree and Petitioner did not agree to any such sanction.

(8) The requirement that Petitioner wear a GPS Monitor at any time is unconstitutional as a violation of Due Process and deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel where counsel should have objected and took reasonable steps to ensure that the additional sanction was not imposed.

(9) Petitioner was prejudiced in that his counsel and the Solicitor intend that he register as a sex offender and wear a GPS monitor, thereby subjecting him to various forms of discrimination and harassment by the public for the rest of his life, for a criminal act that he did not commit.

(10) Petitioner is also prejudiced whereas the State imposed an additional sanction against him [wearing a GPS Monitor] without lawful authority and when no such agreement was made by Petitioner.

(11) The State made the additional changes to the sentencing sheet after Petitioner had signed the sheet, said changes were made without the knowledge and consent of Petitioner, said changes constitute fraud and the entire contractual agreement between Petitioner and the State, if one did in fact exist, is null and void.

(d) Counsel failed to inform Petitioner that the Solicitor would be permitted to argue for the trial judge to sentence Petitioner to thirty (30) years, as opposed to stating only that there was to be a cap of thirty (30) years and misled Petitioner as to the nature of any plea bargain.

(1) Within approximately one (1) month after Petitioner's counsel was hired, counsel approached Petitioner with what he termed as a plea offer from the Solicitor, to which counsel quickly stated that "we are not going to accept this because we can do better."

(2) Petitioner asked counsel to obtain any offers from the Solicitor in writing and counsel stated he would do so.

(3) Counsel later informed Petitioner that the plea offer had changed, Petitioner asked counsel a second time for him to obtain the plea offer in writing, and counsel asserted he would do so.

(4) After receiving other plea offers, the Petitioner was finally informed by counsel that he should plead to a charge of kidnapping for a cap of a thirty (30) year sentence, which was more than the original plea offer to which counsel first stated that "we can do better."

(5) While in a holding cell at the Courthouse, waiting to plead to kidnapping with a cap at thirty (30) years, counsel brought Petitioner a sentencing sheet that showed that the charge he was pleading guilty to was CSC 1st Degree, with a cap of thirty (30) years.

(6) After a discussion between counsel and Petitioner to which Petitioner was left with no other reasonable alternative, and after his counsel informed him that the trial judge would sentence him to somewhere below the cap of thirty (30) years, Petitioner signed the sentencing sheet under duress.

(7) During the plea, the Solicitor accused Petitioner of committing other crimes, labeled him a serial rapist and predator, and also mentioned that the State had DNA evidence to prove Petitioner committed other crimes.

(8) The Solicitor made these comments so as to urge the judge to sentence Petitioner to the full thirty (30) years, when the Solicitor had no evidence to support her allegations.

(9) Counsel failed to object to the Solicitor's unsupported allegations even though there was not one (1) shred of evidence tending to indicate that this Petitioner committed any unsolved crimes and even though DNA will usually be found when two (2) people have consensual sex.

(10) Counsel's unreasonable inaction prejudiced Petitioner in that the judge accepted everything said by the solicitor as true and relied on those false allegations when he sentenced Petitioner to thirty (30) years.

(11) Petitioner was also prejudiced in that the trial judge unreasonably relied on the fact that there was DNA evidence available to prove that Petitioner had sexual relations with more than two (2) women, when having sexual relations with women, standing alone, is not a crime and should not have been a determinative factor in sentencing Petitioner to the full thirty (30) year cap.

(12) Had Petitioner been aware that the Solicitor was going to argue to the trial judge to sentence Petitioner to the full thirty (30) years and that she was going to be allowed to make unsupported allegations to buttress her argument, Petitioner would not have entered a guilty plea to anything, would have invoked his right to trial by jury and insisted on going to trial.

(e) Counsel was ineffective in filing to ensure that Petitioner was provided with a written plea agreement after Petitioner requested same on more than one (1) occasion and in failing to advise Petitioner to accept the first plea offer.

(1) Within approximately one (1) month after Petitioner's counsel was hired, counsel approached Petitioner with a plea offer that was allegedly from the Solicitor and of which consisted of a verbal agreement to, among other things, recommend a sentence of twenty (20) years and a dismissal of other charges in exchange for a guilty plea to one (1) charge, to which counsel quickly state that "we are not going to accept this because we can do better."

(2) Petitioner asked counsel to obtain any offers from the Solicitor in writing and counsel stated he would do so.

(3) Counsel again provided Petitioner with yet another plea offer and advised that they should wait for further developments, but the Petitioner requested again, that counsel obtain the plea offer in writing and once again, counsel stated that he would do so.

(4) After receiving various other offers to enter into a plea bargain with the state, none of which were ever produced in writing despite Petitioner's continued requests, Petitioner was informed by counsel that he should plead to a charge of kidnapping for a cap of a thirty (30) year sentence, which was higher than the original plea offer where counsel first stated that he could do better.

(5) While in a holding cell at the Courthouse, waiting to plead to a kidnapping charge with a cap at thirty (30) years, counsel gave Petitioner a sentencing sheet that showed that the charge he was pleading guilty to was CSC 1st Degree, and that there would be a cap of thirty (30) years incarceration.

(6) After a discussion between Petitioner and his counsel, to which Petitioner asserted that he would not plead guilty to CSC and wherein counsel informed him to plead to CSC or go to trial on that day and receive life without parole, Petitioner informed counsel again, that he was not guilty of CSC.

(7) Petitioner asked counsel to obtain the offer in writing again and when counsel couldn't, he asked counsel why it wasn't in writing.

(8) Counsel unreasonably informed Petitioner that he could not bother the Solicitor with getting anything in writing or she might get mad and withdraw the plea offer, and, that if he did not take this "deal," that Petitioner would have to go to trial that day and he would receive life without parole because counsel had no defense to raise on his behalf.

(9) Counsel unreasonably informed Petitioner that the jury was being picked at that moment and led him to believe that he had no choice but to abide by counsel's wishes and accept the plea offer.

(10) Petitioner signed the sentencing sheet under duress and as an involuntary act as he had no other reasonable choice at the time.

(11) Counsel should have advised Petitioner to take the first plea offer instead of making the decision on his own, that "we can do better."

(12) Counsel's failure to advise Petitioner to take the first plea offer was unreasonable and prejudiced Petitioner whereas the longer the Petitioner waited, the worse the plea offers became.

(13) Petitioner was prejudiced in that he was not provided with any reasonable alternatives to entering the plea that his own counsel and the solicitor coerced him to enter, as it was made clear to him that his trial would be a mere formality if he did not sign accept the plea and sign the sentencing sheet.

(14) Petitioner was also prejudiced in that he received a sentence of thirty (30) years instead of the twenty (20) that he would have received if he had pled to the original plea offer.

(f) Petitioner was not provided with any reasonable choice entering a guilty plea whereas his trial counsel refused to make any type of an investigation into the matter after being repeatedly informed that Petitioner had consensual sex with the alleged victim.

(1) Petitioner consistently informed counsel that any sexual relations that may have occurred between Petitioner and Ms. Miller was consensual and he asked counsel to investigate.

(2) Specifically, Petitioner asked counsel to obtain the proper hospital records of Ms. Miller to among other things, show that the results of any exam of Ms. Miller would not support her version of events and would substantially damage her credibility.

(3) Petitioner asked counsel to look into the time period that Ms. Miller claimed that Petitioner committed the alleged acts when such an investigation would have revealed that Petitioner had not left his place of employment at the time Ms. Miller claims Petitioner was forcing himself upon her under the condominium.

(4) Petitioner asked counsel to look into the reason that Ms. Miller was lying on the beach all alone so early in the morning and why she was under the influence of alcohol.

(5) Petitioner asked counsel to look into the reason that Ms. Miller, although claiming that Petitioner did not have intercourse with her, asked for a pregnancy test at the hospital, which signifies that she was providing police with false information and damaged her credibility.

(6) Petitioner asked counsel, after reviewing some of the discovery material, to investigate the matter of how Ms. Miller "Somehow got away" after alleging that Petitioner held her down and forced himself upon her, when all evidence points to the fact that Ms. Miller voluntarily walked under the condominium with Petitioner.

(7) Petitioner asked counsel to investigate why the Police took photos of his footprints on the beach near where Ms. Miller was lying on her towel, but failed to take photos of the footprints that showed the two walking side by side up to and under the condominium where the two engaged in consensual sex.

(8) Petitioner asked counsel to interview Ms. Miller so as to obtain statements from her that would tend to show that her allegations against the Petitioner were fabricated.

(9) Counsel failed to make a reasonable investigation when such an investigation would have show that Ms. Miller was not credible and would have provided for a basis to encourage Petitioner to proceed with a jury trial.

(10) Petitioner was prejudiced in that had counsel made any type of reasonable investigation to prepare for trial, Petitioner would not have entered a guilty plea and would have insisted on going to trial.

(11) Counsel merely accepted a \$30,000.00 payment and did nothing but to plea bargain with the Solicitor because counsel had failed to investigate and prepare for a trial, leaving Petitioner with no choice other than to plead guilty and hope to obtain assistance on appeal.

(g) Counsel failed to inform Petitioner that a plea of guilty under the law, is an admission to all of the facts to the offense for which he was pleading guilty.

(1) Petitioner was never made aware that in pleading guilty to the offense, that pursuant to the law, he was admitting all of the elements of the charge as alleged against him.

(2) Petitioner did not at any time, knowingly admit that he committed any or all of the elements of the offense of CSC as he has never had anything but consensual sex with Ms. Miller or any other females he has ever engaged in sexual activity with.

(3) Had Petitioner been made aware that a guilty plea acts to admit the elements of the charge, he would not have entered a guilty plea under any circumstances and would have insisted on going to trial.

(4) Petitioner was prejudiced in that he was unreasonably put into a position where he is presumed under the law to have admitted to committing unlawful acts that he did not commit and is forced into the position of utilizing a burdensome and unfair legal system to attempt to clear his name, reverse an unconstitutional conviction and sentence, and set the record straight.

(5) Petitioner was also prejudiced in that he was led to believe that he would be able to appeal that matter and explain his version to a reviewing court in order to obtain relief, however his attorney made sure to deprive him of an appeal as well.

(6) Petitioner was prejudiced in that he has been the same as sentenced to die in prison for doing nothing other than acting in a lawful manner.

(7) Petitioner was also prejudiced in that his sentence is unconstitutional as a violation of Due Process and his Eighth Amendment right is to be free from cruel and unusual punishment.

(h) The trial judge improperly participated in the proceedings and was bias whereas the trial judge asked questions to elicit responses from Petitioner that would assist trial counsel in preparing a defense to later assertions of his ineffectiveness instead of simply assuring that the guilty plea was knowing, voluntary and intelligent.

(1) The trial judge asked Petitioner if he was satisfied with his attorney's representation so as to elicit a "yes", when that is not the judge's concern and is the basis for helping the attorney evade any allegations of ineffectiveness and other misconduct as a reward for the attorney's participation in convicting Petitioner.

(2) Petitioner was not satisfied with counsel's alleged representation because counsel, after accepting the \$30,000.00 payment from Petitioner's family, would not investigate, would not check the background and character of the alleged victim, and would not investigate by searching for witnesses who passed by the spot where Petitioner and Ms. Miller were engaging in consensual sexual activities.

(3) Counsel would not take reasonable action that may have been consistent with preparing to defend Petitioner at a jury trial despite the Petitioner's repeated assertions to counsel that he [Petitioner] was not guilty of committing any criminal acts against Ms. Miller, whether CSC, kidnapping or any other offense.

(4) The trial judge asked if counsel did everything that Petitioner would hope that he would do for Petitioner, to which Petitioner provided the "yes, sire" response that is expected in these type matters, when the trial judge had no legitimate reason to make such an inquiry, and the inquiry was for the purpose of assisting counsel in preparing to defend himself against allegations of providing ineffective assistance to the Petitioner.

II. Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel.

(a) Petitioner was denied his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel because of the combined actions and inactions of counsel as stated and/or contemplated in this Petition and any other amended or supplemental Petition.

(1) The combined errors of counsel prior to, during and after the plea, as described and/or contemplated herein deprived Petitioner of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel.

- (c) the disposition thereof:
- i. Hearing held on March 14, 2012 and order issued amending sentencing sheet and
 - ii. denying motion to reconsider sentence.
 - iii. NOT APPLICABLE
 - iv. NOT APPLICABLE
- (d) the date of each such disposition:
- i. April 3, 2013
 - ii. NOT APPLICABLE
 - iii. NOT APPLICABLE
 - iv. NOT APPLICABLE
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Order of Judge Larry B. Hyman dated April 3, 2013, captioned as:
 - ii. ORDER AMENDING SENTENCE SHEET AND DENYING DEFENDANT'S
 - iii. MOTION TO RECONSIDER SENTENCE.
 - iv. NOT APPLICABLE
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. NOT APPLICABLE
 - ii. NOT APPLICABLE
 - iii. NOT APPLICABLE
 - iv. NOT APPLICABLE
- (b) the proceedings in which each ground was raised:
- i. NOT APPLICABLE
 - ii. NOT APPLICABLE
 - iii. NOT APPLICABLE

Revised 3/2003

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) All grounds raised in this Petition are only proper for PCR review.
 - (b) All grounds raised in this Petition are only proper for PCR review.
 - (c) All grounds raised in this Petition are only proper for PCR review.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? G. Scott Bellamy, PC, Attorney at Law
 - (b) your trial, if any? G. Scott Bellamy, PC
 - (c) your sentencing? G. Scott Bellamy, PC
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Pachak, Esq., Divisions of Appellate Defense
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
G. Scott Bellamy, PC;
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. G. Scott Bellamy, PC, 1206 Third Avenue, Suite A; Conway, SC 29526
Guilty Plea, Sentencing, Motion for Reconsideration over objections of Defendant
 - ii. Robert M. Pachak, Division of Appellate Defense; 1330 Lady St., Suite 401,
Columbia, SC 29211, Direct Appeal.
 - iii. NOT APPLICABLE
 - (b) the proceedings at which each such attorney represented you:
 - i. G. Scott Bellamy, Arraignment and Plea
G. Scott Bellamy, Guilty Plea Proceeding
 - ii. G. Scott Bellamy, Guilty Plea Trial, Sentencing, and Motion for Reconsideration
over Petitioner's objections.
 - iii. Robert M. Pachak, Direct Appeal.

Revised 3/2003

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

Petitioner seeks to have his guilty plea conviction and sentence vacated and to have the case remanded for a New Trial, or to obtain such other and further relief as this court deems fair, proper and within its authority.

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

No, Petitioner is currently serving sentence for prior conviction of which Petitioner has already challenged in the State Courts.

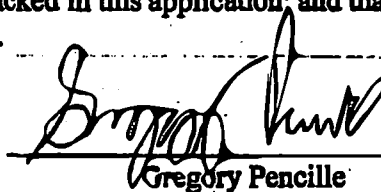
STATE OF SOUTH CAROLINA)

County of Horry)

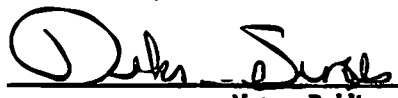
VERIFICATION

HORRY COUNTY
13 NOV - 8 PM 2:32
MELANIE HUGGINS-MARD
CLERK OF COURT

I, Gregory Pencille, 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 at this time for vacating, setting aside or correcting the convictions and sentence attacked in this application; and that the matters and allegations therein set forth are true and correct.


Gregory Pencille

SWORN to and subscribed before me this 4
day of November 2013

 (L.S.)
Notary Public

My Commission Expires: 11-4-2015

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

**HORRY COUNTY
CLERK OF COURT
MELANIE HUGHES
13 NOV - 8 PM
COURT HOUSE**

I, Gregory Pencille, hereby apply for leave to proceed in this action without prepayment of fees or costs or security thereof. In support of my application I declare under penalty of perjury that the following facts are true:

- (a) I am the applicant in this action and I believe I am entitled to redress.
- (b) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

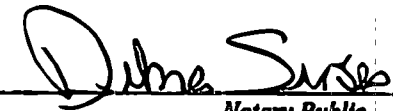


Applicant

Gregory Pencille, #312332
Lee Corr., Inst., RID-233
990 Wisacky Highway
Bishopville, SC 29010-1775

SWORN or affirmed to and subscribed before me this

4 day of November 2013



Notary Public

My Commission Expires: 11-4-2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Gregory Pencille, #312332,	)	Case No. 2013-CP-26-7463
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed November 8, 2013, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2008, the Horry County Grand Jury indicted Applicant for first degree criminal sexual conduct (2008-GS-26-4686). G. Scott Bellamy, Esquire, represented Applicant. On August 9, 2010, Applicant pled guilty as indicted. In exchange for the plea, the State dismissed two pending charges of kidnapping (2008-GS-26-4687, 2009-GS-26-5015) and one charge of first degree criminal sexual conduct (2009-GS-26-5014). The Honorable Larry B. Hyman, Jr., sentenced Applicant to twenty (20) years imprisonment.

Applicant filed a motion to reconsider his sentence on August 10, 2010. Applicant also filed a notice of appeal on August 10, 2010. The South Carolina Court of Appeals dismissed the notice of appeal without prejudice pending the resolution of the motion to reconsider on February 9, 2011.

On March 14, 2012, Judge Hyman convened a hearing on the motion to reconsider the sentence. By order filed April 3, 2012, Judge Hyman denied the motion.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. The Court of Appeals dismissed the appeal on June 5, 2013. State v. Pencille, Op. No. 2013-UP-235 (S.C. Ct. App. filed June 5, 2013). The remittitur was returned to the circuit court on June 21, 2013.

II.

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

“I. The Guilty Plea is invalid in that it was taken in violation of the Fourteenth Amendment where it was not entered knowingly, voluntarily and intelligently, and entered because of the Ineffective Assistance of Counsel as alleged and shown below:

(a) Counsel failed to object to Petitioner not being informed of his Constitutional rights to confront the accused and any witnesses against him and that he was waiving those rights by pleading guilty, when Petitioner was not aware of those rights.

(1) Petitioner was never informed of his Constitutional right to confront his accuser and the witnesses against him by the trial judge.

(2) Petitioner did not know of his rights to confront and cross-examine the accuser and the witnesses against him and his counsel failed to ensure that he was fully informed of these rights or object to the trial judge's failure to explain these rights during the plea colloquy.

(3) Had the trial judge or defense counsel informed and explained to petitioner, prior to or during the plea, that he possessed the right to confront and cross-examine his accuser and the witnesses against him if he proceeded to trial by jury, he would not have entered a guilty plea and would have insisted on going to trial.

(4) Petitioner informed counsel from the very first day he met with counsel, that he was not guilty of committing any offenses against the alleged victim [*THE VICTIM*] and that any sexual encounter between he and [*THE VICTIM*] was entirely consensual.

(5) Had Petitioner properly been informed by his attorney, that counsel could and would, put his accuser [*THE VICTIM*] on the

¹ Anders v. California, 386 U.S. 738 (1967)

witness stand to look Petitioner in the eye while she attempted to make her false allegations against him and that counsel could cross-examine her to impeach her testimony. Petitioner would not have entered a guilty plea and would have insisted on going to trial and then appeal any adverse verdict.

- (6) Petitioner was prejudiced in that he did not possess sufficient information concerning the rights he was waiving by entering a guilty plea and therefore involuntarily waived constitutional rights that he would not otherwise have waived, i.e., his right to a jury trial, to confront his accuser, and to confront the witnesses against him.
- (b) Counsel failed to object to the fact that Petitioner was not adequately informed of the nature of the charge(s) that he was facing and Petitioner did not otherwise know and/or understand the true nature of the charge(s) against him.
 - (1) Petitioner was not informed and was otherwise unaware, of the nature of the charges against him to which he was being asked to plead guilty.
 - (2) Petitioner was informed at first that he was facing a charge of Criminal Sexual Conduct ("CSC") and was not made aware that the state would have to prove beyond a reasonable doubt, that he had committed "aggravated force" and "sexual battery" against [THE VICTIM] as he denies that he did so.
 - (3) After the charge was pending for about six (6) months. Petitioner was informed that he was facing kidnapping charges and was not told of the elements of that charge.
 - (4) Petitioner did not know the elements of the charge of kidnapping and no one explained those elements to him.
 - (5) Just prior to the plea colloquy, Petitioner was told by his counsel that the charge would be CSC, but he was not informed of the alleged facts that allegedly converted the lawful act of engaging in consensual sex with any victim, into an unlawful act.
 - (6) Petitioner did not use "aggravated force" on [THE VICTIM] and did not commit a "sexual battery" within the meaning of the statute, whereas [THE VICTIM] consented to have sexual relations with Petitioner.
 - (7) Had Petitioner's counsel or the trial judge explained the lawful definition of "Aggravated Force" and/or "Sexual Battery," as well as the illegal acts of which it was claimed Petitioner committed [the nature of the charges] to him in terms he could understand, he would not have entered a guilty plea, would have insisted on going to trial and would have appealed any adverse ruling and/or verdict.

- (8) Petitioner DENIES any and all allegations that he did in any way, shape or for, unlawfully engage in any type of sexual contact with [THE VICTIM].
- (c) Counsel failed to object to changes and additions being made to the sentencing sheet after Petitioner signed the sheet at his counsel's request.
- (1) While Petitioner was being held in the holding cell of the court room on the day of the plea, counsel brought him a sentencing sheet for him to sign.
 - (2) Petitioner reviewed the sentencing sheet, saw that it contained a charge of CSC in the First Degree and questioned his lawyer because he had not agreed to plead to any such charge.
 - (3) After a discussion and counsel's assertions that he could 'take it or leave it,' Petitioner signed the sentencing sheet.
 - (4) Prior to signing the sentencing sheet, nothing was checked on the sheet to indicate that Petitioner was to wear a GPS monitor as a part of his sentence and Petitioner did not agree to the inclusion of a requirement that he wear a GPS monitor at any time.
 - (5) After the plea and after Petitioner was returned to the SCDC, he was reviewing his sentencing sheet and noticed the addition of the requirement that he wear a GPS monitor, which would put him within the jurisdiction of the Probation and Parole Department.
 - (6) Petitioner did not agree to wear a GPS Monitor at any time, does not agree to do so now, and wearing a GPS Monitor is not part of any agreement or proposed agreement.
 - (7) Based upon information and belief, the requirement that Petitioner wear a GPS monitor is not a lawful requirement as applied to him for the charge of CSC in the First Degree and Petitioner did not agree to any such sanction.
 - (8) The requirement that Petitioner wear a GPS Monitor at any time is unconstitutional as a violation of Due Process and deprived Petitioner of his Sixth Amendment right to the effective assistance of counsel where counsel should have objected and took reasonable steps to ensure that the additional sanction was not imposed.
 - (9) Petitioner was prejudiced in that his counsel and the Solicitor intend that he register as a sex offender and wear a GPS monitor, thereby subjecting him to various forms of discrimination and harassment by the public for the rest of his life, for a criminal act that he did not commit.
 - (10) Petitioner is also prejudiced whereas the State imposed an additional sanction against him [wearing a GPS Monitor] without lawful authority and when no such agreement was made by Petitioner.

- (11) The State made the additional changes to the sentencing sheet after Petitioner had signed the sheet, said changes were made without the knowledge and consent of Petitioner, said changes constitute fraud and the entire contractual agreement between Petitioner and the State, if one did in fact exist, is null and void.
- (d) Counsel failed to inform Petitioner that the Solicitor would be permitted to argue for the trial judge to sentence Petitioner to thirty (30) years, as opposed to stating only that there was to be a cap of thirty (30) years and misled Petitioner as to the nature of any alleged plea bargain.
- (1) Within approximately one (1) month after Petitioner's counsel was hired, counsel approached Petitioner with what he termed as a plea offer from the Solicitor, to which counsel quickly stated that "we are not going to accept this because we can do better."
 - (2) Petitioner asked counsel to obtain any offers from the Solicitor in writing and counsel stated he would do so.
 - (3) Counsel later informed Petitioner that the plea offer had changed, Petitioner asked counsel a second time for him to obtain the plea offer in writing, and counsel asserted he would do so.
 - (4) After receiving other plea offers, the Petitioner was finally informed by counsel that he should plead to a charge of kidnapping for a cap of a thirty (30) year sentence, which was more than the original plea offer to which counsel first stated that "we can do better."
 - (5) While in a holding cell at the Courthouse, waiting to plead to kidnapping with a cap at thirty (30) years, counsel brought Petitioner a sentencing sheet that showed that the charge he was pleading guilty to was CSC 1st Degree, with a cap of thirty (30) years.
 - (6) After a discussion between counsel and Petitioner to which Petitioner was left with no other reasonable alternative, and after his counsel informed him that the trial judge would sentence him to somewhere below the cap of thirty (30) years. Petitioner signed the sentencing sheet under duress.
 - (7) During the plea, the Solicitor accused Petitioner of committing other crimes, labeled him a serial rapist and predator, and also mentioned that the State had DNA evidence to prove Petitioner committed other crimes.
 - (8) The Solicitor made these comments so as to urge the judge to sentence Petitioner to the full thirty (30) years, when the Solicitor had no evidence to support her allegations.
 - (9) Counsel failed to object to the Solicitor's unsupported allegations even though there was not one (1) shred of evidence tending to indicate that this Petitioner committed any unsolved crimes and

- even though DNA will usually be found when two (2) people have consensual sex.
- (10) Counsel's unreasonable inaction prejudiced Petitioner in that the judge accepted everything said by the solicitor as true and relied on those false allegations when he sentenced Petitioner to thirty (30) years.
 - (11) Petitioner was also prejudiced in that the trial judge unreasonably relied on the fact that there was DNA evidence available to prove that Petitioner had sexual relations with more than two (2) women, when having sexual relations with women, standing alone, is not a crime and should not have been a determinative factor in sentencing Petitioner to the full thirty (30) year cap.
 - (12) Had Petitioner been aware that the Solicitor was going to argue to the trial judge to sentence Petitioner to the full thirty (30) years and that she was going to be allowed to make unsupported allegations to buttress her argument, Petitioner would not have entered a guilty plea to anything, would have invoked his right to trial by jury and insisted on going to trial.
- (e) Counsel was ineffective in failing to ensure that Petitioner was provided with a written plea agreement after Petitioner requested same on more than one (1) occasion and in failing to advise Petitioner to accept the first plea offer.
- (1) Within approximately one (1) month after Petitioner's counsel was hired, counsel approached Petitioner with a plea offer that was allegedly from the Solicitor and of which consisted of a verbal agreement to, among other things, recommend a sentence of twenty (20) years and a dismissal of other charges in exchange for a guilty plea to one (1) charge, to which counsel quickly state that "we are not going to accept this because we can do better."
 - (2) Petitioner asked counsel to obtain any offers from the Solicitor in writing and counsel stated he would do so.
 - (3) Counsel again provided Petitioner with yet another plea offer and advised that they should wait for further developments, but the Petitioner requested again, that counsel obtain the plea offer in writing and once again, counsel stated that he would do so.
 - (4) After receiving various other offers to enter into a plea bargain with the state, none of which were ever produced in writing despite Petitioner's continued requests. Petitioner was informed by counsel that he should plead to a charge of kidnapping for a cap of a thirty (30) year sentence, which was higher than the original plea offer where counsel first stated that he could do better.

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 - (6) After a discussion between Petitioner and his counsel, to which Petitioner asserted that he would not plead guilty to CSC and wherein counsel informed him to plead to CSC or go to trial on that day and receive life without parole, Petitioner informed counsel again, that he was not guilty of CSC.
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 - (8) Counsel unreasonably informed Petitioner that he could not bother the Solicitor with getting anything in writing or she might get mad and withdraw the plea offer, and, that if he did not take this "deal," that Petitioner would have to go to trial that day and he would receive life without parole because counsel had no defense to raise on his behalf.
 - (9) Counsel unreasonably informed Petitioner that the jury was being picked at that moment and led him to believe that he had no choice but to abide by counsel's wishes and accept the plea offer.
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 - (11) Counsel should have advised Petitioner to take the first plea offer instead of making the decision on his own, that "we can do better."
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 - (13) Petitioner was prejudiced in that he was not provided with any reasonable alternatives to entering the plea that his own counsel and the solicitor coerced him to enter, as it was made clear to him that his trial would be a mere formality if he did not sign accept the plea and sign the sentencing sheet.
 - (14) Petitioner was also prejudiced in that he received a sentence of thirty (30) years instead of the twenty (20) that he would have received if he had pled to the original plea offer.
- (f) Petitioner was not provided with any reasonable choice to entering a guilty plea whereas his trial counsel refused to make any type of an investigation into the matter after being repeatedly informed that Petitioner had consensual sex with the alleged victim.

- (1) Petitioner consistently informed counsel that any sexual relations that may have occurred between Petitioner and [THE VICTIM] was consensual and he asked counsel to investigate.
- (2) Specifically, Petitioner asked counsel to obtain the proper hospital records of [THE VICTIM] to among other things, show that the results of any exam of [THE VICTIM] would not support her version of events and would substantially damage her credibility.
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- (4) Petitioner asked counsel to look into the reason that [THE VICTIM] was lying on the beach all alone so early in the morning and why she was under the influence of alcohol.
- (5) Petitioner asked counsel to look into the reason that [THE VICTIM], although claiming that Petitioner did not have intercourse with her, asked for a pregnancy test at the hospital, which signifies that she was providing police with false information and damaged her credibility.
- (6) Petitioner asked counsel, after reviewing some of the discovery material, to investigate the matter of how [THE VICTIM] "Somehow got away" after alleging that Petitioner held her down and forced himself upon her, when all evidence points to the fact that [THE VICTIM] voluntarily walked under the condominium with Petitioner.
- (7) Petitioner asked counsel to investigate why the Police took photos of his footprints on the beach near where [THE VICTIM] was lying on her towel, but failed to take photos of the footprints that showed the two walking side by side up to and under the condominium where the two engaged in consensual sex.
- (8) Petitioner asked counsel to interview [THE VICTIM] so as to obtain statements from her that would tend to show that her allegations against the Petitioner were fabricated.
- (9) Counsel failed to make a reasonable investigation when such an investigation would have show that [THE VICTIM] was not credible and would have provided for a basis to encourage Petitioner to proceed with a jury trial.
- (10) Petitioner was prejudiced in that had counsel made any type of reasonable investigation to prepare for trial, Petitioner would not have entered a guilty plea and would have insisted on going to trial.

- (11) Counsel merely accepted a \$30,000.00 payment and did nothing but to plea bargain with the Solicitor because counsel had failed to investigate and prepare for a trial, leaving Petitioner with no choice other than to plead guilty and hope to obtain assistance on appeal.
- (g) Counsel failed to inform Petitioner that a plea of guilty under the law, is an admission to all of the facts to the offense for which he was pleading guilty.
- (1) Petitioner was never made aware that in pleading guilty to the offense, that pursuant to the law, he was admitting all of the elements of the charge as alleged against him.
 - (2) Petitioner did not at any time, knowingly admit that he committed any or all of the elements of the offense of CSC as he has never had anything but consensual sex with [THE VICTIM] or any other females he has ever engaged in sexual activity with.
 - (3) Had Petitioner been made aware that a guilty plea acts to admit the elements of the charge, he would not have entered a guilty plea under any circumstances and would have insisted on going to trial.
 - (4) Petitioner was prejudiced in that he was unreasonably put into a position where he is presumed under the law to have admitted to committing unlawful acts that he did not commit and is forced into the position of utilizing a burdensome and unfair legal system to attempt to clear his name, reverse an unconstitutional conviction and sentence, and set the record straight.
 - (5) Petitioner was also prejudiced in that he was led to believe that he would be able to appeal that matter and explain his version to a reviewing court in order to obtain relief, however his attorney made sure to deprive him of an appeal as well.
 - (6) Petitioner was prejudiced in that he has been the same as sentenced to die in prison for doing nothing other than acting in a lawful manner.
 - (7) Petitioner was also prejudiced in that his sentence is unconstitutional as a violation of Due Process and his Eighth Amendment right is to be free from cruel and unusual punishment.
- (h) The trial judge improperly participated in the proceedings and was bias whereas the trial judge asked questions to elicit responses from Petitioner that would assist trial counsel in preparing a defense to later assertions of his ineffectiveness instead of simply assuring that the guilty plea was knowing, voluntary and intelligent.
- (1) The trial judge asked Petitioner if he was satisfied with his attorney's representation so as to elicit a "yes", when that is not

the judge's concern and is the basis for helping the attorney evade any allegations of ineffectiveness and other misconduct as a reward for the attorney's participation in convicting Petitioner.

(2) Petitioner was not satisfied with counsel's alleged representation because counsel, after accepting the \$30,000.00 payment from Petitioner's family, would not investigate, would not check the background and character of the alleged victim, and would not investigate by searching for witnesses who passed by the spot where Petitioner and [THE VICTIM] were engaging in consensual sexual activities.

(3) Counsel would not take reasonable action that may have been consistent with preparing to defend Petitioner at a jury trial despite the Petitioner's repeated assertions to counsel that he (Petitioner) was not guilty of committing any criminal acts against [THE VICTIM], whether CSC, kidnapping or any other offense.

(4) The trial judge asked if counsel did everything that Petitioner would hope that he would do for Petitioner, to which Petitioner provided the "yes, sire" response that is expected in these type matters, when the trial judge had no legitimate reason to make such an inquiry, and the inquiry was for the purpose of assisting counsel in preparing to defend himself against allegations of providing ineffective assistance to the Petitioner.

(i) The trial judge improperly participated in the proceedings and was biased whereas the trial judge virtually guaranteed Petitioner that he would have an appeal and a lawyer to perfect the appeal even though he was pleading guilty, however, no appeal was forthcoming or the lawyer never ensured that Petitioner's appeal was a reality.

II. Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel.

(a) Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel because of the combined actions and inactions of counsel as state and/or contemplated in this Petition and any other amended or supplemental Petition.

(1) The combined errors of counsel prior to, during and after the plea, as described and/or contemplated herein deprived Petitioner of his Sixth and Fourteenth Amendment rights to the Effective Assistance of Counsel. ”

Although not conceivable in light of Applicant's verbosity, any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the

evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits any allegation Applicant's guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. "A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376

S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding the voluntariness of the plea may raise questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing on this allegation. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits any allegation of ineffective assistance of plea counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of plea counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes plea counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant

must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, plea 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." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show 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, 59 (1985).

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

V.

Respondent submits Applicant's allegations of actual innocence should be dismissed. Post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(b); see also Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). Applicant's allegation

regarding his actual innocence is an inappropriate challenge to the sufficiency of the evidence. Simmons, 264 S.C. at 423, 215 S.E.2d at 885 (“[T]he Uniform Post-conviction Procedure Act ‘shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.’” (citing Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973))). Furthermore, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)). Because Applicant admitted his guilt at the plea hearing, he cannot now challenge the sufficiency of the evidence against him. See Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (“A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed.” (citing Blackledge v. Allison, 431 U.S. 63 (1977))). Therefore, Respondent request these allegations be dismissed pursuant to Rule 12(b)(6), SCRPC.

VI.

Respondent submits any allegation regarding judicial bias is wholly without merit and should be dismissed. An allegation of judicial bias must be supported by evidence of bias. State v. Howard, 384 S.C. 212, 218, 682 S.E.2d 42, 45 (Ct. App. 2009) (quoting State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002)). However, the alleged bias “must be personal, as distinguished from judicial, in nature.” Id. Allegations of judicial bias based on a trial judge’s adverse ruling are wholly frivolous and are not grounds for relief. See Reading v. Ball, 291 S.C. 492, 495, 354 S.E.2d 397, 399 (Ct. App. 1987) (“The fact a judge rules against a litigant is not proof of prejudice by the

judge[.] We find Reading's argument clearly frivolous[.]”).

Furthermore, PCR “is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(b); see also Simmons, 264 S.C. at 423, 215 S.E.2d at 885 (“It is uniformly held that an application for post-conviction relief is not a substitute for an appeal.”). Applicant’s allegations regarding judicial bias could have been raised on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, Respondent requests these allegations be dismissed pursuant to Rule 12(b)(6), SCRPC.

VII.

Respondent further submits any allegations regarding the plea agreement are without merit. The State may withdraw a plea offer at any time prior to the court accepting the defendant’s plea. Reed v. Becka, 333 S.C. 676, 688, 511 S.E.2d 396, 402 (Ct. App. 1999) (“A plea agreement is only an ‘offer’ until the defendant enters a court-approved guilty plea. A defendant accepts the ‘offer’ by pleading guilty. Thus, until formal acceptance of the plea by the court has occurred, the plea binds no one, not the defendant, the State, or the court.” (citing Harden v. State, 453 So.2d 550 (Fla. Dist. Ct. App. 1984))). The only exception to this rule is when the defendant detrimentally relies on the plea offer. Id. Respondent submits the record indicates the State fully complied with any plea agreement made with Applicant. Respondent further submits the record also reflects Applicant entered his plea freely, knowingly, and voluntarily. Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (“To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991))). Likewise, Applicant was advised at

this plea of the consequences of pleading guilty, including the sentencing range. See Wolfe v. State, 326 S.C. 158, 164, 485 S.E.2d 367, 370 (1997) (any possible errors by counsel regarding sentencing advice cured by plea colloquy). Furthermore, Applicant's allegations regarding GPS monitoring are wholly without merit, as Judge Hyman issued an order finding Applicant is not subject to lifetime monitoring. Therefore, Respondent requests any allegation regarding the terms of Applicant's plea agreement be dismissed pursuant to Rule 12(b)(6), SCRPC.

VIII.

Regarding any allegation that plea counsel failed to file an appeal, Respondent submits such an allegation is wholly without merit. "Absent extraordinary circumstances ... there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). Extraordinary circumstances are those where counsel perceives "nonfrivolous grounds for appeal" or where a defendant "reasonably demonstrated an interest in appealing." Id. Here, Applicant had a direct appeal where he was represented by counsel. Therefore, Respondent requests any such allegation be dismissed pursuant to Rule 12(b)(6), SCRPC.

IX.

Applicant also vaguely alleges due process and Eighth Amendment violations. TO the extent these allegations are merely recitations of his other grounds for relief, Respondent submits these allegation are without merit and incorporates its response in Parts III - VIII, supra.

In the event Applicant seeks to set forth independent allegations of due process violations, he fails to set forth with specificity any facts supporting his claim that he was denied due process of law.

The Uniform Post-Conviction Procedure Act requires that the applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In a post-conviction relief application, the applicant must make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief." (citing Babb v. State, 240 S.C. 235, 125 S.E.2d 467 (1962); Crosby v. State, 241 S.C. 40, 126 S.E.2d 843 (1962); Tillman v. Manning, 241 S.C. 221, 127 S.E.2d 721 (1962); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965))).

Since Applicant has failed to make even a *prima facie* showing, Respondent would submit this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCF, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. In the alternative, Respondent would submit Applicant should be required to provide a more definite statement pursuant to Rule 12(e), SCRCF, because this allegation is so vague and ambiguous Respondent cannot reasonably be required to frame a response.

X.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

XI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

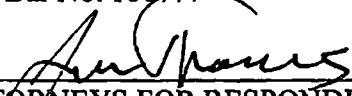
Respectfully submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

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S.C. Bar No. 100777

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

June 10, 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2013-CP-26-7463
GREGORY PENCILLE, #312332	)	
	)	
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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Daniel A. Selwa, II, Esquire
1053 London St., Suite A
Myrtle Beach, SC 29577

DATED this 10TH day of June, 2014.


 Norma Bigbee, Legal Assistant
 For Respondent

1 State of South Carolina) Court of Common Pleas
2 County of Horry) 2013-CP-26-07463

3

4

Gregory Pencille)

5

vs.)

6

State of South Carolina)

7

8

9

November 9, 2015
Conway, South Carolina

10

11 BEFORE:

12 Honorable Thomas A. Russo, Judge.

13

14 APPEARANCES:

15

16 Daniel A. Selwa, Esq.
Attorney for the Applicant

17

18 J. Croom Hunter, Esq.
Assistant Attorney General
State of South Carolina

19

20

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22

23

24

25

Teresa J. F. Bautz, RPR
Official Court Reporter

ORIGINAL

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
G. Scott Bellamy				
Mr. Selwa	24	--	48	--
Mr. Hunter	--	41	--	--
Gregory Pencille				
Mr. Selwa	49	--		
Mr. Hunter	--	59		

E X H I B I T S

NO.	DESCRIPTION	ID	EV
13	No exhibits submitted.		

1 (The hearing commenced at approximately
2 12:10 p.m.)

3 MR. HUNTER: May it please the Court, this is
4 Gregory Pencille versus the State of South Carolina,
5 2013-CP-26-07463. Mr. Pencille is presently confined
6 to SCDC pursuant to orders from the Horry County Clerk
7 of Court. He was indicted in November 2008 by the
8 Horry County Grand Jury for first degree criminal
9 sexual conduct. That was 2008-GS-26-4686. He was
10 represented by G. Scott Bellamy.

11 On August 9th, 2010, Mr. Pencille pled guilty as
12 indicted. In exchange for the plea the State dismissed
13 two pending charges of kidnapping, those were
14 2008-GS-26-4687 and 2009-GS-26-5015 as well as one
15 charge of first degree criminal sexual conduct, that
16 was 2009-GS-26-5014. Judge Hyman sentenced
17 Mr. Pencille to 30 years of imprisonment.

18 Mr. Pencille filed a motion to reconsider on
19 August 10th, 2010 as well as a notice of appeal on
20 August 10th, 2010. The notice of appeal was dismissed
21 without prejudice pending the resolution of the motion
22 to reconsider on February 9th, 2011.

23 On March 14th, 2012, Judge Hyman convened a
24 hearing on the motion to reconsider. By order filed
25 April 3rd, 2012, Judge Hyman denied the motion, at

1 which point Mr. Pencille filed another notice of appeal
2 which was perfected in the form of an Anders brief.
3 The Court of Appeals dismissed the appeal on June 5th,
4 2013. Mr. Pencille filed this application on
5 November 8th, 2013. He's represented here today by
6 Mr. Selwa. The State's ready to proceed.

7 THE COURT: All right. Mr. Selwa?

8 MR. SELWA: Your Honor, may it please the Court?

9 THE COURT: Yes, sir.

10 MR. SELWA: Your Honor, I'm going to ask for your
11 direction at this point. Mr. Pencille and I have had
12 disagreements about what issues to proceed on and what
13 claims to go forward on. And, you know, this is
14 Mr. Pencille's life, he's got 30 years. It's no skin
15 off my back, I want him to feel secure and feel like
16 his rights have been exhausted in defense of the case.
17 But I do not feel that Mr. Pencille is happy with the
18 way that my direction is going.

19 And there's a number of issues, one of which is he
20 was asking me to file a funding order for an expert.
21 And I didn't feel that we needed that. But, again,
22 this is Mr. Pencille's claim, his petition. I think
23 we're at odds as far as what issues to proceed.

24 I have a firm belief on the issue that I want to
25 go forward on, I feel confident in it, but I believe

1 that Mr. Pencille has a lot more, and I think he wishes
2 to address the Court on that.

3 THE COURT: I'll be happy to hear from you,
4 Mr. Pencille.

5 THE APPLICANT: Yeah.. Well, what grounds are
6 you...

7 (Discussion off the record.)

8 THE APPLICANT: Yeah, that's a minor one. Yeah, I
9 have several issues I want to raise, and he doesn't
10 want to raise them. I was also interested in
11 subpoenaing Ms. Lively because she made some false
12 accusations at the guilty plea hearing. And he was
13 adverse to that, having her here, which I figured that
14 she needed to be here to contest the statements that
15 she --

16 THE COURT: Were those statements addressed during
17 the plea?

18 THE APPLICANT: She made false statements during
19 the plea to bias the judge --

20 THE COURT: Did you correct those?

21 THE APPLICANT: I asked Mr. Bellamy to. That was
22 one of issues that I'm going against him on. He would
23 not object to her statement.

24 THE COURT: Did you let the Court know that you
25 objected to those statements?

1 THE APPLICANT: He told me to be quiet.

2 THE COURT: Here's the thing, Mr. Pencille.

3 THE APPLICANT: Yes, sir.

4 THE COURT: And it has nothing to do with you
5 personally. I don't know you, I've never met you
6 before, I don't believe. But let's say I continued
7 this case, I relieve Mr. Selwa and appoint another
8 attorney.

9 THE APPLICANT: Yes, sir.

10 THE COURT: What if the other attorney feels the
11 same way, based on their legal experience, their
12 background, their ethical obligations to the Court that
13 they not proceed because it's unethical to proceed with
14 frivolous claims. What if the next lawyer feels the
15 same as Mr. Selwa feels?

16 THE APPLICANT: Well, I had actually -- I had
17 hired a lawyer.

18 THE COURT: You can hire a lawyer.

19 THE APPLICANT: Yeah, I had one come in and speak
20 with me in between February, the last time we were
21 here --

22 THE COURT: Is that lawyer going to represent you?

23 THE APPLICANT: He told me -- his advice was for
24 Mr. Selwa to represent me. And after I lose, he'll
25 pick me up on appeal. But I don't want to exhaust this

1 stage.

2 THE COURT: Okay. That comment right there?

3 THE APPLICANT: Yeah.

4 THE COURT: I would encourage you to question very
5 seriously --

6 THE APPLICANT: Right.

7 THE COURT: -- the counsel of that lawyer.

8 THE APPLICANT: Yes.

9 THE COURT: You don't counsel someone, go forward
10 with the one you don't like, and when you lose that,
11 I'll represent you here.

12 THE APPLICANT: Well, I didn't say I was hiring
13 him. I said I asked him --

14 THE COURT: No, I understand that. But if his --

15 THE APPLICANT: Right.

16 THE COURT: -- if his recommendations to you are,
17 go forward with the guy you don't like and lose, and
18 then I'll handle your appeal --

19 THE APPLICANT: Yeah, that's --

20 THE COURT: -- that's incredibly bad advice.

21 THE APPLICANT: Exactly, yeah, I agree.

22 THE COURT: So again, we get back to, I mean, if
23 you're not going to hire someone to represent you, then
24 the Court has to appoint a lawyer.

25 THE APPLICANT: Right.

1 THE COURT: We are not going to continue to
2 appoint lawyers until we find one that agrees with your
3 position.

4 THE APPLICANT: Of course not.

5 THE COURT: So...

6 THE APPLICANT: To be honest, Mr. Selwa kind of
7 caught me off guard with what he said today. I am on
8 the same page with him, but I wasn't expecting him to
9 come in and tell me, I'm going to let the judge decide.
10 I wasn't -- I had a continuance filed in February.
11 It's now November.

12 The judge that granted the continuance gave a
13 suggestion to Mr. Selwa to come see me and file an
14 amendment. In nine months he hasn't come see me once,
15 and there has been no amendment filed. I actually have
16 a letter from Mr. Selwa stating that he's not going to
17 file any amendments or file subpoenas.

18 So, I mean, I -- a personal opinion, Mr. Selwa is
19 the kind of lawyer I would like because of his
20 disposition, he shoots it straight. But he's not
21 willing to shoot straight with the arguments I want.

22 MR. SELWA: And, Your Honor, this comes down to --
23 this was a plea. This comes down to -- how do I put
24 this -- first and foremost, I have to address, you
25 know, plea counsel's deficiencies. And I think

1 Mr. Pencille wants to address a lot of the stuff that
2 didn't actually occur in what would have been a trial.
3 And I just, I --

4 THE COURT: Well, and again, I don't know all the
5 facts surrounding it, but I know this -- and I haven't
6 read the transcript of the pleas, so I don't know what
7 happened through that process -- but I'm assuming you
8 understand, Mr. Pencille, that any time someone pleads
9 guilty to any offense, that when you plead guilty, you
10 waive or you give up any defenses you have.

11 THE APPLICANT: Right.

12 THE COURT: So even if you're going to stand here
13 today and say, I had some great defenses that I could
14 have gone forward on, you waived those when you pled
15 guilty.

16 THE APPLICANT: I understand.

17 THE COURT: You gave up those.

18 THE APPLICANT: Yeah.

19 THE COURT: So...

20 THE APPLICANT: Well, part of the issue was the
21 fact of the breach of contract with the actual
22 sentencing sheet. As far as the guilt or innocence,
23 there was an issue that I can present to the Court, but
24 that comes in after I prove that Mr. Bellamy was
25 deficient in his performance and it prejudiced me.

1 THE COURT: Well, and certainly Mr. Selwa is
2 completely aware that the issue or one of the issues
3 that he has to deal with, I want to term it as
4 ineffectiveness assistance of counsel as the typical
5 phrase. If you're complaining about your attorney not
6 performing to the appropriate standard, that would be
7 ineffective assistance. He's clearly aware of the
8 standard with regard to that, so --

9 THE APPLICANT: Right.

10 THE COURT: And I'm not being critical of you at
11 all, I don't -- again, I don't know your educational
12 level, I don't know your experience. You may actually
13 have a law degree, I just don't know. But I know this
14 guy does, and I know he's practiced law for a long time
15 and does a good job.

16 THE APPLICANT: What now, 11 years?

17 THE COURT: That doesn't mean he's infallible, it
18 doesn't mean he doesn't make mistakes.

19 THE APPLICANT: Right.

20 THE COURT: But here's where we're at, okay. This
21 is the problem that I have in having to make this
22 decision. I haven't been given any -- if I appoint
23 another lawyer, we may be back here again in a few
24 months with this same issue.

25 THE APPLICANT: Right.

1 THE COURT: I don't know that we would, we may
2 not. But the next lawyer may say, you know what,
3 judge, I got the same problems that Mr. Selwa had that
4 Mr. Pencille wants me to proceed in this matter, but
5 there's really not a basis for it, it's not relevant or
6 whatever the reason may be. And then we're back here
7 going through the same thing again.

8 THE APPLICANT: Right. Well, I mean --

9 THE COURT: It sounds to me like the two of y'all
10 need to get together, sit across the table and go
11 through this stuff.

12 THE APPLICANT: Which is what the last judge had
13 told us.

14 THE COURT: And hash through the stuff.

15 THE APPLICANT: Yeah.

16 MR. SELWA: And, Your Honor, we have done that.
17 I've met with him and had a nice long meeting with him
18 and --

19 THE APPLICANT: I've had him for five years. It's
20 been five years. 2010, that was when you were first
21 appointed to me. And then it was dismissed without
22 prejudice, and you were reassigned to my case a year
23 later, two years later.

24 MR. SELWA: That's correct, that's correct. He
25 had a pending appeal, so that PCR was dismissed. And

1 then I came back on this case later on.

2 THE COURT: All right. So there was an appeal.

3 There was a PCR filed, you represented him on that.

4 That got set aside to let the appeal run its course?

5 MR. SELWA: Correct, Your Honor.

6 THE COURT: And then we're back here.

7 MR. SELWA: Yes. Yes. We've corresponded, you
8 know.

9 THE APPLICANT: A number of times.

10 MR. SELWA: A number of times.

11 THE COURT: And let me say this. I'm not siding
12 with him over you or you over him. But I will say
13 this. We can sit down for four hours a day, ten days a
14 month between now and March, and if the issue is what
15 the issue is, us continuing to meet on it isn't going
16 to change it.

17 THE APPLICANT: Right.

18 THE COURT: So what is it that you think would
19 change if y'all sat down again and went through all of
20 this again? I mean, I don't know, there may not be
21 anything.

22 THE APPLICANT: We -- the first time we met and
23 discussed everything, I didn't have my file and he
24 didn't have his file. It was a spur of moment thing, I
25 didn't know I was going up to the holding cell. The

1 second time -- did we meet twice? I think -- yeah, we
2 met again when he was rehired. And again, we didn't
3 have a chance to actually go through the discovery or
4 the transcript of record.

5 So what he's done on his own and what I've done on
6 my own is all I have and all he has. We haven't
7 actually had a chance to sit down and formulate a
8 strategy. That's why we sound like an old married
9 couple, for lack of term. You know, I would like
10 nothing more than to have this handled today, because
11 these cuffs hurt, and I've been here three times with
12 Mr. Selwa and we've gotten nowhere.

13 I mean, the last time we were in front of the
14 judge, he didn't even know what I had filed. And now,
15 I believe he knows what I have filed but he doesn't
16 want to, what's the word I want to use, because the
17 issue J, you don't want to proceed with it.

18 MR. SELWA: If I could explain, Your Honor,
19 Mr. Pencille had sent in some pleadings. He did it on
20 his own, amendments and stuff. And they explained and
21 sent a letter back saying that obviously he has
22 counsel, he can't do that while he has counsel.

23 THE COURT: All right. Well, why have y'all not
24 met since the last continuance was granted?

25 MR. SELWA: Well, Your Honor, my opinion has not

1 changed, and it hadn't changed at that last hearing,
2 and I brought that to the Court's attention. I just
3 said Mr. Pencille had filed some things, I didn't
4 necessarily agree with them. It hasn't changed my
5 position on what I want to go forward with. I
6 evaluated this case, sat down and talked with him and
7 told him that there are a number of issues that he
8 brought up. And I said, you know, really, we need to
9 focus on the issues that I think are win-able.

10 THE COURT: One of the things you mentioned early
11 on in this discussion here today was his desire to have
12 an expert witness called. For what purpose?

13 MR. SELWA: Your Honor, I believe he wanted the
14 DNA tested, and --

15 THE COURT: That should have been done prior to
16 any plea happening.

17 THE APPLICANT: Well, this is one of the issues he
18 has with one of my arguments. And honestly, I
19 understand where he's coming from, having done more
20 research, but I had requested a preliminary hearing.
21 And Mr. Bellamy had canceled the preliminary hearing
22 last minute. I had the Court summons to come, but I
23 never went.

24 Had we went, the evidence that was supposed to
25 exist for the '01 case, there is an '01 and '04 case,

1 existence for the '01 case doesn't exist. The State is
2 saying that the evidence was destroyed, but needless to
3 say whether it existed or not, it's not in existence
4 now. And I don't -- I have the statute, but I don't
5 remember the numbers on it, South Carolina code. They
6 have to keep on file for seven years after a conviction
7 is made.

8 So if it wasn't there to be tested in the first
9 place, there's no case. Had I went to the preliminary
10 hearing, there would have been some sort of evidence
11 about that as far as, well, we have evidence, but it
12 doesn't exist. So there's -- it's in the dark with me,
13 but Mr. Bellamy --

14 THE COURT: Well, during the course of discovery,
15 I'm assuming evidence was exchanged?

16 THE APPLICANT: It was. But like I'm -- part of
17 the issue is the entire time Mr. Bellamy was coming to
18 see me, and he did come see me quite often, he kept
19 telling me that the State had pleas. And I kept
20 telling him, get them in writing. And he kept telling
21 me, I will. And I never got anything in writing.

22 And at the very last time we saw each other before
23 I actually came to court, it was, well, the State
24 doesn't have the evidence for the '01 case, so they're
25 probably just going to take that off the table. But

1 the issue is the State also upped the plea deal and
2 they switched the charges, which, again, I was like,
3 you know, how did they up the sentence -- you know, how
4 did they up a plea agreement, and they never gave me a
5 plea agreement in writing in the first place. So I'm
6 battling a gray issue there anyways.

7 THE COURT: You keep mentioning an '01 case.

8 THE APPLICANT: There's an '01 case and an '04
9 case.

10 THE COURT: Okay. And I'm looking at --

11 THE APPLICANT: And I was indicted in '08.

12 THE COURT: I'm looking at the plea sheet, and it
13 appears, unless I'm missing something here, that your
14 plea was based upon the '04 case.

15 THE APPLICANT: Right.

16 THE COURT: So what relevance is the '01 case?

17 THE APPLICANT: Well, that's just the thing, the
18 whole time that I had Mr. Bellamy hired, he's telling
19 me the State is pushing the '01 case. And then at the
20 very end, at the very last minute he said, well,
21 there's no evidence for the '01 case, so they are not
22 even going to argue that anymore, they're going to push
23 the '04 case.

24 THE COURT: Okay..

25 THE APPLICANT: Which has lesser, I guess,

1 incriminating accusations, and that's what they're
2 going to push. But the whole time it was, you know,
3 they are seeking life on the '01 case, which that was
4 never the case. Because I have -- I finally got a copy
5 of the sentence to -- notice to seek life -- what is
6 that?

7 MR. SELWA: Life without parole.

8 THE COURT: Life without parole?

9 THE APPLICANT: Right.

10 THE COURT: LWOP?

11 THE APPLICANT: Yeah. That the paperwork that
12 they served on me was for the '04 cases, but the whole
13 time Mr. Bellamy's telling me they were for the '01
14 cases. So I mean, that's got to be ineffective there.

15 THE COURT: But you pled to the '04 cases.

16 THE APPLICANT: '04, at the last minute. And he
17 told me I'm coming to the Court to plead to kidnapping,
18 I get there and it's CSC. And then after I asked
19 him -- I mean, what happens behind that door before we
20 come out here, there's no one, no witness, no proof of
21 what is said. So me saying to the Court that I asked
22 Mr. Bellamy why am I here on this and is there anything
23 you can do, and he tells me there's nothing I can do, I
24 have no defense for you, that's pointless for me to say
25 because I have no witnesses on that. It's my word

1 against his.

2 So when I come out here to plead to a CSC because
3 I have no other choice because he has no defense
4 formulated for me, then I'm stuck with -- I'm stuck --

5 THE COURT: Well, you had a choice, you had a
6 choice to not plead.

7 THE APPLICANT: Well, he couldn't do anything for
8 me. He told me, if you don't sign this, you're getting
9 life.

10 THE COURT: Is continuing this matter going to
11 change anything?

12 MR. SELWA: Not in my mind, Your Honor, and that
13 was the same position that I took last time,
14 unfortunately.

15 THE COURT: I don't see any reason to continue the
16 matter. I don't see any reason to appoint another
17 lawyer. I don't know who you spoke with, what other
18 lawyer you spoke with who told you to go forward and
19 get your application denied and I'll represent you.

20 THE APPLICANT: It was more along the lines of, if
21 you lose, which he was telling me I'm going to because
22 we're not on the same page of what needs to be brought
23 up.

24 THE COURT: Well, it's not that -- and please
25 understand, Mr. Pencille, that's not unusual. It

1 happens a lot.

2 THE APPLICANT: Yeah.

3 THE COURT: Probably more times than not. Because
4 I'm not -- I'm not saying you don't understand, I'm
5 saying that there's probably a greater chance that you
6 don't understand necessarily what's relevant versus
7 what Mr. Selwa understands what's relevant. And so we
8 often have times that the clients don't agree with
9 their lawyer's assessment.

10 It's kind of like when I send my car in to a
11 mechanic that have transmission problems, I think I
12 know what the problems are and the mechanic -- let me
13 change that scenario, because I'm going through this
14 right now.

15 THE APPLICANT: Yeah.

16 THE COURT: I have a contractor who's putting in
17 hardwood floors in my upstairs, and he's finished with
18 one room. I walk in there and the floor gives and
19 there's a popping going on and all this, and I'm
20 telling him, this isn't right, these aren't in right,
21 this shouldn't be occurring. And he's trying to
22 explain to me that there's an issue there with the
23 subfloor that I'm unaware of and he can repair, but
24 it's going to cost a lot more to do it. And I'm like,
25 no, I don't think it ought to and all this.

1 I mean, so then I get my brother-in-law involved
2 who's a builder and he looks at it and he goes, Tommy,
3 you got problems in the subfloor that have to be
4 corrected before you put down this hardwood. It's
5 going to cost you more money.

6 THE APPLICANT: Which the contractor should have
7 noticed.

8 THE COURT: Which the contractor told me, he told
9 me that. And I didn't believe it. I knew. He's the
10 contractor.

11 THE APPLICANT: Yeah.

12 THE COURT: You know, and I'm not saying that's
13 the case with you, but I'm saying that, you know,
14 sometimes as a lay person you got to defer to the
15 contractor who knows what he's talking about.
16 Sometimes as a layer person you got to defer to your
17 lawyer who understands the issues so much more than
18 you.

19 This is difficult, you know, I'm the kind of guy
20 that usually errs on the side of caution and will
21 continue a matter and let it get resolved. But I don't
22 know that it's going to benefit this situation to
23 continue the case. I think what we should do is
24 proceed, and I'm going to hear -- I'm going to allow
25 you to put up what you want to put up.

1 MR. SELWA: I want to proceed. Your Honor, I
2 agree completely with what you're saying. And my
3 understanding of kind of what I was asking the Court
4 for was we either proceed or the Court releases me and
5 either let's him go on his own or hires his own
6 attorney. I hate that we're in the situation because
7 this is his life. He's got 30 years.

8 THE COURT: I understand that. I'm not
9 insensitive to that at all. But my thing is, and I've
10 been doing this a long time, which doesn't make me
11 right all the time, I'm not, but all we can do is go
12 off our experience. And I just don't think continuing
13 this matter is going to increase the chances of
14 prevailing or not prevailing on this application.

15 I'm going to allow you to present whatever it is
16 you want to present. I'm going to allow --
17 Mr. Pencille, I'm going to hear from you, whatever you
18 want to be heard on. Some things at least from first
19 blush may seem irrelevant to me. For example, you
20 know, an expert on DNA on a case that you pled guilty
21 on, I mean, I don't know if that has any relevance or
22 not.

23 Understanding that, you know, you waive any
24 defenses you may have when you enter a guilty plea.
25 But regardless, I think we'll proceed and I'll hear

1 from everybody, we'll have a full hearing. All right?
2 So go ahead and call the case. I think you already
3 have, we're ready to proceed.

4 MR. SELWA: I think we already have, Your Honor.
5 He's asking for five minutes; is that --

6 THE COURT: We'll do that. We'll take a short
7 recess and we'll start back.

8 THE APPLICANT: Thank you, Your Honor.

9 THE COURT: But let me ask, because I need y'all's
10 guidance little bit maybe. Because I want to hear from
11 everybody, I'm going to have a full hearing. Do we
12 need to break and start this matter after lunch?

13 MR. SELWA: It's 12:30, it doesn't matter to me.

14 MR. HUNTER: The State's case won't take very
15 long, Your Honor. It's just however long their case
16 will be.

17 THE COURT: Well, I'll tell you what, let's take
18 the break, let y'all have some time to discuss some
19 things, and then we'll start back. All right, we'll
20 take about five or ten minutes.

21 (WHEREUPON, a brief recess was taken at
22 12:37 p.m.)

23 MR. SELWA: Your Honor, I don't normally bring
24 this up, his cuffs look like they hurt him a little
25 bit. If they could loosen them up a little bit?

1 THE APPLICANT: The cuffs are loose, that's not
2 the problem. My shoulders are wrong, it's hurting my
3 shoulders.

4 THE COURT: Let's do this, unless y'all tell me
5 that there's some -- for purposes of this hearing,
6 let's just take those off.

7 THE DEPUTY: Can we take one off?

8 THE APPLICANT: Well, I actually asked the bailiff
9 if he could put a second set on me to cuff, you know,
10 one hand to the ring, and just have -- that would give
11 me a little bit more room.

12 THE COURT: What hand do you need?

13 THE APPLICANT: I'm right-handed.

14 THE COURT: Give him his right hand. And make
15 sure the other one's loose enough to where -- well, I
16 think they are loose enough, it's just having to put
17 them in front of it, yeah.

18 THE APPLICANT: Thank you. Yeah, it's plenty
19 loose.

20 THE COURT: Okay. All right. We ready to
21 proceed, then?

22 MR. SELWA: Yes, Your Honor.

23 THE COURT: All right. So?

24 MR. SELWA: Your Honor, I've got to call Scott
25 Bellamy first.

G. SCOTT BELLAMY-DIRECT BY MR. SELWA

1 THE COURT: Mr. Bellamy, if you would please come
2 around and be sworn, sir.

3 G. SCOTT BELLAMY, after being duly sworn,
4 testified as follows:

5 THE CLERK: Please have a seat and state your name
6 for the Court.

7 THE APPLICANT: My name is Scott Bellamy.

8 MR. SELWA: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. SELWA: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MR. SELWA:

13 Q Mr. Bellamy, you represented Mr. Pencille; is that
14 correct?

15 A I did.

16 Q And you represented him for the charges of
17 kidnapping and CSC?

18 A There were two sets of charges, yes. On both sets
19 of charges.

20 Q And the first charge was from 2001; is that
21 correct?

22 A As best I can remember. There were two in the
23 early 2000's.

24 Q Okay. And then were there any subsequent charges?

25 A There were two sets of CSC charges, one I think in

1 '01, one in '04.

2 Q Okay. And initially you were retained for the
3 '01; is that correct?

4 A I was retained for both of them.

5 Q Both of them. What was your discussion with
6 Mr. Pencille on the facts surrounding the '01 case?

7 A I don't remember a distinction with '01, '04, but
8 the -- so the Court understands, what happened is
9 Mr. Pencille had been pled guilty to a totally
10 unrelated charge in '07, '08, somewhere in that time
11 period. I was not involved. He was sent to the
12 Department of Corrections. As part of that they take
13 his DNA, enter it to the CODIS system.

14 These two cases originated in -- over at the
15 beach, they were unsolved rape cases where there was
16 DNA obtained from the victims. That DNA was likewise
17 put into CODIS. They came back after he got in the
18 Department of Corrections, it took some period of time
19 for him, I assume, to get his DNA and go through the
20 process. There was a hit on these two unsolved rape
21 cases.

22 Based upon that hit, they secured arrest warrants
23 for him. Now, of course he's in the Department of
24 Corrections. Then what the police did is brought him
25 for a hearing to determine if they could actually take

1 his DNA separately from the CODIS, which they did. And
2 it came back as a match on both of them to him with
3 these old unsolved rape cases that were very similar in
4 nature, on the beach, late at night, female, alone,
5 grabbed at the beach access, or I don't remember the
6 exact location, held against her will and forcibly had
7 sex with her.

8 Q Okay.

9 A Now, to distinguish between '01 and '04, I don't
10 remember off, you know, any great distinction, they
11 were very similar in nature to what happened. And
12 Mr. Pencille at the time was living in that area of
13 Myrtle Beach.

14 Q Okay. And did you go over the facts of the case
15 as you had them through the discovery process?

16 A I did. And provided him a copy of all the
17 discovery. Of course a little more difficult because
18 he was, I believe, in Lee County.

19 THE APPLICANT: Evans at the time and then Lee.

20 A Evans then Lee. But so I had to go see him. So
21 it's not as easy as J. Reuben. But I did, and we would
22 meet for several hours at a time when I would go see
23 him and in fact took all the discovery with me, and
24 left him a copy, if I'm not mistaken.

25 Q And when you did do that, did you go through the

1 elements of each crime --

2 A Yes.

3 Q -- so that he understood it?

4 A I did. I talked about with both the CSC and
5 kidnapping, what that means. And I can go through off
6 the top of my head, but yes, I would go through the
7 elements of each of the crimes.

8 Q Okay. Was the State in your opinion missing any
9 evidence that would have deflated their case?

10 A And I've listened in here today to him talking
11 about the '01 case and some missing evidence. I don't
12 recall that specifically without having to go back
13 through and look at everything. You know, they had
14 a -- they had two cases, and they could have proceeded
15 under either of them. And the deal was they would
16 proceed under one, they would dismiss the other
17 charges, which is what they ultimately did.

18 Q Okay. And this was obviously a plea; is that
19 correct?

20 A It was a plea.

21 Q Okay. And you didn't have a trial on it, so
22 therefore didn't get to put up defenses; correct?

23 A No, we did not. And he and I discussed because of
24 his prior conviction that he was serving time on when
25 these came to light, he was eligible for life without

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1 parole. And one of the first things in my discussions
2 with him and his family was, you know, that was the
3 hope is to -- based upon what we saw as evidence is to
4 get him out of that. He was a relatively young man and
5 if we could get him a sentence that could let him see
6 the light of day somewhere before he's in his sixties,
7 then we would be doing good.

8 And that's what we were looking at, trying to get
9 as little time as we could understanding that he would
10 have to do some time.

11 Q Did you employ the services of an investigator, or
12 did your office have an investigator?

13 A No, we did not.

14 Q Okay. Would the facts of the case -- at any point
15 did you speak to the victims or try to get in touch
16 with the victims?

17 A One of the victims, I think, had moved away. But
18 through the solicitor's office, I believe I was able to
19 maybe communicate with a victim by phone with the
20 solicitor present in the solicitor's office to make
21 sure that that person was available on my own.

22 Q Mr. Bellamy, what -- through your representation
23 of him during this process, what kind of pleas were
24 offered, concrete pleas, basically that you received
25 from the solicitor's office?

1 A Well, there was an initial conversation that I
2 with Ms. Lively, Candice Lively who is no longer with
3 the solicitor's office. And, again, it was nothing
4 formal, written, it was, hey, what do you think about
5 would your guy do this. And I think the number was 25
6 or maybe 23. It was less than what we ultimately got.
7 But that was -- that was not a formal, hey, here's an
8 offer, it was what do you think about, what are you
9 thinking, Scott, and I'm like, what are you thinking.

10 I believe I communicated that with him. And I
11 thought it was a pretty good offer at the time, which
12 raised some red flags with me as to the availability --
13 because you got a CODIS hit and then a confirmation on
14 DNA which the number was astronomical, one out of
15 whatever, that that was his DNA. And we had no other
16 explanation for why he would have been there with this
17 female, which is -- it's not like an ex-girlfriend,
18 somebody who's had a grudge against him that could come
19 up with why she would make some accusation and it
20 turned out to be his DNA.

21 So it did raise a red flag with me, hold it, maybe
22 they're missing the witness, maybe, you know, sometimes
23 these victims don't want to relive this, and this was
24 years later. And that's why I reached out to make sure
25 that they had somebody live willing to come forward.

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1 But that initial offer, I say, and probably not
2 fair to say it was an offer, it was kind of a back and
3 forth like you do in a civil case, what will you take,
4 what will you take. But Ms. Lively upped it and for
5 reasons you have to ask her, that maybe she hadn't
6 formally talked about that number with the victims, and
7 maybe -- and again, I don't want to speculate. But it
8 came back ultimately with a cap of 30 years, no
9 specific number is where we ended up.

10 Q And how did you explain that to -- the plea to
11 Mr. Pencille?

12 A Well, I explained to him that we're not entitled
13 to a plea offer, number one, and that, you know, this
14 isn't -- doesn't necessarily lend itself to a contract
15 law where we would have to show some detriment on our
16 behalf in reliance upon something to enforce, I believe
17 under the Thrift Brothers case, to enforce a plea
18 agreement.

19 Because as a defendant we're not entitled to a
20 plea agreement. In other words, he would have had to
21 accepted their offer of 25 years, then given an
22 incriminating statement to lock him into the 25 years,
23 and we never got that far. So I explained to him that
24 the solicitor's entitled to withdraw it, change it and
25 in fact could have went forward with life without

1 parole should they -- had they chosen to because we had
2 no detrimental reliance.

3 Q Did he understand the process of the plea,
4 actually, to your knowledge?

5 A You mean the plea that we did, the actual plea
6 when he pled to --

7 Q Yes.

8 A I believe -- yes, I believe he understood that he
9 was giving up his right to have a trial, we wouldn't
10 pick 12 people, that we would not be confronting the
11 State's witnesses or the victims in a testimony
12 situation.

13 Q Did he understand that the victims would be
14 speaking to the judge?

15 A I informed him that that's possible, that they
16 have a right to. You don't always know whether they
17 will or won't. Sometimes they speak, sometimes they
18 don't.

19 Q Did he understand that the prosecutor would give a
20 summation of the facts?

21 A Well, I explained to him that the way it worked
22 would be that the judge would question me and then
23 question him about, you know, understanding what he was
24 giving up by pleading. But then the solicitor would
25 read a state of facts or make a statement of facts to

1 support the plea. So you had to -- the solicitor would
2 have to tell the judge what he had allegedly done in
3 order to accept it.

4 So yes, I would have told him that -- and then
5 they would come back to us and ask us if that was true
6 and correct what the solicitor had said.

7 Q And to go back to the -- my client brought up an
8 issue for me -- to go back to the plea, did you ever
9 receive any -- did he ever ask you to get the pleas in
10 writing?

11 A I believe he did, I believe he asked me. He'd
12 wanted -- he'd wanted things to be concrete, and I told
13 him I would try. But these things a lot of times back
14 and forth with solicitors are, you know, they make an
15 offer, you go into lockup, you talk to your client, you
16 come back out, and that's the way it works. So there
17 was, you know, her statement.

18 Now, if she had got up there on the day of the
19 plea and said, we want life without parole, then we
20 wouldn't have went forward. She did what she told me
21 she would do which is cap it at 30 years. But there
22 was nothing in writing, but he did ask for that.

23 Q And he understood basically the judge at that
24 point would be making a decision for no more than 30,
25 but it would be around that area?

1 A He understood that there was a cap, meaning that
2 the recommendation was that he receive a sentence of no
3 more than 30 years, and in my conversations with him,
4 based upon the nature of the allegation and his prior
5 criminal conviction, that it would be on the upper end
6 of that. Obviously, the hope was the judge would cut
7 it a few years. But as I recall, I believe the victim
8 spoke and it was rather impactful.

9 Q You do recall the victim's impact statement; is
10 that correct?

11 A Word for word, no. But I just remember, I
12 believe, you know, I haven't read the transcript of
13 this one, but...

14 Q Do you recall Ms. Lively referring to him as a
15 serial rapist?

16 A I think she may have used that or similar language
17 when she was talking about what she thought maybe the
18 appropriate sentence would be.

19 Q And had he ever been convicted of rape in that
20 sense of the word, I guess; I mean, was he a serial
21 rapist at that point?

22 A I can't tell you what he was or wasn't.

23 Q Well, I mean, according to court record.

24 A Well, I mean, he had been convicted of a prior
25 sexually-related offense down on the beach, I believe

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1 at the Landmark Hotel where he pled guilty to that as
2 well. But he pled to, I believe, kidnapping, I
3 believe, and not the -- in exchange for the kidnapping
4 plea. And again, I wasn't his lawyer, they dismissed
5 the sexual charge. And, again, I'm speculating but it
6 may have been to keep him off some kind of registry at
7 the time. But anyhow, no, he had not been convicted of
8 an actual CSC case at the time she made that statement.

9 Q And so --

10 MR. SELWA: If I may approach the witness, Your
11 Honor.

12 THE COURT: Yes, sir.

13 Q Mr. Bellamy, can you refresh your memory with the
14 transcript there where --

15 A Where it says, Ms. Lively, do you want me to read
16 what she said?

17 Q Correct.

18 A Okay. And for purposes --

19 THE COURT: Is this the transcript of the plea?

20 MR. SELWA: Yes, Your Honor.

21 THE WITNESS: It would be page 17, Your Honor.

22 THE COURT: All right.

23 THE WITNESS: Then after the Court says, all
24 right, then Ms. Lively, I'll read it. Whenever these
25 cases were assigned to me, we went through, we being

1 myself as well as the victim advocate and law
2 enforcement, went through --

3 THE COURT: All right. Go slow now.

4 THE WITNESS: Okay -- went through extensive
5 research regarding the Defendant's -- this Defendant's,
6 MO and his actual -- the concerns that we would have
7 ourselves a serial rapist on our hands. And I
8 understand that I am, you know, I'm obviously
9 dismissing the charge in exchange for him pleading
10 guilty to this charge and receiving a 30-year sentence,
11 which I am hoping for at this time.

12 Because based upon all the information that was
13 provided to me through law enforcement as well as
14 concerns that there may have been other cases out there
15 which I'm not asking the Court to consider, I'm
16 explaining why I did what I did, that he truly is a
17 predator. Now, do you want me to continue reading?

18 Q No, no, thank you. So in the transcript there she
19 does -- she basically calls him a serial rapist but
20 alleges that she is not saying that; is that right?

21 A She says it, but then she says she's asking the
22 Court not to consider that. Now, that's like
23 un-ringing the bell. But it is at a sentencing
24 hearing, so we're not bound by the rules of evidence as
25 a defense lawyer or as a prosecutor.

G. SCOTT BELLAMY-DIRECT BY MR. SELWA

1 Q Okay. And later on in the plea process, one of
2 the victims actually referenced her comments about
3 that; is that right?

4 A You would have to show it to me, she may have.

5 Q And if this may refresh your memory, this is on
6 page 23. I think it's Ms. Ungerman.

7 A Okay, do you want me to read that as well?

8 Q Yes, if you don't mind.

9 THE WITNESS: Page 23, Your Honor.

10 THE COURT: Okay.

11 THE WITNESS: The Court's, okay. Yes, sir, I do
12 understand that people deserve a right to make the best
13 of their life and do what they can and deal with the
14 circumstances that may arise out of their control. It
15 was just a, you know, small encounter that happened
16 with me. It was out of my control and I'm making the
17 best of my life in light of that. I don't go out and
18 harm other people, weapon or not. I don't find
19 someone, follow them myself and force them to do
20 something they're not okay with. I don't terrify
21 people and that's what it is, it was terrorism. It
22 took -- keep reading?

23 MR. SELWA: I'm sorry. Court's indulgence.

24 Q Yes, I'm sorry. Continue.

25 A It took me years to trust people, it took me -- I

1 still don't go on parking decks or elevators by myself.
2 And maybe it's just made me more aware of a person, and
3 I think that's a good thing for any woman is just to be
4 more aware of her surroundings. I don't trust people
5 the same anymore, but I think that I'm just a little
6 bit less naive. I just felt the best in people.

7 I felt this man was maybe just kind of creepy and
8 maybe he was hitting on me. And I could just, you
9 know -- I don't think anything more or that I would
10 have just walked away as quickly as possible. I
11 wouldn't have tried to chitchat my way out of it, but
12 to downplay is I think is unfair to say that he was
13 unarmed and nothing really came of it, that's not fair.

14 And obviously it wasn't a one-time thing, I guess,
15 speculation doesn't matter. But as far as what the
16 courts already know about, they already know about
17 several other women that he has done this to, a child
18 that he has done this to. Do you want me to keep
19 reading?

20 Q No, I just wanted --

21 A That part.

22 Q You've refreshed your memory there in regards to
23 her calling him a serial rapist; is that correct?

24 A Well, she doesn't use that word. But she
25 references that there was another woman and a child

G. SCOTT BELLAMY-DIRECT BY MR. SELWA

1 that he's done this to.

2 Q And that was not actually correct, according to
3 court record; is that correct?

4 A Depending on how you look at it. He had already
5 been convicted of a kidnapping involving a sexually
6 based offense back several years where he pled to
7 involving a child. So that part, I guess you could say
8 is correct.

9 The other person that she references, I assume,
10 would be the second case that we were dealing with here
11 which he had not been convicted of but had been accused
12 of.

13 Q And do you think that Ms. Lively's statement
14 impacted her statement and angered her or incensed her
15 in that she thought that there was other women and that
16 she was actually dealing with a serial rapist?

17 MR. HUNTER: Your Honor, I'm going to object to
18 speculation there.

19 THE COURT: Sustained.

20 Q Well, Mr. Bellamy, do you think you should have
21 objected at any point?

22 A I don't think, because again, we're not at a
23 evidentiary hearing, we're not taking testimony
24 necessarily under oath where the rules of evidence
25 apply. You know, had he been convicted of another

1 sexually based charge with a child, yes. I don't know
2 how I can say, you know, she's in left field talking
3 about something nobody had heard of.

4 And we had to put on the record obviously that
5 there was a second charge on the CODIS hit that was
6 being dismissed. And clearly as a defense lawyer, I
7 want to make sure that that's put on the record as a
8 part of this plea, that that's going to be dismissed.
9 So by the nature of that, the Court obviously is going
10 to hear that there was a second charge. It's a very
11 common occurrence, you know, you're charged with 18
12 things, you plead to four, and the judge hears about
13 the other 14 that are dismissed.

14 So, no, I didn't object. And I don't think -- and
15 I would rarely if ever object to a victim in a CSC when
16 they are speaking for all kinds of reasons. But I did
17 not object and didn't think that there was a basis.

18 Now, I would point out as well that there was a
19 hearing in front of Judge Hyman after this on a motion
20 to reconsider where he did a written order which I
21 think outlines that he did not consider these other
22 offenses. He based it on what he was pleading to that
23 day and his criminal history.

24 Q But of course it's hard to un-ring the bell, as
25 you said; right?

G. SCOTT BELLAMY-DIRECT BY MR. SELWA

1 A I agree with you.

2 Q And he didn't move off of 30 years obviously;
3 right?

4 A He did not.

5 Q He got the full 30 years. So that was a very
6 impacting impact statement; correct?

7 MR. HUNTER: Objection, that's speculation.

8 THE COURT: Sustained.

9 MR. SELWA: I'll withdraw it.

10 Q Mr. Bellamy, were you aware of the absence of the
11 evidence from the '01 case?

12 A Off the top of my head, that doesn't ring a bell.
13 When you say absence, what are you, you mean that they
14 didn't preserve something?

15 Q Or --

16 A Now, I know he had a CODIS hit on it, it was
17 positive. And he had a follow up that I believe was
18 also positive. I'm not sure exactly what you're
19 referring to, quite frankly.

20 Q You obviously got all the information from your
21 discovery request on the first case; is that correct?

22 A As far as I know, I received everything.

23 Q Was there any outstanding discovery issues on the
24 '01 case?

25 A I don't recall of any at this time, no. That's

1 been five years ago or seven to five -- five to seven
2 years.

3 Q Did you review the '01 case evidence with
4 Mr. Pencille?

5 A I reviewed all of it with him.

6 MR. SELWA: Thank you. No further questions, Your
7 Honor.

8 THE COURT: Mr. Hunter?

9 MR. HUNTER: May it please the Court?

10 THE COURT: Yes, sir.

11 CROSS-EXAMINATION

12 BY MR. HUNTER:

13 Q Good afternoon, Mr. Bellamy. Briefly, how long
14 have you been practicing law?

15 A As of now, 25 years this month.

16 Q And how much of your practice is devoted to
17 criminal law?

18 A 90 percent.

19 Q Okay. And you were retained on this case?

20 A I was.

21 Q Okay. And I think a lot of this has already been
22 covered, but you filed Rule 5 Brady motions?

23 A I did.

24 Q Didn't have any trouble getting it from the
25 solicitor?

G. SCOTT BELLAMY-CROSS BY MR. HUNTER

1 A No.

2 Q Went over that with Mr. Pencille?

3 A I did.

4 Q Okay. Do you recall about how many times you met
5 with Mr. Pencille prior to his plea?

6 A I don't know. I met with him a number of times.
7 I think I met with him initially when he was here
8 locally at J. Reuben. But most of my meetings of
9 substance occurred when he was at the Department of
10 Corrections, and those were usually half day type
11 meetings.

12 Q Okay.

13 A But I don't know the number. I have to be honest
14 with you.

15 Q Did you ever have any trouble -- let me rephrase
16 that. When you went over the State's evidence against
17 Mr. Pencille, did you ever have any trouble with him
18 understanding what he was facing or what the evidence
19 entailed?

20 A No. I felt like he understood all discussions.
21 We had some disagreements on things. But I felt like
22 he understood what the evidence was and the problem.

23 Q Okay. Did he ever give you any leads or witnesses
24 to follow up with, or anything like -- any possible
25 defenses?

1 A Nothing of substance that, hey, John Doe or my
2 roommate so and so can vouch that I was here versus
3 there, or I was out of the country or state, no alibi
4 situation like that.

5 Q Okay. So was it fair to say this was always going
6 to be a plea?

7 A No. I wouldn't say that's fair because he -- it
8 was his position that he wanted me to get him out of it
9 and that he wanted me to not just to get a plea, but
10 he -- you know, look at this evidence and see how we
11 can break it down and beat this thing.

12 And ultimately as a lawyer, you have to do that
13 before you do the plea. Because whether it's a
14 technical issue or a factual issue, you look at it, you
15 break it down and see if you can raise any issue that
16 is faulty in the State's case to get him out of it.

17 Q Okay. But after you and Mr. Pencille had reviewed
18 all the evidence and discussed the possible
19 consequences of trial, Mr. Pencille decided it was in
20 his best interest to go ahead and plead?

21 A He did. I discussed with him the risk of going to
22 trial would be, number one, there could potentially be
23 two trials because there were two separate incidents;
24 number two, that life without parole would be then on
25 the table, but at a plea situation we would have it off

G. SCOTT BELLAMY-CROSS BY MR. HUNTER

1 the table.

2 And at his age, while it is a long time, it would
3 afford him an opportunity to get out at some point.
4 And they were willing to back date the time, even
5 though he pled in 2010, he got two plus years credit
6 going back to when he went in, I believe, on the other
7 charge.

8 Q Okay. And you explained that Mr. Pencille, had he
9 gone to trial, he would have been able to confront his
10 accuser, but by pleading guilty he was waiving that
11 right?

12 A Yes. I explained to him that the alleged victim
13 would have to come to court, testify, and that we could
14 cross examine her, and that he would have a right to
15 testify if he wanted to. I also explained to him that
16 because of his having a criminal record that it could
17 be brought up if he testified but not if -- if he did
18 not testify, his record wouldn't come in.

19 Q Did you agree with Mr. Pencille's decision to
20 plead guilty?

21 A I did.

22 Q Did you explain his constitutional rights that he
23 was waiving by pleading guilty?

24 A I did.

25 Q If Mr. Pencille indicated that he did want to go

1 to trial, would you have done that?

2 A Yes.

3 Q Now, I believe you testified earlier that sort of
4 your goal was just to avoid Mr. Pencille getting life
5 without parole throughout the whole process; is that
6 accurate?

7 A Well, after you reviewed the evidence and
8 determined that it was not a case that you had a
9 likelihood of succeeding, which is not guilty, then
10 yes, you -- now, obviously, if they come back and say,
11 well, he's got to plead to life without parole, then
12 you go to trial.

13 Q Right.

14 A There's nothing to lose. But if you get something
15 on the table that's less than that, then we had to
16 strongly consider it because the other would be that he
17 would never get out.

18 Q Did you ever feel that you needed to hire an
19 investigator?

20 A No. And we discussed those issues and he agreed
21 with me not to.

22 Q Okay. Did you see any reason at the time to
23 object to the prosecutor's -- or the solicitor's
24 statement, I guess, sort of characterizing Mr. Pencille
25 as a serial rapist?

G. SCOTT BELLAMY-CROSS BY MR. HUNTER

1 A I did not. It was -- obviously it was in the
2 record that he had a prior conviction where he pled,
3 and it was in the record that there was a separate
4 incident that they were dismissing. And we were not in
5 front of a jury or a criminal judge who listens to us
6 lawyers get up and huff and puff all the time. And I
7 don't think it's necessary to object, and I did not
8 think it was then.

9 Q And, in fact, the solicitor went on to kind of
10 explain her statement --

11 MR. HUNTER: At the bottom of page 17, judge,
12 going into page 18. I'll bring it to you.

13 Q Mr. Bellamy, if you'll just start where I've
14 marked.

15 A You want me to read?

16 Q Yes, sir. And just finish where I've marked on
17 the next page.

18 A The case from 2005, he was convicted or he pled
19 guilty to the kidnapping. Okay. It was a young girl,
20 I believe she was only 12 at the time. And then
21 because of that we were able to get his DNA, which led
22 to these other two cases, one from '01 and one from
23 '04. Do you want me to keep going?

24 Q No, sir, that's it. And so that testimony there
25 was not objectionable; correct?

1 A I think it was, you know, his criminal history and
2 how they got the CODIS hit, and that there were two
3 cases that arose from the CODIS hit.

4 Q And at Mr. Pencille's plea, the victim stated that
5 she was willing to testify at trial; didn't she?

6 A I believe so.

7 Q Okay. Do you recall the victim actually stating
8 that she thought it was ridiculous that Mr. Pencille
9 was being allowed to plea?

10 MR. HUNTER: And that's on page 24, Your Honor.

11 A If it is, it is. I don't remember word for word
12 what she said.

13 MR. HUNTER: Beg the Court's indulgence.

14 Q Did you represent Mr. Pencille at his resentencing
15 hearing in front of Judge, I guess it was, Hyman?

16 A Judge Hyman. I believe I was there, yes.

17 Q Okay.

18 MR. HUNTER: No further questions, Your Honor.

19 Thank you, Mr. Bellamy.

20 THE WITNESS: Thank you.

21 THE COURT: Anything else?

22 MR. SELWA: Just one quick redirect question, Your
23 Honor.

24 REDIRECT EXAMINATION

25 BY MR. SELWA:

G. SCOTT BELLAMY-REDIRECT BY MR. SELWA

1 Q Mr. Bellamy, after the line on page 18 where you
2 read that --

3 A You want me to pick up?

4 Q Yes, if you could, just that couple sentences
5 there.

6 A Okay. It says, who knows if there are others out
7 there. But the concern for the State would be
8 protecting the community and, you know, we could take
9 him to trial on this, have him get life without parole
10 in exchange for putting victims through having to
11 testify. And we believe that this is a good
12 resolution.

13 Q So, again, she's inferring that there may be other
14 cases out there, that he's probably a serial rapist;
15 isn't she?

16 A She is certainly referring -- yes.

17 MR. SELWA: All right, no further questions.
18 Thank you.

19 THE COURT: Thank you very much, sir. You can
20 step down.

21 THE WITNESS: Thank you, judge.

22 (Witness excused.)

23 MR. BELLAMY: May I be excused, judge?

24 THE COURT: Any objection to Mr. Bellamy being
25 excused?

1 MR. SELWA: No objection.

2 MR. HUNTER: No, Your Honor.

3 MR. BELLAMY: If you need me, y'all know how to
4 get me.

5 THE COURT: Thank you, sir. Call your next
6 witness.

7 MR. SELWA: Your Honor, I would call Gregory
8 Pencille to the stand.

9 THE COURT: All right. Mr. Pencille, if you would
10 please come around and be sworn, please, sir.

11 GREGORY PENCILLE, after being duly sworn,
12 testified as follows:

13 THE CLERK: Please have a seat, and state your
14 name for the Court.

15 THE APPLICANT: Gregory Pencille.

16 DIRECT EXAMINATION

17 BY MR. SELWA:

18 Q Is it Pencille or --

19 A Pencille.

20 Q Pencille, excuse me. Mr. Pencille, you are here
21 for a petition for post conviction relief; is that
22 correct?

23 A Correct.

24 Q And you're alleging that Mr. Bellamy was
25 ineffective; is that right?

GREGORY PENCILLE-DIRECT BY MR. SELWA

1 A Correct.

2 Q Can you explain to the Court your reasonings for
3 your allegations that Mr. Bellamy was ineffective?

4 A Mr. Bellamy was ineffective for the reasons of not
5 investigating the material. Had he researched the '01
6 case, he would have found out that there was no
7 evidence in the case. CODIS hit or not, testing the
8 evidence which is allowed by the law to substantiate
9 whether it's confirmed or denied, there was none to
10 test. So you can't confirm or deny it.

11 I believe he mentioned something, and this was at
12 the very end right before we went to the actual guilty
13 plea hearing, was that the '01 apparently had been
14 administratively closed, which I don't -- I can't
15 refute whether it existed or didn't exist. Alls I know
16 is it didn't exist for the trial.

17 So that's when Ms. Lively had taken that off the
18 consideration and for some reason upped the plea which
19 was from 20 to 30. Mr. Bellamy had several times, you
20 know, he came and saw me quite frequently, it was about
21 15 times plus or minus a couple times. He -- every
22 time he came he mentioned that Ms. Lively had this
23 offer available, and every time I said I want to see it
24 in writing, we might, you know, see what it is.

25 I didn't believe -- basically I did not believe

1 that there was a plea offer on the table unless I saw
2 it in writing. And every time he said he would work on
3 it, and we had never got anything. But it was
4 basically it bounced around between kidnapping and CSC
5 and 20 years. And then at the very end he said, I got
6 good news and bad news.

7 And he said the '01 case there's no evidence for,
8 so they can't argue that in court. The bad news is
9 Ms. Lively took all the pleas off the table and raised
10 it to a 30-year recommendation cap with kidnapping.
11 Now, when I came to the hearing to actually plead to
12 that, Mr. Bellamy met me in the back room and the
13 sentencing sheet had CSC first.

14 I said, this isn't what we agreed to. He said,
15 this is what she is offering, take it or leave it. I
16 said, is there anything you can do. He said, no,
17 there's nothing I can do, if we take this to trial
18 you're going to get life. I said, well, so you don't
19 have a defense, he said, no.

20 Q Did he go over the elements of each crime you were
21 charged with?

22 A I was prepared to plead to the kidnapping. I
23 didn't have a chance to sit down and discuss with him
24 the elements of CSC.

25 Q Okay. Did you get any paperwork from him

GREGORY PENCILLE-DIRECT BY MR. SELWA

1 regarding that?

2 A As far as?

3 Q As the statute or the elements.

4 A No. All I had was my discovery from him.

5 Q Okay. Had you understood that, would you have
6 pled guilty?

7 A No.

8 Q Having understood that, what would you have done?

9 A Went to trial.

10 Q Do you feel confident that you would have won?

11 A Yes. The discovery that I did end up having from
12 Mr. Bellamy pretty much clears me of CSC and
13 kidnapping. The one statement that was read by
14 Ms. Millers, Miller, I think it's Ms. Miller, the
15 testimony at the end of the plea hearing basically says
16 had she known what was going to happen, she would have
17 walked away, which means there was no forced
18 confinement. The issue of me actually meeting her on
19 the beach and us going to a secluded area was all
20 consensual, so --

21 Q So you're alleging that Mr. Bellamy's
22 investigation --

23 A Lack of investigation.

24 Q -- was insufficient; is that what you're saying?

25 A Exactly, yes.

1 Q And had he actually talked to her, he would have
2 found out that the kidnapping charge wouldn't have gone
3 forward?

4 A Yeah. I mean, you can prove it in the evidence
5 that was support -- you know, was given to me.

6 Q Okay. Now, you obviously heard the prosecutor's
7 classification or description of you as a serial
8 rapist?

9 A Yes. When she said that -- I believe it was
10 actually this courtroom, the podium was right there --
11 when she started saying that, Mr. Bellamy was standing
12 where you were, and I was sitting or standing in the
13 chair next to you or him. And when she started going
14 on about other cases and serial rapist and predator and
15 all that stuff, I looked at Mr. Bellamy, I said, she's
16 lying, you need to object. And his response to me was,
17 shh, let's just get through this.

18 And I believe in the transcript it has a spot
19 where the stenographer mentions, Mr. Bellamy speaks
20 with client. But there's no mention of what was
21 spoken.

22 Q Okay. And did Mr. Bellamy talk to you about the
23 implications of being sentenced for CSC?

24 A No.

25 Q Did you have any understanding of the Predator

GREGORY PENCILLE-DIRECT BY MR. SELWA

1 Act?

2 A None at all. I knew that there was such a thing
3 as Predator Act, but I didn't know how you were, I will
4 say, eligible for it or what the conditions for it
5 were.

6 Q You understand that now?

7 A Right. My classification officer explained to me
8 that and the ATU program which neither of them are
9 listed on my sentencing sheet, which was --

10 Q And you're testifying that neither of those were
11 explained to you by Mr. Bellamy?

12 A Right.

13 Q Okay. And did Mr. Bellamy explain to you the
14 sexual registry?

15 A That was a misunderstanding or misquote by him.
16 The prior case, the '05 that I was -- that I pled to
17 previously, the kidnapping plea was under the condition
18 that I register anyway. So that was an irrelevant
19 statement he made.

20 Q Okay. So you were already on the registry?

21 A I was already on the registry.

22 Q Okay. Had you gotten an offer in writing for 20
23 years, would you have taken that?

24 A Well, I mean, when they took life off the table,
25 it would have -- I was expecting to go to trial. But

1 through all of our discussions, Mr. Bellamy and I, I
2 kept asking him what kind of angles do we have, what
3 can we go up against, because I didn't do it.

4 And he kept coming up with, you know, it's bad for
5 you to go up there, if I put you on the stand, then
6 they can bring up the '05 case. And the jury is going
7 to buy into that, and they are going to find you guilty
8 on those grounds. They're not even going to look at
9 the case of what's going on now.

10 And, you know, he never came up with a formulated
11 strategy to actually argue the case. Whereas me
12 looking at it after the fact, it's right there.

13 Q And so your basic testimony is that had he done
14 his job correctly, you would have decided to go to
15 trial on it?

16 A Correct.

17 Q Okay. And the consideration here is that
18 basically it was either you plead guilty or you get
19 life in prison; is that right?

20 A Basically, that's what -- yeah.

21 Q Is that the reason you pled guilty?

22 A Yeah. I mean, he was pretty much forcing my hand
23 into that.

24 Q And would you have pled guilty otherwise?

25 A No. There was also the incident -- well, I found

GREGORY PENCILLE-DIRECT BY MR. SELWA

1 out now which is he could have argued for a lesser
2 included, which had I known that, it would have even
3 persuaded me even more to go to trial.

4 Q And you're talking about if you had gone to trial
5 and --

6 A I might possibly get a lesser included rather than
7 the CSC first or the kidnapping.

8 Q And did he explain anything about lesser included
9 offenses --

10 A Not never.

11 Q -- to you at all?

12 A Never.

13 Q And so you found that out after you were
14 incarcerated?

15 A Yes. Yes. Jailhouse lawyers.

16 Q And your statement basically is that had you
17 actually known about that as well, you might have even
18 gone to trial?

19 A Correct.

20 Q Okay. And that wasn't explained to you?

21 A No.

22 Q Okay.

23 A I believe he mentioned along the lines of if you
24 do go in with this cap, you understand that the judge
25 can give you 30, but he's most likely going to give you

1 28 or less. They don't usually give you the cap, but
2 that's not guaranteed.

3 Had I known when we came into the Court for the
4 plea hearing that he was going to -- that Ms. Lively
5 was going to be able to argue the case for the 30, that
6 again would have created an issue and I would have gone
7 to trial. From what I understood from Mr. Bellamy was
8 you sign the sentencing sheet, we go out before the
9 judge, he says, you know, Your Honor, this is a cap of
10 30, what do you recommend. He recommends his number,
11 and the case closed.

12 I had no idea that we were going to go out there
13 and Ms. Lively had any statement prepared or that the
14 witness was going to testify or anything. And also on
15 the grounds of the witness actually making a statement,
16 if you look at the transcript, they ask her after -- I
17 believe, after I testified whether she wants to make a
18 statement and she says no. Ms. Lively asked her and
19 she said she doesn't wish to make a statement at this
20 time. After Ms. Lively's however you want to describe
21 her slanderous remarks --

22 Q Summation of the facts.

23 A Yeah, well, not wrong facts. After she came up
24 with all these other cases and what that have no match
25 to me, at the very end she says, I want to make a

GREGORY PENCILLE-DIRECT BY MR. SELWA

1 statement. So she was actually biassed to make a
2 statement because of these accusations Ms. Lively was
3 making.

4 Q Okay. And knowing that you would possibly face
5 two CSC charges, kidnapping charge again and
6 potentially life in prison, you are asking this Court
7 for a chance to face that again; is that correct?

8 A Yes, Your -- or yes, Mr. Selwa.

9 Q And that's what you're asking the Court to do?

10 A Yes.

11 Q Okay. Is there anything further that you wish to
12 discuss?

13 A Did we clarify the involuntary plea, clarify all
14 that?

15 Q I'm not sure. What is your issue?

16 A About the sentencing sheet. We went over the ATU
17 program, the Predator Act. There was the mandatory GPS
18 monitoring bracelet with CSC minor that was added or
19 was on my sentencing sheet which should not have been
20 on there, and during my motion to reconsider, it was
21 taken off.

22 Q So that's a moot point at this point?

23 A Right. But it was still -- wouldn't that be
24 considered a breach of contract issue?

25 Q Well, I think the Court can consider that

1 information.

2 A Okay. Other than that, I think that's everything.

3 MR. SELWA: Thank you. Please answer any
4 questions the AG's office may have for you.

5 MR. HUNTER: If it please the Court?

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. HUNTER:

9 Q Mr. Pencille, you're claiming today that the
10 discovery handed over by the State prior to the plea
11 clears you of these charges?

12 A Correct.

13 Q Even though your DNA was matched to both rapes?

14 A Correct, correct.

15 Q Okay. Well, then how does the discovery clear
16 you?

17 THE COURT: All right, I'm sorry. Your question
18 was that the discovery would clear him?

19 MR. HUNTER: Yes, sir.

20 THE COURT: Okay, all right. I just want to make
21 sure I had -- I didn't hear the first part. Go ahead.

22 Q You testified that you pled to the cap of 30
23 because you didn't want to get a life sentence at
24 trial; correct?

25 A Because I had no choice.

GREGORY PENCILLE-CROSS BY MR. HUNTER

1 Q Well, you did have a choice.

2 A Mr. Bellamy told me if I don't take this offer,
3 I'm getting life.

4 Q Well, the judge told you you had a choice; didn't
5 he?

6 A I'm not sure.

7 Q You're not? Well, didn't the judge tell you that
8 you did not have to plead guilty, that you have an
9 absolute right to a jury trial?

10 A Um-hum, yeah.

11 MR. HUNTER: And judge, that's on page nine.

12 Q So you did have a choice?

13 A Yeah. But my attorney had no defense for me.

14 Q Tell me how you assisted him in preparing for
15 trial, what defenses -- did you give him any witnesses
16 to call, any leads to investigate, anything like that?

17 A I did.

18 Q Are they here today?

19 A No. I had a time stamp for where I was working
20 which made the timing of the allegations incorrect.
21 And I told him basically, you know, I did meet this
22 girl, we did hang out, it was consensual. And that was
23 it. I mean, when it came down to actual sexual
24 intercourse, that was out of the question because she
25 was on her menstruation, which the assault kit clearly

1 states that she was on her menstruation.

2 Q Okay. So you're claiming today that both
3 encounters were consensual?

4 A I'm not understanding the '01 case, there was no
5 evidence in it. I was talking about the '04 case.

6 Q Aside from your DNA matching up with the DNA?

7 A There's no proof of that is what I'm saying. The
8 '01 case, there was no evidence for it. It was entered
9 in the computer, I don't know how it was entered in
10 there. There's no way to test that evidence to see if
11 it's substantial or false.

12 Q Okay.

13 A Computers malfunction.

14 Q Let's move on. Prior to your plea, Mr. Bellamy
15 did explain that the State could bring up your '05
16 charges if you pled guilty to -- if you went to trial;
17 correct?

18 A Correct. If I...

19 Q If you testified?

20 A Yeah.

21 Q Okay. Now, you told the judge that Mr. Bellamy
22 went over all the evidence with you; correct?

23 A He read through the discovery.

24 Q Okay. And you told the judge that you agreed --

25 MR. HUNTER: Well, beg the Court's indulgence.

GREGORY PENCILLE-CROSS BY MR. HUNTER

1 Q You did tell the judge that you concurred that the
2 State had enough evidence to convince the jury of your
3 guilt beyond a reasonable doubt; is that correct?

4 A Mr. Bellamy did.

5 Q You didn't agree with him?

6 A No.

7 Q The judge didn't say, Mr. Pencille, do you concur
8 with that?

9 A All of that was staged by Mr. Bellamy, he told me
10 what to say.

11 MR. HUNTER: Judge, that's all on page five.

12 THE COURT: All right.

13 THE APPLICANT: Before we came out here for the
14 plea, he told me everything was rehearsed, if you will,
15 as well as my father's testimony at the plea hearing of
16 what to say and what not to say.

17 Q Okay. So you're telling me that what you told the
18 judge was not the truth?

19 A No.

20 Q Okay. Why didn't you tell the judge, Your Honor,
21 I'm only saying these things because Mr. Bellamy told
22 me to?

23 A Well, when Ms. Lively started going off the record
24 and I asked him to object, he didn't object to that
25 either. Basically I was fearing for my life at that

1 moment because I had life on the table.

2 Q Okay. Well, when Ms. Livesay went over the facts
3 of the case that you were pleading guilty to, didn't
4 the judge ask you after she had finished, didn't the
5 judge say, is that what occurred, and you responded,
6 yes, Your Honor?

7 A Again, rehearsed.

8 Q All right. So it's your testimony that everything
9 you told the judge that day was rehearsed?

10 A All of the answers to the formal questions for a
11 plea hearing, yes.

12 Q So none of those were true?

13 A Pretty -- I can attest to that.

14 Q Okay.

15 MR. HUNTER: Beg the Court's indulgence.

16 THE COURT: Yes, sir.

17 Q Towards the end of your plea when the judge asked
18 you if you were satisfied with Mr. Bellamy and you told
19 him yes, sir, that was rehearsed as well?

20 A Correct.

21 Q So you weren't satisfied with him at that time?

22 A No. That's why I'm here today.

23 Q Okay. So when the judge asked you if Mr. Bellamy
24 had done everything you would hope he could do for you,
25 you told him, yes, sir, that wasn't accurate either?

1 A Rehearsed.

2 Q Okay.

3 MR. HUNTER: I don't have any further questions.

4 THE COURT: Thank you.

5 MR. SELWA: No redirect, Your Honor.

6 THE COURT: All right. Thank you, sir. You may
7 step down.

8 (Witness excused.)

9 MR. SELWA: Your Honor, I have no further
10 witnesses.

11 THE COURT: All right. Mr. Hunter, does the State
12 have any witnesses?

13 MR. HUNTER: The State has no witnesses, Your
14 Honor.

15 THE COURT: All right. I'll be happy to hear from
16 you, Mr. Selwa.

17 MR. SELWA: Your Honor, Mr. Pencille here, he's
18 obviously got a bunch of issues with what has
19 transpired, and I think I feel like he's gotten a bad
20 deal and maybe led astray here. And I think his
21 testimony regarding what Mr. Bellamy didn't do for him
22 kind of explains why he's in the position that he is.

23 I definitely think even though the judge stated
24 that he didn't consider that stuff, still the bell
25 rung, you can't un-ring that bell. And I think that

1 incensed him, and I feel like -- I just feel like that
2 may have been inappropriate and that maybe Mr. Bellamy
3 should have spoken up and said something about that.

also feel like maybe had Mr. Bellamy gone
5 through the case as well as Mr. Pencille has, obviously
6 he's demonstrated his knowledge of the case, that there
7 would have been more of a fight. But at that point
8 Mr. Pencille wasn't familiar with the law, and I think
9 now he is, he's familiar with it. He knows that he's
10 up for life if he wins this, and that's a big decision.

11 I think he's competent and I think he's
12 intelligent. I think he knows the choice that he would
13 be making if he was given the choice to go back and
14 face it again. And, Your Honor, I think he's asking
15 for that. And so, Your Honor, I would ask that he be
16 given that opportunity. I think there may be enough
17 evidence there to give him that. And if that's what he
18 wants to do and face that, then so be it.

19 THE COURT: All right, sir.

20 MR. SELWA: Thank you, Your Honor.

21 THE COURT: Mr. Hunter?

22 MR. HUNTER: Just very briefly, Your Honor. I
23 think the evidence -- or I think the record before the
24 Court shows that Mr. Pencille's plea was entered
25 freely, knowingly, intelligently and voluntarily.

1 Mr. Bellamy's testimony shows that he was clearly
2 prepared and met with. And Mr. Pencille backed this
3 up, they met around 15 times. Mr. Bellamy had a grasp
4 of the evidence in the State's case against
5 Mr. Pencille.

6 And after going over that evidence with
7 Mr. Pencille and counseling on it, Mr. Pencille decided
8 that his best interest was to plead guilty. He
9 testified that he pled guilty to avoid getting a life
10 sentence. He might not like the deal he got but, you
11 know, he's not entitled to a deal anyway.

12 He got up here and lied -- or, well, I don't know
13 if he lied today or if he lied at his plea, but he got
14 up here and said that everything he told the judge at
15 his plea was essentially a lie. So I don't believe
16 that he has any credibility before this Court.

17 And as far as the solicitor's comments regarding
18 him being a serial rapist, the State submits that the
19 evidence before the Court shows that he is a serial
20 rapist. He's already had an '05 charge that he was
21 serving time for, and then he was DNA matched on two
22 others. So that's -- the State doesn't think that
23 Mr. Pencille has met his burden. That all I've got.

24 THE COURT: All right, sir. I made some notes to
25 address some issues that were raised. One of the big

1 things that I think has been raised deals with comments
2 Ms. Lively made regarding the facts of the case
3 referring to the case that was dismissed and references
4 she made with regards to Mr. Pencille. And even though
5 this may be difficult for a lay person to understand,
6 you can object to those, but -- and I'm going to tell
7 you, I've heard this comment made a couple of times,
8 you can't un-ring the bell.

9 That's a great comment to make when you're in
10 front of a jury, because with lay people sometimes
11 something coming out that shouldn't come out can be
12 prejudicial to the extent that it affects the outcome.
13 But that doesn't occur when you're before the Court.
14 The Court, none of the judges are infallible, we're not
15 infallible. But we do understand the law, we
16 understand the evidence.

17 If this case would have been before me and she
18 would have made all those comments, I would have taken
19 them just for what they were, with a grain of salt.
20 Because the evidence in front of me is a young man
21 who's got a conviction for a kidnapping that had a
22 sexual element to it, which was the reason he had to
23 register as a sex offender. And he's pleading guilty
24 to a CSC in front of me, and there's another one that's
25 being dismissed. The one that's being dismissed is

1 gone. I'm not considering that.

2 I'm considering what's in front of me. She can
3 call him all the names she wants to call him. That has
4 little effect on the Court, if at all. So -- and
5 Mr. Bellamy could have objected, and that would have
6 looked good in front of Mr. Pencille, that would have
7 looked good in front of any family members he may have
8 had there.

9 But the result would be that the judge could do
10 one of two things. I'm going to sustain your
11 objection, I'm not going to consider those remarks, I'm
12 going to have those remarks stricken from the record.

13 Or, you know, I appreciate your objection but --
14 you know, I guess what I'm saying is it was appropriate
15 to not object. It was appropriate to object. But it
16 had no play in the result of the case.

17 There's -- I'm not still not clear -- there's been
18 talk throughout this whole thing of 2001 evidence that
19 is gone, that is no longer around. I don't know what
20 that means. I know that according to what Mr. Bellamy
21 said, what even Mr. Pencille initially agreed to and
22 what went throughout the colloquy here was that there
23 was a CODIS hit on two occasions and that they did take
24 DNA based upon that.

25 They came before the Court, there was a hearing as

1 to whether or not they could take DNA from
2 Mr. Pencille. The Court allowed it, that DNA was
3 taken, and then that DNA tested positive. Now, maybe
4 that's the positive test that Mr. Pencille claims is
5 gone or wasn't present. Regardless of any of that, he
6 didn't plead to that case. He pled to the 2004 case.
7 There's nothing in this record that indicates that any
8 of that evidence was lost or misused or mishandled.

9 Now, there's testimony from Mr. Bellamy that
10 Mr. Pencille didn't give him any alibi, anything of
11 that nature. Mr. Pencille testifies that he did give
12 him alibi information. So I do have a conflict of
13 testimony there. Mr. Pencille testified that there was
14 no evidence of forced confinement, and that it was
15 consensual because the victim in her own statement
16 indicated that she stood around and chatted with him
17 and willingly went with him to wherever it is this
18 occurred.

19 Well, that's not an accurate rendition of what she
20 said, it's similar. She says that this whole
21 experience caused her to be more aware of people, and
22 she thinks that's a good thing, that women need to be
23 more aware of people and to not trust people. And then
24 she goes further, she says, I'm a little bit less
25 naive. I just thought the best of people, I just

1 thought this man was maybe kind of creepy and maybe was
2 hitting on me. And I could just -- you know, I didn't
3 think anything more of it, or I would have just walked
4 away as quickly as possible. I wouldn't have tried to
5 chitchat my way out of it.

6 Well, that's not evidence of it being consensual,
7 that's evidence that she sat around and did chitchat.
8 So I don't know -- but again, I'm kind of even getting
9 off track by talking about evidence that could have
10 been presented if the case had gone to trial. But the
11 problem is it didn't. It ended in a plea.

12 Now, in looking at the evidence, you know,
13 surrounding that plea, Mr. Pencille has testified here
14 that he had no idea that Ms. Lively would argue the
15 case, that it was a plea. He thought it would just be
16 he'd plea and, you know, get whatever sentence was
17 agreed upon or the cap or whatever.

18 But I find that to be highly unlikely. Because if
19 I'm correct, and I think am, the 2005 conviction was a
20 guilty plea. So you've been through a guilty plea, you
21 know good and well the State argues their case in a
22 guilty plea.

23 THE APPLICANT: They never did in '05.

24 THE COURT: Well, that's hard for me to believe.
25 Because, first of all, the Court can't accept a plea

1 until it hears from the State. And the State has to
2 put on the record the factual basis to support the
3 plea.

4 THE APPLICANT: Yeah, and they did that.

5 THE COURT: All right. And then at the end of the
6 plea, the Court will always recognize the State, do you
7 have anything you wish to tell the Court?

8 THE APPLICANT: And they didn't say anything.

9 THE COURT: And they didn't say anything in that
10 case. But they were given the opportunity, they chose
11 not to. The fact that Ms. Lively took the opportunity
12 to do it certainly shouldn't come as some surprise.

13 But even if it did come as a surprise, that had no
14 effect as to whether or not someone is going to plead
15 or not plead. Throughout the testimony given here by
16 Mr. Pencille, it was very confusing because it was like
17 I was taking the plea to avoid life. And now today,
18 well, I would have risked life if I would have known
19 this or I would have known that.

20 This is what happens often, and it causes the
21 Court to be in this dilemma. And I repeat myself, and
22 those of you that were here in the earlier hearing,
23 you'll have to listen to it again. But there is a
24 reason that we ask people to come around, place their
25 hand on the Bible and raise their hand to swear to tell

1 the truth.

2 If we cannot trust that you take your oath
3 seriously, then how do we even do this, how do we even
4 have a system. Why do we even put people under oath,
5 why do we even go through all this charade. The only
6 thing we can do is we can trust that people have enough
7 respect for the system that when they come into a court
8 of law and they're in front of a Court and they are
9 placed under oath and they swear to tell the truth,
10 that's what they're going to do.

11 So here I am, I've got Mr. Pencille, and I've got
12 a whole transcript where he was placed under oath and
13 swore he would tell the truth. And then I've got
14 today, he was placed under oath and I'm assuming --
15 well, I'm assuming he swore he would tell the truth
16 today.

17 Now, what am I supposed to believe. Was this all
18 a lie and trust what he tells me today, or is what he's
19 telling me today is because he got 30, he now feels
20 like, well, if I got to do 30, I might as well do life,
21 give me another shot at life. And so that today is a
22 bunch of lies. And this really was the truth.

23 I'm not making a judgment one way or the other,
24 because I don't know. Because I can't trust what
25 you're telling me. You've already testified under oath

1 that you're more than willing to lie under oath. And
2 so I have to err, at least in my opinion, that when you
3 were before Judge -- I mean, there's no other evidence
4 in this case that would support a reason for you to lie
5 to Judge Hyman. It was Judge Hyman; wasn't it?

6 THE APPLICANT: Yes. I was under duress.

7 THE COURT: Well, you're just saying that now.
8 That wasn't testified to up here. That wasn't
9 testified to in this hearing at all. You're just
10 saying it now. And the thing is, there's -- and folks,
11 you know, again, and Mr. Pencille, don't get me wrong,
12 all I'm saying is through your own admission you have
13 lied at some point here to some judge, whether it was
14 to me or whether it was to Judge Hyman, I don't know.
15 And I'm not going to make any assertion of when you
16 were telling the truth and when you weren't.

17 But my point being this, is that the burden of
18 proof, and it's a civil burden, so it's by the
19 preponderance or the greater weight of the evidence.
20 And in this case I don't think you've carried that
21 burden. You've got to be able to show that counsel's
22 performance was deficient.

23 Mr. Bellamy met with you on countless occasions.
24 I shouldn't say countless, about 15, for hours on end
25 on each of those meetings. There was discussion as to

1 what all was going on, what the plea was, initially
2 believing it to be 20, then realizing and finding out
3 later that it wasn't 20, that it was 30, and even after
4 finding out it was 30, apparently still going forward
5 with the plea.

6 At that point, you know, you said you had no
7 choice. Well, your choice would be, I'm not going to
8 accept your plea offer because you're not offering me
9 anything other than to dismiss another case. I'm going
10 to go to trial. I do know this, if you would have
11 declined to take that plea, they weren't going to pull
12 a jury that day. It would have been tried at a later
13 date.

14 So you weren't under the gun to go to trial this
15 morning or plea this morning. That wasn't the case, so
16 you could have easily -- but you decided not to and you
17 decided to go through with the plea understanding that
18 it was now a cap of 30 and not a cap of -- and not 20,
19 and it was on CSC and not on kidnapping.

20 And if that information, if you were blind-sided
21 by that information, you could have declined to go
22 forward. But you did not, you proceeded forward. And
23 this is the problem with transcripts, you can't tell
24 through the written word people's inflexions, their
25 emotional state at the time.

1 But as you go through the whole transcript, it
2 appears that you absolutely understand Judge Hyman's
3 questions, and your responses are all appropriate, they
4 are all -- nothing here causes me any concern or belief
5 that you did not understand the things that you were
6 being asked and that your responses were accurate.

7 And so I'm going to respectfully -- and it goes to
8 the second prong. The first prong is to show that
9 counsel's performance was deficient. Second prong is
10 was that deficient performance that prejudiced the
11 Defendant. I don't find that that's been shown here
12 during these proceedings.

13 And so I'm going to respectfully deny the post
14 conviction relief application for failure to carry the
15 burden.

16 (The hearing concluded at approximately 2:00 p.m.)

17 (End of Transcript of Record.)
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1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court

7 Reporter for the Fifteenth Judicial Circuit of the

8 State of South Carolina, do hereby certify that the

9 foregoing is a true, accurate and complete Transcript

10 of Record of the proceedings had and evidence

11 introduced in the trial of the captioned case, relative

12 to appeal, in the Court of Common Pleas for Horry

13 County, South Carolina, on the 10th day of May, 2016.

14

15 I FURTHER CERTIFY that I am neither of

16 kin, counsel nor interest to any party hereto.

17

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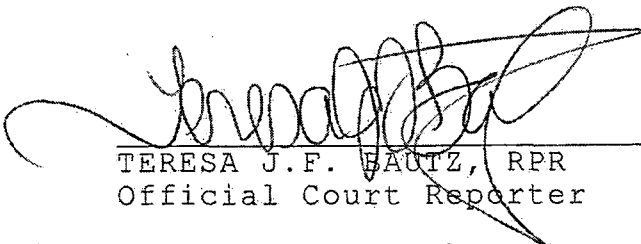
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TERESA J.F. BAUTZ, RPR
Official Court Reporter

**STATE OF SOUTH CAROLINA
COUNTY OF HORRY**

Gregory Pencille, #312332,

Applicant,

V.

State of South Carolina,

Respondent.

**IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT**

Case No. 2013-CP-26-7463

ORDER OF DISMISSAL

HENRY COUNTY
2016 JAN 25 PM 1:51
MELANIE J. BARNES-KRUGER
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 8, 2013. Respondent made a Return on or about June 10, 2014. The Court convened an evidentiary hearing into the matter on November 9, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Daniel Selwa, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Scott Bellamy, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. In November 2008, the Horry County Grand Jury indicted Applicant for first degree criminal sexual conduct (2008-GS-26-4686). G. Scott Bellamy, Esquire, represented Applicant. On August 9, 2010, Applicant pled guilty as indicted. In exchange for the plea, the State dismissed two pending charges of kidnapping (2008-GS-26-4687,

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2009-GS-26-5015) and one charge of first degree criminal sexual conduct (2009-GS-26-5014). The Honorable Larry B. Hyman, Jr., sentenced Applicant to twenty (20) years imprisonment.

Applicant filed a motion to reconsider his sentence on August 10, 2010. Applicant also filed a notice of appeal on August 10, 2010. The South Carolina Court of Appeals dismissed the notice of appeal without prejudice pending the resolution of the motion to reconsider on February 9, 2011.

On March 14, 2012, Judge Hyman convened a hearing on the motion to reconsider the sentence. By order filed April 3, 2012, Judge Hyman denied the motion.

Applicant filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. The Court of Appeals dismissed the appeal on June 5, 2013. State v. Pencille, Op. No. 2013-UP-235 (S.C. Ct. App. filed June 5, 2013). The remittitur was returned to the circuit court on June 21, 2013.

II. ALLEGATIONS

In his PCR application, Applicant raised numerous allegations; however, at the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary Guilty Plea:
 - a. Counsel failed to object to inflammatory testimony at Applicant's sentencing.
 - b. Applicant did not understand the plea.
2. Ineffective assistance of counsel.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's

¹ Anders v. California, 386 U.S. 738 (1967)

testimony credible and Applicant's testimony not credible. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

1. Failure to object to inflammatory testimony at sentencing

At the PCR hearing, Applicant alleged counsel was deficient for failing to object to the solicitor's and the victim's characterization of him as a serial rapist during Applicant's sentencing. This Court finds the allegation to be without merit. Initially, the Court notes the characterization of Applicant was not inaccurate. The record before the plea judge clearly indicated Applicant was not a one-time offender. The solicitor indicated during the plea colloquy that the Applicant's DNA was obtained from the victim in a separate 2005 case where Applicant pled guilty to kidnapping a twelve year old girl. Once Applicant's DNA was entered into the crime database, it was matched to two separate unsolved rapes, one from 2001 and one from 2004. Applicant was indicted based on the DNA matches, and the plea Applicant is currently challenging resulted from those indictments. The other set of charges was nolle-prossed as part of the plea.

Additionally, even if the comments were inflammatory, Applicant cannot show any resulting prejudice. The comments were directed to the plea judge outside the presence of a jury after Applicant's plea had already been qualified. Counsel testified he did not believe he had a reason to object to the statements, and he rarely, if ever, objects to statements made by a victim. Counsel testified the absence of a jury made an objection pointless. Furthermore, counsel testified the plea judge made it clear at the resentencing hearing that his sentence was not based on any inflammatory testimony. Accordingly, this Court finds the allegation is without merit.

2. Applicant did not understand the plea

Applicant testified at his PCR hearing that plea counsel did not thoroughly prepare him for his guilty plea. Specifically, Applicant alleged he did not understand what sentence he was potentially facing by pleading guilty. This Court finds Applicant's testimony to be not credible. The plea colloquy is clear; the plea judge went over Applicant's right to trial as well as Applicant's potential exposure as

a result of pleading guilty. Furthermore, Applicant told the plea judge he understood he was facing a maximum sentence of thirty years, rather than life imprisonment, by pleading guilty. Applicant specifically told the plea judge he did not wish to have a jury trial, and he wanted to give up that right and enter a plea of guilty. Additionally, plea counsel testified he went over all of those things with Applicant prior to his guilty plea. This Court has no reason to doubt plea counsel's testimony and finds it credible. Applicant is merely unhappy with the decision he made to plead guilty. The record and testimony before this Court leave no doubt Applicant was fully aware of his right to a jury trial and the consequences of his guilty plea. Applicant's conflicting testimony from the PCR hearing and the plea indicates he was lying at one or both of the proceedings. Because of Applicant's obvious willingness to place his hand on the Bible and tell the truth while doing the opposite, this Court is unable to discern when Applicant was being truthful and when he was not. Therefore, Applicant's credibility with this Court is nonexistent. As this Court can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily, the allegation is without merit and must be denied.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court

strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

This Court finds Applicant has failed to show Counsel's performance fell below an objective standard of reasonableness. Counsel's testimony indicated he was extremely familiar with the facts of Applicant's case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant's constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty in order to avoid life imprisonment, and Counsel agreed with the decision. As such, Counsel's testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel's testimony was not credible. Additionally, this Court finds Applicant's claims that Counsel did not discuss all the evidence with him hard to believe. At the PCR hearing, Applicant testified the State's evidence was not strong enough to result in a conviction, and he

is an innocent man. However, Applicant's DNA matches tend to show otherwise. Applicant's unhappiness with his decision to plead guilty is not a ground for post-conviction relief. Accordingly, this Court finds Applicant's allegations are without merit.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

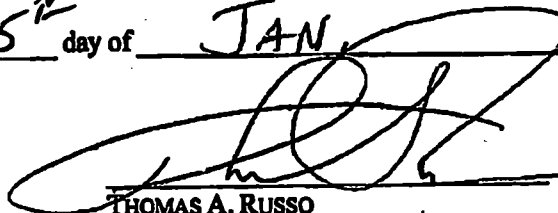
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, her post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and her attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
and
2. Applicant must be remanded to the custody of the Department of Corrections to
complete service of his sentence.

AND IT IS SO ORDERED this 15th day of JAN, 2015.



THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina