

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Robin B. Stilwell, Trial Judge
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

Appellate Case No: 2016-001690

RANDALL H. NORDAN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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INDEX

INDEX.....	i
GUILTY PLEA TRANSCRIPT.....	1
MOTION TO VACATE GUILTY PLEAS OR, IN THE ALTERNATIVE, TO RECONSIDER SENTENCING.....	45
ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER AND/OR VACATE HIS GUILTY PLEA.....	47
ORDER DISMISSING APPEAL	49
REMITTITUR	50
PCR APPLICATION.....	51
RETURN.....	64
PCR TRANSCRIPT.....	70
STATE'S PROPOSED ORDER OF DISMISSAL.....	308
PCR OPINION AND ORDER	327
CLERK OF COURT RECORDS	357
SOUTH CAROLINA DEPARTMENT OF CORRECTIONS RECORDS.....	364

1 State of South Carolina

Court of General Sessions

2 County of Lexington

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5 State

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Transcript of Record

v.

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11-GS-32-1858

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12-GS-32-2625

Randall Houston Nordan

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Defendant.

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December 9, 2013

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Lexington, South Carolina

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B E F O R E:

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The Honorable Robin B. Stilwell, Judge.

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

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Samuel R. Hubbard, III, Deputy Solicitor
Attorney for the State

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19

C. Lawrence Simmons, III, Esquire
Attorney for the Defendant

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24

25

Stacy L. Sheppard, RPR
Circuit Court Reporter

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WITNESSESDIRECTCROSSREDIRECTRECROSS

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(There were no witnesses.)

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1 (The following proceedings were held on,
2 December 9, 2013.)

3 **THE CLERK:** Indictment 2011-GS-32-01858, State
4 versus Randall Houston Nordan, indicted for leaving
5 the scene of an accident involving death. He is
6 pleading as charged.

7 Indictment 2012-GS-32-02625, State versus
8 Randall Houston Nordan, indicted for reckless
9 homicide. He is pleading as charged.

10 They are both signed and properly attested to,
11 true billed, and represented by Attorney Lawrence
12 Simmons.

13 RANDALL HOUSTON NORDAN,
14 having been duly sworn, testified as follows:

15 **THE COURT:** All right. Mr. Simmons, you've had
16 the opportunity to discuss with Mr. Nordan his
17 constitutional rights and the ramifications of his
18 plea?

19 **MR. SIMMONS:** Yes, Your Honor.

20 **THE COURT:** Do you feel like he understands all
21 of this, sir?

22 **MR. SIMMONS:** Yes, Your Honor.

23 **THE COURT:** And do you also believe that he's
24 made an intelligent decision to waive those rights
25 and proceed with a guilty plea today?

1 **MR. SIMMONS:** That he has, Your Honor.

2 **THE COURT:** And based on your investigation and
3 your discussions with him, do you agree with that
4 decision?

5 **MR. SIMMONS:** Yes, I do, Your Honor.

6 **THE COURT:** Good afternoon, Mr. Nordan.

7 **DEFENDANT:** How are you doing, Your Honor?

8 **THE COURT:** Good. I'm going to explain to you
9 some of your important constitutional rights as they
10 relate to these charges, so if you'll just bear with
11 me for a few minutes, and then I'm going to ask you
12 questions related to these charges, okay?

13 **DEFENDANT:** Yes, Your Honor.

14 **THE COURT:** You have a right to a jury trial on
15 these charges. If you had a jury trial, the State
16 would have the burden of proving you guilty beyond a
17 reasonable doubt to a jury of 12 of your peers.

18 In that proceeding, you would not have the
19 burden of proving yourself innocent because under
20 the constitution, you enjoy the right to remain
21 silent and the right against self-incrimination,
22 which means that you would not have the burden of
23 saying or doing or proving anything to that jury.
24 The State has the burden of proving each and every
25 element of the offenses beyond a reasonable doubt.

1 Now, understand that you could have a jury
2 trial, and in that proceeding, you could waive your
3 right to remain silent. You could take the stand in
4 that proceeding and testify on your own behalf. You
5 could present witnesses. You could present evidence
6 in your defense. You could tell the jury your side
7 of the story essentially. You could also present
8 motions and make motions before the Court to protect
9 your constitutional and your procedural rights. You
10 could cross-examine any of the State's witnesses,
11 including those persons who are accusing you of
12 these crimes.

13 Now, I ask you, do you understand all of these
14 rights, sir?

15 **DEFENDANT:** Yes, Your Honor.

16 **THE COURT:** Do you wish to waive the same and
17 enter a plea of guilty today?

18 **DEFENDANT:** Yes, Your Honor.

19 **THE COURT:** All right. In indictment
20 2012-GS-32-2625, you are pleading guilty to reckless
21 homicide resulting in death. Do you recognize that
22 you could receive up to ten years in prison for that
23 and a fine of up to \$5,000, sir?

24 **DEFENDANT:** Yes, Your Honor.

25 **THE COURT:** And how do you wish to plead to

1 that offense?

2 **DEFENDANT:** Guilty, Your Honor.

3 **THE COURT:** In indictment 2011-GS-32-1858, you
4 are pleading guilty to hit and run involving death.
5 Do you recognize that you could receive a
6 consecutive one to 25 years in prison and a fine of
7 up to \$25,000, sir?

8 **DEFENDANT:** Yes, Your Honor.

9 **THE COURT:** You also recognize that that's
10 classified as a violent crime, sir?

11 **DEFENDANT:** Yes, Your Honor.

12 **THE COURT:** And do you recognize that because
13 it's classified as a violent crime, that it could
14 affect the manner and method whereby you do any
15 period of incarceration, and it could affect the
16 calculation of your max-out date; do you understand
17 that?

18 **DEFENDANT:** Yes, Your Honor.

19 **THE COURT:** And how do you wish to plead to
20 that offense, sir?

21 **DEFENDANT:** Guilty, Your Honor.

22 **THE COURT:** Has anyone forced or threatened or
23 made you plead guilty?

24 **DEFENDANT:** No, Your Honor.

25 **THE COURT:** Are you pleading guilty of your own

1 free will because you are guilty, sir?

2 **DEFENDANT:** Yes, Your Honor.

3 **THE COURT:** Has anyone promised you anything in
4 connection with your plea?

5 **DEFENDANT:** No, Your Honor.

6 **THE COURT:** Are you under the influence of any
7 drugs or alcohol today?

8 **DEFENDANT:** No, Your Honor.

9 **MR. SIMMONS:** He is under medications.

10 **THE COURT:** Okay. And what type of medication
11 is that, sir?

12 **DEFENDANT:** Tramadol, sir, psycho -- Baclofen
13 and meloxicam, Your Honor.

14 **THE COURT:** All right. And do those drugs
15 actually help you understand and remain calm and are
16 they affecting you in any meaningful way today?

17 **DEFENDANT:** No, Your Honor.

18 **THE COURT:** Are they affecting your ability to
19 understand and appreciate the questions that I'm
20 asking you?

21 **DEFENDANT:** No, Your Honor.

22 **THE COURT:** Are they affecting your ability to
23 discuss this matter with your attorney?

24 **DEFENDANT:** No, Your Honor.

25 **THE COURT:** Do you suffer from any mental

1 sickness that would affect your ability to
2 understand and appreciate what we're having -- what
3 we're doing here today or affect your ability to
4 discuss this matter with your attorney?

5 **DEFENDANT:** No, Your Honor.

6 **THE COURT:** Okay. Have you had the opportunity
7 to discuss this matter with Mr. Simmons as much as
8 you needed to?

9 **DEFENDANT:** Yes, Your Honor.

10 **THE COURT:** Has he answered all of your
11 questions and done everything that you've asked him
12 to do?

13 **DEFENDANT:** Yes, Your Honor.

14 **THE COURT:** Do you have any questions that you
15 would like to ask him before we proceed, sir?

16 **DEFENDANT:** No, Your Honor.

17 **THE COURT:** Do you have any questions that you
18 would like to ask me related to any of your
19 constitutional rights or the questions that I've
20 posed to you?

21 **DEFENDANT:** No, Your Honor.

22 **THE COURT:** Okay. You have ten days to appeal
23 the sentence that I hand down today.

24 I'll be happy to hear the facts.

25 **MR. HUBBARD:** Thank you, Your Honor. Your

1 Honor, I'm Rick Hubbard, Deputy Solicitor at the
2 Solicitor's office. The victim in this case is
3 Hiram Juarez Miller. His friends and family know
4 him as Rez.

5 In the courtroom today, Your Honor, we have his
6 family, most of whom have driven quite a ways,
7 almost eight hours for most of them to get here.
8 His parents, Bernard and Cynthia Miller are seated
9 right here. His aunt, Gwynn Miller, is right here.
10 The mother of his child, and I call her girlfriend,
11 Omaira Ramos, and her father are also here. They
12 have a child in common, I believe she's 13 years
13 old.

14 Also in the courtroom is law enforcement that
15 worked this case. This is a fairly, still a small
16 community. And when law enforcement pulled out,
17 just about everybody got out there to work this case
18 as you can imagine. This was middle of the night,
19 so it involved a lot of hands. But we have Major
20 Jay Koon. We have Lieutenant Matt Davis. We have
21 -- I'm going to start forgetting names -- Mike
22 Lawler. We have Scott Doogle. All of these folks
23 were involved in this case helping prepare this case
24 for me, for us, our team, because it involved a lot
25 of moving parts of just, you had the crime scene and

1 then tracking down who did this.

2 Your Honor, just to let you know a little bit
3 about Rez. He was 37 years old when this happened.
4 He was single, but he was a father.

5 He was on a moped at the time. It was about
6 2:35 at night. He's driving down Highway 6, which
7 is right here in front of the courthouse, just maybe
8 a mile and a half down the road, not even two miles.
9 He was at an intersection right before you get to
10 I-20. He had stopped at a red light, the light
11 turned green. He stayed on his -- he's on his
12 moped. And we have video of a truck coming up from
13 behind him and hitting him and dragging the moped
14 and Mr. Miller through that intersection.

15 I let the family know this: The pathologist
16 said death was instantaneous, that he suffered a
17 head injury. It was mostly internal and
18 hemorrhaging that basically choked out his brain
19 stem basically killing him, but that it was instant.

20 There is a gas station right catercorner to
21 that intersection, a Shell gas station. Law
22 enforcement promptly went over there and found that
23 there's a video of the incident taking place. It's
24 grainy. It's at a distance. Of course, this is a
25 security camera that just happens to capture that

1 intersection.

2 What my office did was we took some still
3 photos from that video. And if I can approach,
4 there's a couple on here that I'd like to show Your
5 Honor.

6 It begins with picture number one. You see a
7 single light and double lights coming behind it with
8 looks like a light rack. As it progresses, you see
9 those lights all combine to make one. By the time
10 you get down to photo six and seven, you see it
11 appears that this truck appears to be dragging a
12 vehicle, but you also see what appears to be tapping
13 of brake lights. Those brake lights disappear in
14 the subsequent photos and they're not present early
15 on in the photos. Six and seven show the brake
16 lights tapping.

17 Your Honor, obviously that was important to us,
18 just showing some sense of awareness, somebody's
19 hitting something, because when MAIT gets out there,
20 they said there's no skid marks, no one's slammed on
21 brakes. It's just the subtle tap of the brakes.
22 Later there's actually another tap of brakes at
23 least one other time as the truck is passing through
24 the end of the intersection.

25 We also made a point to look to see, make sure

1 it wasn't a reflection from lighting, ambient
2 lighting from the street lights or anything else.
3 We looked at other cars going through. This is the
4 only vehicle passing through that had brake lights.

5 Law enforcement put this video on the news and
6 it was playing on all of our stations, does anybody
7 have any information? This was just later that
8 morning. This was 2:35 in the morning. By sunrise,
9 this has plastered the news.

10 A concerned citizen by the name of Mark
11 Simoneau, who happens to own a business and was in
12 West Columbia at the defendant's dad's place of
13 business, he has a trim shop for boats, Mr. Simoneau
14 is in the trim shop that morning and hears a
15 conversation between the defendant's father and an
16 employee and they're talking about Mr. Nordan,
17 Mr. Houston Nordan, about him needing to go home,
18 they're sending him home. The customer said, What's
19 all that about? And the employee tells him, Well,
20 he came in smelling of alcohol, said he had wrecked
21 his truck, had hit something and damaged his truck
22 severely and so he was sending him home.

23 Well, law enforcement obviously went to
24 interview that employee, that employee's name is
25 April Hughes. She admitted that that's what she had

1 heard, that's what she had said.

2 They also talked to the defendant's father,
3 Mr. Randy Nordan. Now, Mr. Nordan, the last time I
4 talked to him, had a little bit different memory of
5 things, but I had two officers that talked to him
6 that day just hours after this collision and they
7 asked him, Where is your son, Houston? He said, I
8 sent him home. He came in and he'd been drinking
9 and had wrecked his truck.

10 Then they told him the significance of why they
11 were there and he directed them to the defendant's
12 mother's house.

13 They went to the mother's house, Kathy Nordan's
14 house, and they saw the truck in the driveway. It's
15 a big 'ol Ram pick-up truck with a light rack on top
16 and it had heavy damage. I'll show Your Honor just
17 a photo of the front.

18 **THE COURT:** Have you seen that, Mr. Simmons?

19 **MR. SIMMONS:** Yes, Your Honor.

20 **MR. HUBBARD:** It also had a winch. Your Honor
21 will notice the winch is propped up. When they got
22 to the house, that winch was in the bed of the
23 truck.

24 They spoke briefly to Mr. Houston Nordan. They
25 didn't interview him at that time. In fact, they

1 never got to interview him. Obviously, he sought
2 counsel by that time, and -- so they've never really
3 had a conversation with him.

4 MAIT was called out, the highway patrol. They
5 worked with Mike Lawler with the Town who does
6 accident reconstruction. And, Judge, what they
7 determined is that the speed of that vehicle was
8 somewhere in the neighborhood of 36 to 43 miles an
9 hour in that intersection. It's a 35 intersection.

10 In talking to the trooper, Steve Garrin, about
11 how he came up with this calculation, he said, It's
12 more likely than not it was 43. His reasoning is
13 this: If it had been a glancing blow, that -- and
14 he measures the speed of the victim. He says, The
15 speed of the victim was more like 43 miles an hour
16 equal to the speed of the truck. If there had been
17 a glancing blow, the bike and moped would have gone
18 off at a 45-degree angle. He said that accounts for
19 the low end speed.

20 He said, But we know this was a head-on
21 collision that dragged the victim and his moped out
22 into the intersection. He said, Your victim, like
23 that {indicating}, was doing 43 miles an hour,
24 plowed out into the intersection, dragged him about
25 95 feet, almost all the way through the

1 intersection.

2 And he did a diagram. Mr. Simmons has seen all
3 of these.

4 **THE COURT:** Okay.

5 **MR. HUBBARD:** Showing that both the moped and
6 the truck are going in the same direction and
7 approximately where the truck is hitting the moped.
8 And, as Your Honor can tell, that accounts for this
9 front-end damage.

10 Your Honor, there are also -- they took photos
11 from the scene. This is an actual photo of where
12 the moped ends up. And, Your Honor, you'll see
13 there's a trail going to the moped. Those aren't
14 skid marks from the bike, Your Honor, or the truck.

15 This is a picture of our victim, Your Honor.
16 That's the skid mark.

17 Once they finished with that scene collecting
18 various items -- and, Your Honor, there were a host
19 of things. There were lights, multiple lights on
20 the front end of the truck. They found a lot of
21 that at the scene. When they found the truck, they
22 could literally, like a jigsaw puzzle, put those
23 pieces back together. There was a bug deflector,
24 part of it was at the scene. It fit perfectly on
25 the defendant's truck.

1 One thing law enforcement also did is they took
2 the truck and the moped and positioned them against
3 the winch to see -- determine the impact, the impact
4 sight of the moped, again all confirming MAIT's
5 conclusion this was a head on, that it just -- he
6 hit him dead on and dragged him.

7 The winch is basically folded under. Pieces of
8 the winch were found at that scene, including some
9 of the words to Mossy Oak, it's a Mossy Oak winch.
10 Some of those letters were found at the scene. They
11 could literally go to that winch when they found it
12 and spell Mossy Oak.

13 After law enforcement got all these things and
14 also got the truck, all this is later that morning,
15 Your Honor, they also got the defendant's phone
16 records, and a number of things were very
17 interesting about the phone records. At 4:00 in the
18 morning, he texted his girlfriend, or his
19 ex-girlfriend at the time, saying, I just got in a
20 bad wreck and need your help.

21 But at 2:43, just eight minutes after this
22 wreck, he's calling a friend. That friend is a guy
23 by the name of Will Taylor. He calls him back and
24 forth. They speak -- we've spoken to Mr. Taylor.
25 Mr. Taylor says he doesn't have anything to do with

1 this case. Before we even asked him, he said, I
2 never left my house that night, three times. But,
3 Your Honor, there's about an hour and a half gap or
4 an hour gap between their conversations, from these
5 initial first conversations until Mr. Taylor and the
6 defendant are talking again.

7 During the interim, about 3:15 or 3:30, on New
8 Orangeburg Road, which is right on down off of 6,
9 this same truck is spotted. A family of three
10 individuals are in a house and they're awakened by
11 the sound of some metal dragging down the road.
12 This truck stops right in front of their house.

13 They go out to the front porch. They see this
14 two-tone Dodge pick-up truck with a light rack with
15 a winch folded under. They see someone get out of
16 the driver's side is trying to lift that winch up.
17 Someone inside that truck is flashing lights. All
18 three of these people tell the same story. We don't
19 know who that other person is, although we certainly
20 suspect we know.

21 Your Honor, once the defendant and this other
22 person saw there were people on the porch, they got
23 in the truck and fled, drove on down the streets.
24 We found parts of the winch in front of that house
25 that match this winch in this case.

1 Doing a search warrant on the truck, we found
2 blood on the outside of the truck. Initially, we
3 thought, well, this must be Mr. Miller's blood. It
4 wasn't. It was the defendant's. It went down the
5 driver's side of the truck and then on the inside,
6 the door handle. It's his blood. We think he cut
7 his hand on his winch trying to get that winch off.
8 We have photos of his hand showing cut marks.

9 Inside the truck, Your Honor, they found two
10 bags of marijuana, looked like personal use
11 marijuana. There was a baggy in the ashtray with a
12 pipe, and there was a baggy on the passenger side.
13 We also found an empty bottle of clonazepam, an
14 anxiety medication, with the name Elizabeth Orvin on
15 it. That belonged to the mother -- that's the
16 mother of his ex-girlfriend. We asked her, How did
17 your pill bottle get in there? She goes, I have no
18 idea, no idea.

19 Your Honor, prior to this wreck, we -- in our
20 investigation of the case, my investigator, Matt
21 Martin, started talking to people at a bar down here
22 called Wild Hare, which is on Highway 1. It's the
23 other road that this courthouse is on the corner of.
24 We would have had one or more witnesses that would
25 have said that night both the victim and the

1 defendant actually came into contact with one
2 another.

3 Your Honor, don't know the significance of
4 this, but what we would have presented it for is we
5 would show that Mr. Nordan was drinking that night
6 before this collision. I have one witness that
7 would say she's a bartender at another establishment
8 and would not have served him at that point, and
9 that is before the wreck. In fact, our victim calls
10 her four minutes before he's killed. He's just
11 checking to see where she is because she left the
12 bar before everybody else to go home.

13 The victim was heading towards his house, which
14 is down Highway 6. I'm not sure where Mr. Nordan
15 was going because I know his parents don't live down
16 that way. But, Your Honor, what we have is a man
17 who's going home, he also has -- our victim also had
18 alcohol and marijuana in his system. There's no
19 question about that. We won't deny that. He did
20 sit at the red light. It turned green. He stayed
21 there for about 20 seconds. But, Judge, even if
22 this is a, just a basic accident, there's still a
23 duty to stop. We believe all the other information
24 also justifies a reckless homicide charge.

25 The defendant has no priors, but he does have a

1 DUS. He was DUS at the time, should not have been
2 on the road at all. We wanted Your Honor to know
3 that.

4 Your Honor, I don't know if the family wishes
5 to speak. I think three of them have indicated they
6 would at the appropriate time.

7 **THE COURT:** All right. Mr. Nordan, you've
8 heard the facts and the allegations from the State.
9 Is that what happened, sir? I know you might take
10 some exception to some of the sum of what the State
11 says, particularly those allegations that may be
12 speculative, but with respect to hitting this
13 individual and killing him and then leaving the
14 scene of the accident, all of those salient facts;
15 is that correct, sir?

16 **DEFENDANT:** Yes, Your Honor.

17 **THE COURT:** All right. I will accept the plea.
18 It's been entered freely and voluntarily with the
19 advice of counsel. I'll be happy to hear from
20 anyone.

21 **MR. HUBBARD:** Yes, Your Honor. I believe I've
22 got three people: The mother, Cynthia Miller; the
23 aunt, Gwynn Miller; and his girlfriend, Omaira
24 Ramos.

25 This is Gwynn Miller. She is the aunt of the

1 victim.

2 **THE COURT:** Welcome, Ms. Miller. Thank you for
3 being here. State your name for the record, please,
4 ma'am.

5 **MS. MILLER:** My name is Gwendolyn Miller.

6 **THE COURT:** Yes, ma'am, I'll be happy to hear
7 from you.

8 **MS. MILLER:** Your Honor, I'm grateful for the
9 time. I won't prolong. I'm the aunt of Hiram
10 Juarez Miller. His mother is my sister. And I'm
11 just here to let you know that I appreciate
12 everything that has been done, but I'm very, very
13 disappointed in the length of time it's taken, over
14 two and a half years, drawing out. So many trips
15 here for no apparent reason, but that's okay.

16 We miss my nephew. He was very well-loved.
17 Nobody is perfect, but he was just such a good
18 person. He made our life full of joy. And he just
19 didn't deserve to be treated so inhumane. No human
20 being should be hit, run over and then left. But
21 I'm grateful that someone did come along and did
22 call for assistance. Everything has been done
23 decent and order since that time.

24 But I'm just so disappointed that it took this
25 length of time just for a person to admit that they

1 were wrong and that they did something they
2 shouldn't have done. But I would like to see
3 everything done rightfully in judgment. I feel like
4 the maximum sentence should be enforced because
5 there has been no regret, remorse or anything
6 towards my family, that anybody cared anything about
7 what we were going through.

8 And so I just ask that you do what you feel in
9 your heart is the best thing as far as justice
10 because I know it was wrong and I know it should
11 have been handled in a different manner and it
12 wasn't. And anybody should at least care when they
13 do take another person's life. They should just
14 care enough to say, I'm sorry, I made a horrible
15 mistake, or, I feel that I owe you all at least some
16 compassion, but none of that was done and I think
17 that you should take that into consideration. Thank
18 you.

19 **THE COURT:** Thank you for being here, ma'am.

20 **MR. HUBBARD:** Ms. Ramos.

21 **COURT REPORTER:** Can you spell your first name,
22 please?

23 **MS. RAMOS:** O-m-a-i-r-a. I would like to see
24 the maximum sentence because what he took from my
25 daughter she can't get back. She's only 13 and her

1 father will never be there. She will never hear his
2 voice. She will never feel his touch. I have my
3 father here with me today and that's something my
4 daughter will never have.

5 He took away a lot and never, I'm sorry, never
6 has admitted, still keeps secrets to this day, and
7 that's fine. And for that reason, I want a maximum
8 sentence because he never came clean and that's my
9 biggest thing. Accidents happen and you correct
10 them. You acknowledge what you do and you correct
11 it. It's been two and a half years, never an
12 apology, never an acknowledgment. I don't expect
13 anybody to bow down and ask for forgiveness. I just
14 want you to acknowledge what was wrong, acknowledge
15 that this 13-year-old, she has no daddy. She has
16 Christmas, she has birthdays, Father's day that we
17 go to a cemetery and we put flowers on a grave site
18 and that's what she has.

19 They're going to say goodbye to him, but it's
20 only going to be till see you later because they'll
21 see him again. They'll hear his voice. My daughter
22 doesn't hear her father's voice. She hears it on
23 recordings or videos or pictures because that's all
24 she has and it's not right.

25 **THE COURT:** Thank you, ma'am. I appreciate you

1 being here.

2 **MR. HUBBARD:** Cynthia Miller, the mother.

3 **MRS. MILLER:** Well, I know that it's been a
4 long time coming, but with your judgment, I think we
5 will get some kind of benefits from this judgment.
6 Even though we -- it's our son and everybody mostly
7 just love him, he just meet you and he just like
8 instantly become your friend and that just was his
9 way.

10 So in this judgment, we just want you to just
11 do what you really believe it should be because even
12 though it might be years out of one person life, but
13 it's just going to be totally forever in our life
14 because it was our son. And we just want to thank
15 you in advance of what you believe and will do right
16 about the decision you make.

17 **THE COURT:** Thank you, ma'am. I appreciate
18 that.

19 **MR. HUBBARD:** Your Honor, I should note, and
20 I've talked with the family, we had scheduled this
21 case for a trial over a year ago. It was properly
22 continued and I won't go into those reasons, but a
23 trial date was set by our judge and that was this
24 week, so that's why we're here. Thank you, Your
25 Honor.

1 **THE COURT:** Yes, sir.

2 All right. Mr. Simmons.

3 **MR. SIMMONS:** Thank you, Your Honor. There are
4 several areas in which I would like to touch on:
5 First was when this case was scheduled for a trial
6 and properly continued, that was because someone set
7 my office on fire. So it was pretty hard to finish
8 getting ready and getting here for trial when you've
9 got an office that's been set on fire and the West
10 Columbia Police Department {sic} had to come put it
11 out. All right, that was one.

12 Number two, this was not an open and shut case.
13 You know, you've seen some photographs as the State
14 showed them today, and we don't agree with all the
15 facts as they have presented them.

16 You know, here's the things that you haven't
17 been told: Mr. Miller's DNA was not found on the
18 truck. We couldn't figure that out. The parts of
19 the winch that were found in the intersection and at
20 another location, his DNA was not on those as well.
21 We could not figure that out. Some of their own
22 witness statements, the witnesses that they're
23 relying on, saw what we consider to be a different
24 truck, two people in a silver and burgundy or they
25 may have even said burgundy and silver truck, that's

1 not my client's truck.

2 And all of this comes together for a reason
3 because he can't tell you what happened as he went
4 through that intersection. It's because of his
5 medical condition and the medications that he was
6 on.

7 So here we have no DNA, conflicting witness
8 reports, he had not been drinking and we had to
9 piece together what had happened. So that's -- a
10 couple more things before I get to that: Where they
11 said that you see a brake light, we have two videos
12 and we watched them ad nauseum. And in one of the
13 videos, we swear it was a red truck that went
14 through the intersection. And we finally came to
15 the conclusion that it had to be the red light that
16 controlled that intersection, which would also
17 account for more illumination of a taillight as you
18 go through there.

19 Now, this witness, April Hughes, that they
20 talked about that said that my client smelled of
21 alcohol and been drinking, well, she's been
22 terminated from Nordan's Trim Shop. And it appears
23 as though she's charged with breach of trust from
24 stealing thousands of dollars from them and she had
25 a vendetta against Houston.

1 Now, I would like to hand the Court up a couple
2 of documents, if I may.

3 **THE COURT:** Have you seen this?

4 **MR. HUBBARD:** I have. Your Honor, my only
5 question is if there's a defense of I don't know
6 what happened, I think we need to address that.

7 **MR. SIMMONS:** That's not where we're going,
8 Your Honor.

9 **THE COURT:** Okay. I'll hear you out.

10 **MR. SIMMONS:** All right. The Shuman-Owens
11 receipt, that shows where Randy Nordan sent Houston
12 Nordan to Shuman-Owens to pick up supplies the
13 morning after this wreck took place. And Randy
14 Nordan, I've talked with him, he says he wouldn't
15 send his son to go pick up supplies had he been
16 drinking.

17 Here's what Houston did wrong: The medications
18 that he took at approximately 11 o'clock that
19 evening included lisinopril, which was for blood
20 pressure; Tramadol, which is a very mild pain
21 killer; cyclobenzaprine, which is a muscle relaxer
22 and an anti-inflammatory medication. That was the
23 reason that we hired Dr. Shawn Fuller to give his
24 report.

25 One of the big problems was the lisinopril

1 itself can cause blackouts and that's what our
2 defense was. And we started looking at this case
3 and said, you know what, the problem is is the
4 defense could also convict you. Where do you go
5 with this?

6 So now's the point where I want to give you
7 Houston's background before we tell you exactly what
8 happened that night. Houston is now 26 years old.
9 He's still employed at Nordan's Trim Shop. He
10 started working in this shop with his daddy as a
11 small child. You know, he's now 26 years old.

12 In 2003, he graduated from Lexington High
13 School. And after high school, after the summer, he
14 went to Midland's Technical College in order to
15 learn how to manage a small business, that was his
16 goal. In 2008, he got the call and he went into our
17 military going into the Marine Corps. He went to
18 boot camp.

19 During boot camp, a drill instructor went to
20 kick a bag of instruments and kicked Houston by
21 accident and it severely injured him. For the next
22 month, he was in the hospital, and for the next six
23 months, he was walking with a cane or was in a
24 wheelchair. He still finished his basic training,
25 his boot camp, became a marine. He went to combat

1 training. He completed his combat training.

2 In 2009, he went to his MOS where he wanted to
3 become an electronics slash communication
4 technician, was out in California at the time, still
5 walking with a cane and was walking down some steps,
6 the cane got jammed, he slipped, fell, and that's
7 what you pick up from Dr. Fuller's report, and
8 severely injured his back. So he fought them
9 putting him out of the military. So in 2010, six
10 months after this, he was involuntarily discharged
11 from the military. His disability rating right now
12 is between 50 and 60 percent.

13 Now, when he had the fall, the back injury is
14 what we consider, I guess, compression fractures
15 among other things. Now, the V.A. had a
16 chiropractor and when he would go see the
17 chiropractor, he would go get some relief. Well,
18 they quit providing the chiropractic treatment and
19 decided to treat them with drugs instead. We think
20 it's a big mistake, but that's the V.A. and we don't
21 have any power over them.

22 The night -- well, as you can see from Dr.
23 Fuller's report, his medications were changed
24 several times over the course of a month or two just
25 before this wreck. The State also interviewed my

1 client's ex-girlfriend, as well as the mother, who
2 said, When these changes in medication came on, he
3 became lethargic. He started acting differently.

4 The night of this, Houston had taken certain
5 medications and had broken up with his girlfriend,
6 was upset about it and went to look for her.

7 He can't tell you what happened at impact, but
8 what he can tell you is that after that time period,
9 he noticed something was dragging, stopped his truck
10 and the winch was dragging. His first thought was,
11 oh, my God, because he is not that good of an
12 engineer as far as putting a winch on a truck, that
13 he had hit something and the winch just came off.
14 He then saw the front-end damage, and that's when we
15 say, when you see that much front-end damage, you
16 should know you've hit something, you know, whether
17 it be another vehicle that's unoccupied, an occupied
18 vehicle or what, and that's when you should find out
19 what's going on and return to the scene.

20 As far as the reckless homicide, I mean, yes,
21 he was under suspension for -- on a motorcycle
22 ticket that he had never paid. And he did the same
23 thing that other young people do, he moved from one
24 residence to another one, didn't pay the ticket and
25 then didn't get the notice that he was under

1 suspension.

2 But the big thing was that he took his
3 medications and then drove. And he has shown a lot
4 of remorse for what has happened. Of course, he's
5 not going to go to the family before all this was
6 over and tell them that he is sorry. He is here
7 today to tell them he is sorry. I have dealt with
8 him for two and a half years and seen what he has
9 gone through. And this whole thing has bothered him
10 as well, not because he was arrested, but because he
11 knows he killed somebody.

12 He still, to this day, suffers from depression
13 and anxiety along with his physical ailments. At
14 this time, his medications include Baclofen, which
15 is for muscle pain and spasms; meloxicam, which is
16 an anti-inflammatory; Tramadol, which is the mild
17 pain killer. They've got him on metoprolol for the
18 blood pressure and gabapentin, which is a nerve pain
19 medication. So the V.A. still treats him.

20 You know, he understands he's going to prison.
21 We all understand that. He would like to address
22 the Court. He would like to address the family and
23 tell them how remorseful and how sorry he is for
24 what happened.

25 And, Your Honor, we ask for a minimal sentence.

1 You know, he's going to have to serve 85 percent of
2 it. He understands that when he comes out of jail,
3 that he'll have no driver's license, he could easily
4 go back, he'll still be under supervision, and that
5 he's got to make something of himself. And I think
6 that this man can do that. He is ready to pay his
7 debt to society, Your Honor.

8 But one of the main things is, he's told, that
9 at this point in time, by the time he's 50, he
10 probably will not be walking. And I think the V.A.
11 needs to take care of him and they're not going to
12 take care of him when he's in the state system.
13 Thank you.

14 **THE COURT:** Thank you, Mr. Simmons.

15 Mr. Nordan, be happy to hear from you, sir.

16 **DEFENDANT:** I just want to let everybody know
17 that I truly am sorry, and listening to y'all today
18 does make it that much worse. I am very sorry for
19 what I've caused whether or not y'all can forgive me
20 or -- I want to let you know I'm truly sorry for
21 everybody. Thank you, Your Honor.

22 **MR. SIMMONS:** And his mother is also here, if
23 she can speak, Your Honor.

24 **THE COURT:** Yes, ma'am.

25 **COURT REPORTER:** Can I get your name?

1 **MS. FOSTER:** I'm Kathy Foster. I want to
2 extend my sincere apologies. As a mother to a
3 mother, I cannot imagine what you have gone through.
4 I truly am sorry. I sent into the Marine Corps a
5 man that was somebody totally different than who I
6 got back. And I just want y'all to know that if
7 there were any way that I could turn things back,
8 that I would.

9 We haven't been given the opportunity to
10 express our remorse and tell you that I'm sorry, but
11 I want you to know that we are very truly sorry. My
12 family, my son and I are very sorry for your loss.

13 Thank you, Your Honor.

14 **THE COURT:** Yes, ma'am. Thank you.
15 Anything further from the defense?

16 **MR. SIMMONS:** No, sir.

17 **THE COURT:** All right. Ladies and gentlemen,
18 it is indeed unfortunate that we find ourselves here
19 under such tragic circumstances. And I am truly
20 sorry from a personal perspective for the tragedy
21 that has befallen not only the victim and the
22 victim's family, but also the defendant's family,
23 because I know that this is a tragedy that you have
24 to suffer under as well. And I'm also sorry that
25 there's nothing that I can do to remedy this

1 situation. I'm mere mortal man and all I can do is
2 issue a sentence in this case, but I can't do
3 anything to remediate or address the hurt and the
4 angst that everyone feels is a consequence of this
5 tragedy.

6 I'm required to sentence Mr. Nordan to a period
7 of incarceration in this case and I intend to do so,
8 but I do want to tell everyone that you should not
9 look to that sentence for vindication or for closure
10 because that sentence really, at the end of the day,
11 whether it's the maximum or the minimum, will not
12 remediate the situation and it won't bring you one
13 step closer to reconciling this spiritually or
14 personally. You should look to your Lord and your
15 Maker to reconcile this and for closure in this case
16 and don't look to the sentence, because, as I say,
17 this sentence, regardless of whether it is the
18 maximum or the minimum, cannot appropriately address
19 the tragedy that has happened in this case and it
20 could never, never sufficiently address the loss
21 that you feel.

22 I've heard from both the victim and the State.
23 I heard from the defense and the defense's family,
24 and I take it all into consideration.

25 On the reckless homicide, the sentence of the

1 Court is ten years in the department of corrections
2 concurrent, credit for any time that you may have
3 served.

4 On the hit and run, sentence of the Court is
5 you be committed to 20 years, provided upon the
6 service of ten years, the balance is suspended to
7 probation for five years concurrent. Credit for
8 time served. During that term of probation,
9 substance abuse counseling, random drug and alcohol
10 testing.

11 Good luck to you, Mr. Nordan.

12 **MR. SIMMONS:** Thank you, Your Honor.

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14 END OF PROCEEDINGS

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the guilty plea of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 9th of December, 2013.

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

January 23, 2014

s/Stacy L. Sheppard

Stacy L. Sheppard, RPR
Circuit Court Reporter

\$	5		based [1] - 5:2 basic [2] - 20:22, 29:24 bear [1] - 5:10 became [2] - 29:25, 31:3 become [2] - 25:8, 30:3 bed [1] - 14:22 befallen [1] - 34:21 begins [1] - 12:6 behalf [1] - 6:4 behind [2] - 11:13, 12:7 belonged [1] - 19:15 benefits [1] - 25:5 Bernard [1] - 10:8 best [1] - 23:9 between [3] - 13:15, 18:4, 30:12 beyond [2] - 5:16, 5:25 big [4] - 14:15, 28:25, 30:20, 32:2 biggest [1] - 24:9 bike [2] - 15:17, 16:14 billed [1] - 4:11 birthdays [1] - 24:16 bit [2] - 11:2, 14:4 blackouts [1] - 29:1 blood [5] - 19:2, 19:3, 19:6, 28:19, 32:18 blow [2] - 15:13, 15:17 boats [1] - 13:13 boot [3] - 29:18, 29:19, 29:25 bothered [1] - 32:9 bottle [2] - 19:13, 19:17 bow [1] - 24:13 brain [1] - 11:18 brake [5] - 12:13, 12:15, 13:4, 27:11 brakes [3] - 12:21, 12:22 breach [1] - 27:23 briefly [1] - 14:24 bring [1] - 35:12 broken [1] - 31:5 bug [1] - 16:23 burden [4] - 5:16, 5:19, 5:22, 5:24 burgundy [2] - 26:24, 26:25 business [3] - 13:11, 13:13, 29:15	C
\$25,000 [1] - 7:7 \$5,000 [1] - 6:23	50 [2] - 30:12, 33:9	36:9 allegations [2] - 21:8, 21:11 almost [2] - 10:7, 15:25 ambient [1] - 13:1 angle [1] - 15:18 angst [1] - 35:4 answered [1] - 9:10 anti [2] - 28:22, 32:16 anti-inflammatory [2] - 28:22, 32:16 anxiety [2] - 19:14, 32:13 apologies [1] - 34:2 apology [1] - 24:12 apparent [1] - 22:15 appeal [2] - 9:22, 37:12 appreciate [5] - 8:19, 9:2, 22:11, 24:25, 25:17 approach [1] - 12:3 appropriate [1] - 21:6 appropriately [1] - 35:18 April [2] - 13:25, 27:19 areas [1] - 26:4 arrested [1] - 32:10 ashtray [1] - 19:11 assistance [1] - 22:22 attested [1] - 4:10 Attorney [3] - 1:17, 1:19, 4:11 attorney [2] - 8:23, 9:4 aunt [4] - 10:9, 21:23, 21:25, 22:9 awakened [1] - 18:10 awareness [1] - 12:18	calculation [2] - 7:16, 15:11 California [1] - 30:4 calm [1] - 8:15 camera [1] - 11:25 camp [3] - 29:18, 29:19, 29:25 cane [3] - 29:23, 30:5, 30:6 cannot [2] - 34:3, 35:18 captioned [1] - 37:12 capture [1] - 11:25 care [4] - 23:12, 23:14, 33:11, 33:12 cared [1] - 23:6 Carolina [4] - 1:1, 1:11, 37:8, 37:13 CAROLINA [1] - 37:3 cars [1] - 13:3 case [16] - 10:2, 10:15, 10:17, 10:23, 18:1, 18:25, 19:20, 25:21, 26:5, 26:12, 29:2, 35:2, 35:7, 35:15, 35:19 catercorner [1] - 11:20 caused [1] - 33:19 cemetery [1] - 24:17 certain [1] - 31:4 certainly [1] - 18:19 certify [2] - 37:8, 37:15 changed [1] - 30:23 changes [1] - 31:2 charge [1] - 20:24 charged [3] - 4:6, 4:9, 27:23 charges [3] - 5:10, 5:12, 5:15 checking [1] - 20:11 child [3] - 10:10, 10:12, 29:11 chiropractic [1] - 30:18 chiropractor [2] - 30:16, 30:17 choked [1] - 11:18 Christmas [1] - 24:16 Circuit [4] - 1:25, 37:6, 37:7, 37:22 circumstances [1] - 34:19 citizen [1] - 13:10 classified [2] - 7:10, 7:13	
	6			
	6 [3] - 11:6, 18:8, 20:14 60 [1] - 30:12			
'ol [1] - 14:15				
1	8			
1 [1] - 19:22 11 [1] - 28:18 11-GS-32-1858 [1] - 1:6 12 [1] - 5:17 12-GS-32-2625 [1] - 1:7 13 [2] - 10:12, 23:25 13-year-old [1] - 24:15	85 [1] - 33:1			
	9			
	9 [2] - 1:10, 4:2 95 [1] - 15:25 9th [1] - 37:14			
2	A			
20 [2] - 20:21, 36:5 2003 [1] - 29:12 2008 [1] - 29:16 2009 [1] - 30:2 2010 [1] - 30:9 2011-GS-32-01858 [1] - 4:3 2011-GS-32-1858 [1] - 7:3 2012-GS-32-02625 [1] - 4:7 2012-GS-32-2625 [1] - 6:20 2013 [3] - 1:10, 4:2, 37:14 2014 [1] - 37:18 23 [1] - 37:18 25 [1] - 7:6 26 [2] - 29:8, 29:11 2:35 [2] - 11:6, 13:8 2:43 [1] - 17:21	ability [4] - 8:18, 8:22, 9:1, 9:3 abuse [1] - 36:9 accept [1] - 21:17 accident [5] - 4:5, 15:6, 20:22, 21:14, 29:21 accidents [1] - 24:9 account [1] - 27:17 accounts [2] - 15:18, 16:8 accurate [1] - 37:9 accusing [1] - 6:11 acknowledge [3] - 24:10, 24:14 acknowledgment [1] - 24:12 acting [1] - 31:3 actual [1] - 16:11 ad [1] - 27:12 address [6] - 28:6, 32:21, 32:22, 35:3, 35:18, 35:20 admit [1] - 22:25 admitted [2] - 13:25, 24:6 advance [1] - 25:15 advice [1] - 21:19 affect [4] - 7:14, 7:15, 9:1, 9:3 affecting [3] - 8:16, 8:18, 8:22 afternoon [1] - 5:6 ago [1] - 25:21 agree [2] - 5:3, 26:14 ailments [1] - 32:13 alcohol [5] - 8:7, 13:20, 20:18, 27:21,			
3		B		
35 [1] - 15:9 36 [1] - 15:8 37 [1] - 11:3 3:15 [1] - 18:7 3:30 [1] - 18:7		background [1] - 29:7 Baclofen [2] - 8:12, 32:14 bad [1] - 17:20 bag [1] - 29:20 baggy [2] - 19:11, 19:12 bags [1] - 19:10 balance [1] - 36:6 bar [2] - 19:21, 20:12 bartender [1] - 20:7		
4				
43 [4] - 15:8, 15:12, 15:15, 15:23 45-degree [1] - 15:18 4:00 [1] - 17:17				

clean [1] - 24:8 CLERK [1] - 4:3 client [1] - 27:20 client's [2] - 27:1, 31:1 clonazepam [1] - 19:13 closer [1] - 35:13 closure [2] - 35:9, 35:15 collecting [1] - 16:17 College [1] - 29:14 collision [3] - 14:6, 15:21, 20:6 Columbia [2] - 13:12, 26:10 combat [2] - 29:25, 30:1 combine [1] - 12:9 coming [3] - 11:12, 12:7, 25:4 committed [1] - 36:5 common [1] - 10:12 communication [1] - 30:3 community [1] - 10:16 compassion [1] - 23:16 complete [1] - 37:9 completed [1] - 30:1 compression [1] - 30:14 concerned [1] - 13:10 conclusion [2] - 17:5, 27:15 concurrent [2] - 36:2, 36:7 condition [1] - 27:5 confirming [1] - 17:4 conflicting [1] - 27:7 connection [1] - 8:4 consecutive [1] - 7:6 consequence [1] - 35:4 consider [2] - 26:23, 30:14 consideration [2] - 23:17, 35:24 constitution [1] - 5:20 constitutional [4] - 4:17, 5:9, 6:9, 9:19 contact [1] - 20:1 continued [2] - 25:22, 26:6 controlled [1] - 27:16 conversation [2] -	13:15, 15:3 conversations [2] - 18:4, 18:5 convict [1] - 29:4 corner [1] - 19:23 Corps [2] - 29:17, 34:4 correct [3] - 21:15, 24:9, 24:10 corrections [1] - 36:1 counsel [3] - 15:2, 21:19, 37:16 counseling [1] - 36:9 County [2] - 1:2, 37:13 COUNTY [1] - 37:4 couple [3] - 12:4, 27:10, 28:1 course [3] - 11:24, 30:24, 32:4 COURT [46] - 4:15, 4:20, 4:23, 5:2, 5:6, 5:8, 5:14, 6:16, 6:19, 6:25, 7:3, 7:9, 7:12, 7:19, 7:22, 7:25, 8:3, 8:6, 8:10, 8:14, 8:18, 8:22, 8:25, 9:6, 9:10, 9:14, 9:17, 9:22, 14:18, 16:4, 21:7, 21:17, 22:2, 22:6, 23:19, 23:21, 24:25, 25:17, 26:1, 28:3, 28:9, 33:14, 33:24, 33:25, 34:14, 34:17 Court [10] - 1:1, 1:25, 6:8, 28:1, 32:22, 36:1, 36:4, 37:7, 37:13, 37:22 courthouse [2] - 11:7, 19:23 courtroom [2] - 10:5, 10:14 credit [2] - 36:2, 36:7 crime [3] - 7:10, 7:13, 10:25 crimes [1] - 6:12 Criminal [1] - 37:12 cross [1] - 6:10 CROSS [1] - 2:2 cross-examine [1] - 6:10 customer [1] - 13:18 cut [2] - 19:6, 19:8 cyclobenzaprine [1] - 28:21 Cynthia [3] - 10:8, 21:22, 25:2	D dad's [1] - 13:12 daddy [2] - 24:15, 29:10 damage [4] - 14:16, 16:9, 31:14, 31:15 damaged [1] - 13:21 date [2] - 7:16, 25:23 daughter [3] - 23:25, 24:4, 24:21 Davis [1] - 10:20 days [1] - 9:22 dead [1] - 17:6 dealt [1] - 32:7 death [4] - 4:5, 6:21, 7:4, 11:16 debt [1] - 33:7 December [3] - 1:10, 4:2, 37:14 decent [1] - 22:23 decided [1] - 30:19 decision [3] - 4:24, 5:4, 25:16 Defendant [2] - 1:8, 1:19 DEFENDANT [25] - 5:7, 5:13, 6:15, 6:18, 6:24, 7:2, 7:8, 7:11, 7:18, 7:21, 7:24, 8:2, 8:5, 8:8, 8:12, 8:17, 8:21, 8:24, 9:5, 9:9, 9:13, 9:16, 9:21, 21:16, 33:16 defendant [4] - 18:6, 18:21, 20:1, 20:25 defendant's [8] - 13:12, 13:15, 14:2, 14:11, 16:25, 17:15, 19:4, 34:22 defense [6] - 6:6, 28:5, 29:2, 29:4, 34:15, 35:23 defense's [1] - 35:23 deflector [1] - 16:23 deny [1] - 20:19 Department [1] - 26:10 department [1] - 36:1 depression [1] - 32:12 Deputy [2] - 1:17, 10:1 DESCRIPTION [1] - 3:2 deserve [1] - 22:19 determine [1] - 17:3 determined [1] - 15:7	diagram [1] - 16:2 different [4] - 14:4, 23:11, 26:23, 34:5 differently [1] - 31:3 DIRECT [1] - 2:2 directed [1] - 14:11 direction [1] - 16:6 disability [1] - 30:11 disappear [1] - 12:13 disappointed [2] - 22:13, 22:24 discharged [1] - 30:10 discuss [4] - 4:16, 8:23, 9:4, 9:7 discussions [1] - 5:3 distance [1] - 11:24 DNA [3] - 26:17, 26:20, 27:7 documents [1] - 28:2 Dodge [1] - 18:14 dollars [1] - 27:24 done [6] - 9:11, 22:12, 22:22, 23:2, 23:3, 23:16 Doogle [1] - 10:22 door [1] - 19:6 double [1] - 12:7 doubt [2] - 5:17, 5:25 down [14] - 9:23, 11:1, 11:6, 11:8, 12:10, 18:8, 18:11, 18:23, 19:4, 19:21, 20:14, 20:15, 24:13, 30:5 Dr [3] - 28:23, 30:7, 30:22 dragged [3] - 15:21, 15:24, 17:6 dragging [5] - 11:13, 12:11, 18:11, 31:9, 31:10 drawing [1] - 22:14 drill [1] - 29:19 drinking [5] - 14:8, 20:5, 27:8, 27:21, 28:16 driven [1] - 10:6 driver's [3] - 18:16, 19:5, 33:3 driveway [1] - 14:14 driving [1] - 11:6 drove [2] - 18:23, 32:3 drug [1] - 36:9 drugs [3] - 8:7, 8:14, 30:19 duly [1] - 4:14 during [3] - 18:7, 29:19, 36:8	DUS [2] - 21:1 duty [1] - 20:23 E early [1] - 12:14 easily [1] - 33:3 eight [2] - 10:7, 17:21 electronics [1] - 30:3 element [1] - 5:25 Eleventh [1] - 37:7 Elizabeth [1] - 19:14 employed [1] - 29:9 employee [3] - 13:16, 13:19, 13:24 employee's [1] - 13:24 empty [1] - 19:13 end [7] - 12:24, 15:19, 16:9, 16:20, 31:14, 31:15, 35:10 END [1] - 36:14 ends [1] - 16:12 enforced [1] - 23:4 enforcement [7] - 10:14, 10:16, 11:22, 13:5, 13:23, 17:1, 17:13 engineer [1] - 31:12 enjoy [1] - 5:20 enter [1] - 6:17 entered [1] - 21:18 equal [1] - 15:16 Esquire [1] - 1:18 essentially [1] - 6:7 establishment [1] - 20:7 EVD [1] - 3:2 evening [1] - 28:19 evidence [2] - 6:5, 37:11 ex [3] - 17:19, 19:16, 31:1 ex-girlfriend [3] - 17:19, 19:16, 31:1 exactly [1] - 29:7 examine [1] - 6:10 exception [1] - 21:10 exhibits [1] - 3:6 expect [1] - 24:12 explain [1] - 5:8 express [1] - 34:10 extend [1] - 34:2 F fact [2] - 14:25, 20:9 facts [4] - 9:24, 21:8, 21:14, 26:15

fairly [1] - 10:15 fall [1] - 30:13 family [13] - 10:3, 10:6, 11:15, 18:9, 21:4, 23:6, 25:20, 32:5, 32:22, 34:12, 34:22, 35:23 far [3] - 23:9, 31:12, 31:20 father [6] - 10:11, 11:4, 13:15, 14:2, 24:1, 24:3 Father's [1] - 24:16 father's [1] - 24:22 feet [1] - 15:25 fell [1] - 30:6 few [1] - 5:11 figure [2] - 26:18, 26:21 finally [1] - 27:14 fine [3] - 6:23, 7:6, 24:7 finish [1] - 26:7 finished [2] - 16:17, 29:24 fire [2] - 26:7, 26:9 first [4] - 18:5, 23:21, 26:5, 31:10 fit [1] - 16:24 five [1] - 36:7 flashing [1] - 18:17 fled [1] - 18:23 flowers [1] - 24:17 folded [2] - 17:7, 18:15 folks [1] - 10:22 following [1] - 4:1 follows [1] - 4:14 forced [1] - 7:22 foregoing [1] - 37:9 forever [1] - 25:13 forgetting [1] - 10:21 forgive [1] - 33:19 forgiveness [1] - 24:13 forth [1] - 17:24 FOSTER [1] - 34:1 Foster [1] - 34:1 fought [1] - 30:8 four [1] - 20:10 fractures [1] - 30:14 free [1] - 8:1 freely [1] - 21:18 friend [3] - 17:22, 25:8 friends [1] - 10:3 front [9] - 11:7, 14:17, 16:9, 16:20, 18:12, 18:13, 18:24,	31:14, 31:15 front-end [3] - 16:9, 31:14, 31:15 full [1] - 22:18 Fuller [1] - 28:23 Fuller's [2] - 30:7, 30:23 G gabapentin [1] - 32:18 gap [2] - 18:3, 18:4 Garrin [1] - 15:10 gas [2] - 11:20, 11:21 General [1] - 1:1 gentlemen [1] - 34:17 girlfriend [7] - 10:10, 17:18, 17:19, 19:16, 21:23, 31:1, 31:5 given [1] - 34:9 glancing [2] - 15:13, 15:17 goal [1] - 29:16 God [1] - 31:11 goodbye [1] - 24:19 graduated [1] - 29:12 grainy [1] - 11:24 grateful [2] - 22:8, 22:21 grave [1] - 24:17 green [2] - 11:11, 20:20 guess [1] - 30:14 guilty [11] - 4:25, 5:16, 6:17, 6:20, 7:2, 7:4, 7:21, 7:23, 7:25, 8:1, 37:11 guy [1] - 17:22 Gwendolyn [1] - 22:5 Gwynn [3] - 10:9, 21:23, 21:25 H half [5] - 11:8, 18:3, 22:14, 24:11, 32:8 hand [4] - 9:23, 19:7, 19:8, 28:1 handle [1] - 19:6 handled [1] - 23:11 hands [1] - 10:19 happy [4] - 9:24, 21:19, 22:6, 33:15 hard [1] - 26:7 Hare [1] - 19:22 head [3] - 11:17,	15:20, 17:5 head-on [1] - 15:20 heading [1] - 20:13 hear [8] - 9:24, 21:19, 22:6, 24:1, 24:21, 24:22, 28:9, 33:15 heard [4] - 14:1, 21:8, 35:22, 35:23 hears [2] - 13:14, 24:22 heart [1] - 23:9 heavy [1] - 14:16 held [1] - 4:1 help [2] - 8:15, 17:20 helping [1] - 10:23 hemorrhaging [1] - 11:18 hereby [1] - 37:8 hereto [1] - 37:16 High [1] - 29:12 high [1] - 29:13 Highway [3] - 11:6, 19:22, 20:14 highway [1] - 15:4 himself [1] - 33:5 Hiram [2] - 10:3, 22:9 hired [1] - 28:23 hit [7] - 7:4, 13:21, 17:6, 22:20, 31:13, 31:16, 36:4 hitting [4] - 11:13, 12:19, 16:7, 21:12 home [6] - 13:17, 13:18, 13:22, 14:8, 20:12, 20:17 homicide [5] - 4:9, 6:21, 20:24, 31:20, 35:25 Honor [65] - 4:19, 4:22, 5:1, 5:5, 5:7, 5:13, 6:15, 6:18, 6:24, 7:2, 7:8, 7:11, 7:18, 7:21, 7:24, 8:2, 8:5, 8:8, 8:13, 8:17, 8:21, 8:24, 9:5, 9:9, 9:13, 9:16, 9:21, 9:25, 10:1, 10:5, 11:2, 12:5, 12:17, 14:16, 14:19, 14:20, 16:8, 16:10, 16:12, 16:14, 16:15, 16:18, 17:15, 18:3, 18:21, 19:9, 19:19, 20:3, 20:16, 21:2, 21:4, 21:16, 21:21, 22:8, 25:19, 25:25, 26:3, 28:4, 28:8, 32:25, 33:7, 33:21, 33:23, 34:13, 36:12 Honorable [1] - 1:14	horrible [1] - 23:14 hospital [1] - 29:22 host [1] - 16:18 hour [5] - 15:9, 15:15, 15:23, 18:3, 18:4 hours [2] - 10:7, 14:6 house [9] - 14:12, 14:13, 14:14, 14:22, 18:2, 18:10, 18:12, 18:24, 20:13 Houston [12] - 1:7, 4:4, 4:8, 13:17, 14:7, 14:24, 27:25, 28:11, 28:17, 29:8, 29:20, 31:4 HOUSTON [1] - 4:13 Houston's [1] - 29:7 HUBBARD [8] - 9:25, 14:20, 16:5, 21:21, 23:20, 25:2, 25:19, 28:4 Hubbard [2] - 1:17, 10:1 Hughes [2] - 13:25, 27:19 human [1] - 22:19 hurt [1] - 35:3 I I-20 [1] - 11:10 ID [1] - 3:2 idea [2] - 19:18 Ill [2] - 1:17, 1:18 illumination [1] - 27:17 imagine [2] - 10:18, 34:3 impact [3] - 17:3, 31:7 important [2] - 5:9, 12:17 incarceration [2] - 7:15, 35:7 incident [1] - 11:23 include [1] - 32:14 included [1] - 28:19 including [2] - 6:11, 17:8 incrimination [1] - 5:21 indeed [1] - 34:18 indicated [1] - 21:5 indicating [1] - 15:23 indicted [2] - 4:4, 4:8 indictment [4] - 4:3, 4:7, 6:19, 7:3 individual [1] - 21:13 individuals [1] -	18:10 inflammatory [2] - 28:22, 32:16 influence [1] - 8:6 information [2] - 13:7, 20:23 inhumane [1] - 22:19 initial [1] - 18:5 injured [2] - 29:21, 30:8 injury [2] - 11:17, 30:13 innocent [1] - 5:19 inside [3] - 18:17, 19:5, 19:9 instant [1] - 11:19 instantaneous [1] - 11:16 instantly [1] - 25:8 instead [1] - 30:19 instructor [1] - 29:19 instruments [1] - 29:20 intelligent [1] - 4:24 intend [1] - 35:7 interest [1] - 37:16 interesting [1] - 17:17 interim [1] - 18:7 internal [1] - 11:17 intersection [14] - 11:9, 11:14, 11:21, 12:1, 12:24, 15:9, 15:22, 15:24, 16:1, 26:19, 27:4, 27:14, 27:16 interview [3] - 13:24, 14:25, 15:1 interviewed [1] - 30:25 introduced [1] - 37:11 investigation [2] - 5:2, 19:20 investigator [1] - 19:20 involuntarily [1] - 30:10 involved [3] - 10:19, 10:23, 10:24 involving [2] - 4:5, 7:4 issue [1] - 35:2 items [1] - 16:18 itself [1] - 29:1 J jail [1] - 33:2 jammed [1] - 30:6

January [1] - 37:18 Jay [1] - 10:20 jigsaw [1] - 16:22 joy [1] - 22:18 Juarez [2] - 10:3, 22:10 judge [1] - 25:23 Judge [3] - 1:14, 15:6, 20:21 judgment [4] - 23:3, 25:4, 25:5, 25:10 Judicial [1] - 37:7 jury [6] - 5:14, 5:15, 5:17, 5:23, 6:1, 6:6 justice [1] - 23:9 justifies [1] - 20:24	37:4 license [1] - 33:3 Lieutenant [1] - 10:20 life [4] - 22:18, 23:13, 25:12, 25:13 lift [1] - 18:16 light [9] - 11:10, 12:7, 12:8, 14:15, 18:14, 20:20, 27:11, 27:15 lighting [2] - 13:1, 13:2 lights [10] - 12:7, 12:9, 12:13, 12:16, 13:2, 13:4, 16:19, 18:17 likely [1] - 15:12 lisinopril [2] - 28:19, 28:25 listening [1] - 33:17 literally [2] - 16:22, 17:11 live [1] - 20:15 location [1] - 26:20 look [5] - 12:25, 31:6, 35:9, 35:14, 35:16 looked [2] - 13:3, 19:10 looking [1] - 29:2 looks [1] - 12:8 Lord [1] - 35:14 loss [2] - 34:12, 35:20 love [1] - 25:7 loved [1] - 22:16 low [1] - 15:19 luck [1] - 36:11	34:4 mark [1] - 16:16 Mark [1] - 13:10 marks [3] - 12:20, 16:14, 19:8 Martin [1] - 19:21 match [1] - 18:25 Matt [2] - 10:20, 19:20 matter [3] - 8:23, 9:4, 9:7 max [1] - 7:16 max-out [1] - 7:16 maximum [5] - 23:4, 23:24, 24:7, 35:11, 35:18 mean [1] - 31:20 meaningful [1] - 8:16 means [1] - 5:22 measures [1] - 15:14 medical [1] - 27:5 medication [5] - 8:10, 19:14, 28:22, 31:2, 32:19 medications [7] - 8:9, 27:5, 28:17, 30:23, 31:5, 32:3, 32:14 meet [1] - 25:7 meloxicam [2] - 8:13, 32:15 memory [1] - 14:4 mental [1] - 8:25 mere [1] - 35:1 metal [1] - 18:11 method [1] - 7:14 metoprolol [1] - 32:17 middle [1] - 10:18 Midland's [1] - 29:14 might [2] - 21:9, 25:12 Mike [2] - 10:21, 15:5 mild [2] - 28:20, 32:16 mile [1] - 11:8 miles [4] - 11:8, 15:8, 15:15, 15:23 military [3] - 29:17, 30:9, 30:11 MILLER [3] - 22:5, 22:8, 25:3 Miller [11] - 10:3, 10:8, 10:9, 11:14, 21:22, 21:23, 21:25, 22:2, 22:5, 22:10, 25:2 Miller's [2] - 19:3, 26:17 minimal [1] - 32:25	minimum [2] - 35:11, 35:18 minutes [3] - 5:11, 17:21, 20:10 miss [1] - 22:16 mistake [2] - 23:15, 30:20 month [2] - 29:22, 30:24 months [2] - 29:23, 30:10 moped [11] - 11:5, 11:12, 11:13, 15:17, 15:21, 16:5, 16:7, 16:12, 16:13, 17:2, 17:4 morning [6] - 13:8, 13:14, 17:14, 17:18, 28:13 mortal [1] - 35:1 MOS [1] - 30:2 Mossy [3] - 17:9, 17:12 most [2] - 10:6, 10:7 mostly [2] - 11:17, 25:6 mother [10] - 10:10, 19:15, 19:16, 21:22, 22:10, 25:2, 31:1, 33:22, 34:2, 34:3 mother's [2] - 14:12, 14:13 motions [2] - 6:8 motorcycle [1] - 31:21 moved [1] - 31:23 moving [1] - 10:25 MR [20] - 4:19, 4:22, 5:1, 5:5, 8:9, 9:25, 14:19, 14:20, 16:5, 21:21, 23:20, 25:2, 25:19, 26:3, 28:4, 28:7, 28:10, 33:22, 34:16, 36:12 MRS [1] - 25:3 MS [4] - 22:5, 22:8, 23:23, 34:1 multiple [1] - 16:19 muscle [2] - 28:21, 32:15 must [1] - 19:3	need [2] - 17:20, 28:6 needed [1] - 9:8 needing [1] - 13:17 needs [1] - 33:11 neighborhood [1] - 15:8 nephew [1] - 22:16 nerve [1] - 32:18 never [15] - 15:1, 15:2, 18:2, 24:1, 24:2, 24:4, 24:5, 24:8, 24:11, 24:12, 31:22, 35:20 New [1] - 18:7 news [2] - 13:5, 13:9 next [2] - 29:21, 29:22 night [8] - 10:18, 11:6, 18:2, 19:25, 20:5, 29:8, 30:22, 31:4 NO [1] - 3:2 nobody [1] - 22:17 none [1] - 23:16 NORDAN [1] - 4:13 Nordan [19] - 1:7, 4:4, 4:8, 4:16, 5:6, 13:16, 13:17, 14:3, 14:24, 20:5, 20:14, 21:7, 28:11, 28:12, 28:14, 33:15, 35:6, 36:11 Nordan's [3] - 14:13, 27:22, 29:9 note [1] - 25:19 nothing [1] - 34:25 notice [2] - 14:21, 31:25 noticed [1] - 31:9 now's [1] - 29:6 number [3] - 12:6, 17:16, 26:12
K				
Kathy [2] - 14:13, 34:1 keeps [1] - 24:6 kick [1] - 29:20 kicked [1] - 29:20 killed [2] - 20:10, 32:11 killer [2] - 28:21, 32:17 killing [2] - 11:19, 21:13 kin [1] - 37:15 kind [1] - 25:5 knows [1] - 32:11 Koon [1] - 10:20				
L				
ladies [1] - 34:17 last [1] - 14:3 law [7] - 10:14, 10:16, 11:21, 13:5, 13:23, 17:1, 17:13 Lawler [2] - 10:22, 15:5 Lawrence [2] - 1:18, 4:11 learn [1] - 29:15 least [3] - 12:23, 23:12, 23:15 leaving [2] - 4:4, 21:13 left [3] - 18:2, 20:11, 22:20 length [2] - 22:13, 22:25 lethargic [1] - 31:3 letters [1] - 17:10 Lexington [4] - 1:2, 1:11, 29:12, 37:13 LEXINGTON [1] -				
M				
ma'am [7] - 22:4, 22:6, 23:19, 24:25, 25:17, 33:24, 34:14 main [1] - 33:8 MAIT [2] - 12:19, 15:4 MAIT's [1] - 17:4 Major [1] - 10:19 Maker [1] - 35:15 man [4] - 20:16, 33:6, 34:5, 35:1 manage [1] - 29:15 manner [2] - 7:14, 23:11 marijuana [3] - 19:10, 19:11, 20:18 marine [1] - 29:25 Marine [2] - 29:17,				
N				
name [8] - 13:10, 13:24, 17:23, 19:14, 22:3, 22:5, 23:21, 33:25 names [1] - 10:21 nauseum [1] - 27:12				
O				
o'clock [1] - 28:18 O-m-a-i-r-a [1] - 23:23 Oak [3] - 17:9, 17:12 obviously [3] - 12:17, 13:23, 15:1 occupied [1] - 31:17 OF [3] - 36:14, 37:3, 37:4 offense [2] - 7:1, 7:20 offenses [1] - 5:25 office [4] - 10:2, 12:2, 26:7, 26:9				

officers [1] - 14:5
old [4] - 10:13, 11:3,
 29:8, 29:11
Omaira [2] - 10:11,
 21:23
once [2] - 16:17,
 18:21
one [16] - 7:6, 12:6,
 12:9, 12:23, 17:1,
 19:24, 20:1, 20:6,
 25:12, 26:11, 27:12,
 28:25, 31:23, 31:24,
 33:8, 35:12
one's [1] - 12:20
open [1] - 26:12
opportunity [3] -
 4:16, 9:6, 34:9
Orangeburg [1] -
 18:8
order [2] - 22:23,
 29:14
Orvin [1] - 19:14
ourselves [1] - 34:18
outside [1] - 19:2
owe [1] - 23:15
Owens [2] - 28:10,
 28:12
own [4] - 6:4, 7:25,
 13:11, 26:21

P

paid [1] - 31:22
pain [4] - 28:20,
 32:15, 32:17, 32:18
parents [2] - 10:8,
 20:15
part [1] - 16:24
particularly [1] -
 21:11
parts [3] - 10:25,
 18:24, 26:18
party [1] - 37:16
passenger [1] -
 19:12
passing [2] - 12:23,
 13:4
pathologist [1] -
 11:15
patrol [1] - 15:4
pay [2] - 31:24, 33:6
peers [1] - 5:17
people [6] - 18:18,
 18:22, 19:21, 21:22,
 26:24, 31:23
percent [2] - 30:12,
 33:1
perfect [1] - 22:17
perfectly [1] - 16:24
period [3] - 7:15,

31:8, 35:6
person [5] - 18:19,
 18:22, 22:18, 22:25,
 25:12
person's [1] - 23:13
personal [2] - 19:10,
 34:20
personally [1] -
 35:14
persons [1] - 6:11
perspective [1] -
 34:20
phone [2] - 17:15,
 17:17
photo [3] - 12:10,
 14:17, 16:11
photographs [1] -
 26:13
photos [5] - 12:3,
 12:14, 12:15, 16:10,
 19:8
physical [1] - 32:13
pick [5] - 14:15,
 18:14, 28:12, 28:15,
 30:7
pick-up [2] - 14:15,
 18:14
picture [2] - 12:6,
 16:15
pictures [1] - 24:23
piece [1] - 27:9
pieces [2] - 16:23,
 17:7
pill [1] - 19:17
pipe [1] - 19:12
place [3] - 11:23,
 13:12, 28:13
plastered [1] - 13:9
playing [1] - 13:6
plea [6] - 4:18, 4:25,
 6:17, 8:4, 21:17,
 37:11
plead [3] - 6:25,
 7:19, 7:23
pleading [5] - 4:6,
 4:9, 6:20, 7:4, 7:25
plowed [1] - 15:24
point [4] - 12:25,
 20:8, 29:6, 33:9
Police [1] - 26:10
porch [2] - 18:13,
 18:22
posed [1] - 9:20
positioned [1] - 17:2
power [1] - 30:21
prepare [1] - 10:23
present [4] - 6:5, 6:7,
 12:14
presented [2] - 20:4,
 26:15

pressure [2] - 28:20,
 32:18
pretty [1] - 26:7
priors [1] - 20:25
prison [3] - 6:22, 7:6,
 32:20
probation [2] - 36:7,
 36:8
problem [1] - 29:3
problems [1] - 28:25
procedural [1] - 6:9
proceed [2] - 4:25,
 9:15
proceeding [3] -
 5:18, 6:2, 6:4
proceedings [2] -
 4:1, 37:10
PROCEEDINGS [1] -
 36:14
progresses [1] -
 12:8
prolong [1] - 22:9
promised [1] - 8:3
promptly [1] - 11:22
properly [3] - 4:10,
 25:21, 26:6
propped [1] - 14:21
protect [1] - 6:8
provided [1] - 36:5
providing [1] - 30:18
proving [4] - 5:16,
 5:19, 5:23, 5:24
psycho [1] - 8:12
pulled [1] - 10:16
put [4] - 13:5, 16:22,
 24:17, 26:10
putting [2] - 30:9,
 31:12
puzzle [1] - 16:22

Q

questions [6] - 5:12,
 8:19, 9:11, 9:14, 9:17,
 9:19
quit [1] - 30:18
quite [1] - 10:6

R

rack [3] - 12:8,
 14:15, 18:14
Ram [1] - 14:15
ramifications [1] -
 4:17
RAMOS [1] - 23:23
Ramos [3] - 10:11,
 21:24, 23:20
Randall [3] - 1:7, 4:4,
 4:8

RANDALL [1] - 4:13
random [1] - 36:9
Randy [3] - 14:3,
 28:11, 28:13
rating [1] - 30:11
ready [2] - 26:8, 33:6
really [3] - 15:2,
 25:11, 35:10
reason [4] - 22:15,
 24:7, 27:2, 28:23
reasonable [2] -
 5:17, 5:25
reasoning [1] - 15:12
reasons [1] - 25:22
receipt [1] - 28:11
receive [2] - 6:22,
 7:5
reckless [5] - 4:8,
 6:20, 20:24, 31:20,
 35:25
recognize [4] - 6:21,
 7:5, 7:9, 7:12
reconcile [1] - 35:15
reconciling [1] -
 35:13
reconstruction [1] -
 15:6
Record [1] - 1:6
record [2] - 22:3,
 37:10
recordings [1] -
 24:23
records [2] - 17:16,
 17:17
RECROSS [1] - 2:2
red [4] - 11:10,
 20:20, 27:13, 27:15
REDIRECT [1] - 2:2
reflection [1] - 13:1
regardless [1] -
 35:17
regret [1] - 23:5
relate [1] - 5:10
related [2] - 5:12,
 9:18
relative [1] - 37:12
relaxer [1] - 28:21
relief [1] - 30:17
relying [1] - 26:23
remain [3] - 5:20,
 6:3, 8:15
remediate [2] - 35:3,
 35:12
remedy [1] - 34:25
remorse [3] - 23:5,
 32:4, 34:10
remorseful [1] -
 32:23
report [3] - 28:24,
 30:7, 30:23

Reporter [3] - 1:25,
 37:7, 37:22
REPORTER [2] -
 23:21, 33:25
reports [1] - 27:8
represented [1] -
 4:11
required [1] - 35:6
residence [1] - 31:24
respect [1] - 21:12
resulting [1] - 6:21
return [1] - 31:19
Rez [2] - 10:4, 11:3
Rick [1] - 10:1
rightfully [1] - 23:3
rights [6] - 4:17,
 4:24, 5:9, 6:9, 6:14,
 9:19
Road [1] - 18:8
road [4] - 11:8,
 18:11, 19:23, 21:2
Robin [1] - 1:14
RPR [2] - 1:24, 37:21
run [3] - 7:4, 22:20,
 36:4

S

salient [1] - 21:14
Samuel [1] - 1:17
saw [4] - 14:14,
 18:22, 26:23, 31:14
scene [10] - 4:5,
 10:25, 16:11, 16:17,
 16:21, 16:24, 17:8,
 17:10, 21:14, 31:19
scheduled [2] -
 25:20, 26:5
School [1] - 29:13
school [1] - 29:13
Scott [1] - 10:22
search [1] - 19:1
seated [1] - 10:8
seconds [1] - 20:21
secrets [1] - 24:6
security [1] - 11:25
see [18] - 12:6, 12:8,
 12:10, 12:12, 12:25,
 16:12, 17:3, 18:13,
 18:15, 20:11, 23:2,
 23:23, 24:20, 24:21,
 27:11, 30:16, 30:22,
 31:15
self [1] - 5:21
self-incrimination
 [1] - 5:21
send [1] - 28:15
sending [2] - 13:18,
 13:22
sense [1] - 12:18

sent [3] - 14:8, 28:11, 34:4 sentence [13] - 9:23, 23:4, 23:24, 24:8, 32:25, 35:2, 35:6, 35:9, 35:10, 35:16, 35:17, 35:25, 36:4 serve [1] - 33:1 served [3] - 20:8, 36:3, 36:8 service [1] - 36:6 Sessions [1] - 1:1 set [3] - 25:23, 26:6, 26:9 seven [2] - 12:10, 12:15 several [2] - 26:4, 30:24 severely [3] - 13:22, 29:21, 30:8 Shawn [1] - 28:23 Shell [1] - 11:21 Sheppard [3] - 1:24, 37:6, 37:21 Shop [2] - 27:22, 29:9 shop [3] - 13:13, 13:14, 29:10 show [4] - 12:4, 12:15, 14:16, 20:5 showed [1] - 26:14 showing [3] - 12:18, 16:5, 19:8 shown [1] - 32:3 shows [1] - 28:11 Shuman [2] - 28:10, 28:12 Shuman-Owens [2] - 28:10, 28:12 shut [1] - 26:12 sic [1] - 26:10 sickness [1] - 9:1 side [4] - 6:6, 18:16, 19:5, 19:12 sight [1] - 17:4 signed [1] - 4:10 significance [2] - 14:10, 20:3 silent [2] - 5:21, 6:3 silver [2] - 26:24, 26:25 Simmons [8] - 1:18, 4:12, 4:15, 9:7, 14:18, 16:2, 26:2, 33:14 SIMMONS [12] - 4:19, 4:22, 5:1, 5:5, 8:9, 14:19, 26:3, 28:7, 28:10, 33:22, 34:16, 36:12 Simoneau [2] -	13:11, 13:13 sincere [1] - 34:2 single [2] - 11:4, 12:7 sister [1] - 22:10 sit [1] - 20:20 site [1] - 24:17 situation [2] - 35:1, 35:12 six [4] - 12:10, 12:15, 29:22, 30:9 skid [3] - 12:20, 16:14, 16:16 slammed [1] - 12:20 slash [1] - 30:3 slipped [1] - 30:6 small [3] - 10:15, 29:11, 29:15 smelled [1] - 27:20 smelling [1] - 13:20 society [1] - 33:7 Solicitor [2] - 1:17, 10:1 Solicitor's [1] - 10:2 someone [4] - 18:15, 18:17, 22:21, 26:6 somewhere [1] - 15:8 son [5] - 14:7, 25:6, 25:14, 28:15, 34:12 sorry [14] - 23:14, 24:5, 32:6, 32:7, 32:23, 33:17, 33:18, 33:20, 34:4, 34:10, 34:11, 34:12, 34:20, 34:24 sought [1] - 15:1 sound [1] - 18:11 SOUTH [1] - 37:3 South [4] - 1:1, 1:11, 37:8, 37:13 spasms [1] - 32:15 speculative [1] - 21:12 speed [5] - 15:7, 15:14, 15:15, 15:16, 15:19 spell [2] - 17:12, 23:21 spiritually [1] - 35:13 spoken [1] - 17:24 spotted [1] - 18:9 Stacy [3] - 1:24, 37:6, 37:21 stand [1] - 6:3 start [1] - 10:21 started [4] - 19:21, 29:2, 29:10, 31:3 state [2] - 22:3, 33:12	State [13] - 1:1, 1:5, 1:17, 4:3, 4:7, 5:15, 5:24, 21:8, 21:10, 26:13, 30:25, 35:22, 37:8 STATE [1] - 37:3 State's [1] - 6:10 statements [1] - 26:22 station [2] - 11:20, 11:21 stations [1] - 13:6 stayed [2] - 11:11, 20:20 stealing [1] - 27:24 stem [1] - 11:19 step [1] - 35:13 steps [1] - 30:5 Steve [1] - 15:10 still [10] - 10:15, 12:2, 20:22, 24:6, 29:9, 29:24, 30:4, 32:12, 32:19, 33:4 Stilwell [1] - 1:14 stop [1] - 20:23 stopped [2] - 11:10, 31:9 stops [1] - 18:12 story [2] - 6:7, 18:18 street [1] - 13:2 streets [1] - 18:23 subsequent [1] - 12:14 substance [1] - 36:9 subtle [1] - 12:21 suffer [2] - 8:25, 34:24 suffered [1] - 11:16 suffers [1] - 32:12 sufficiently [1] - 35:20 sum [1] - 21:10 summer [1] - 29:13 sunrise [1] - 13:8 supervision [1] - 33:4 supplies [2] - 28:12, 28:15 suspect [1] - 18:20 suspended [1] - 36:6 suspension [2] - 31:21, 32:1 swear [1] - 27:13 sworn [1] - 4:14 system [2] - 20:18, 33:12	tap [2] - 12:21, 12:22 tapping [2] - 12:12, 12:16 Taylor [4] - 17:23, 17:24, 17:25, 18:5 team [1] - 10:24 Technical [1] - 29:14 technician [1] - 30:4 ten [4] - 6:22, 9:22, 36:1, 36:6 term [1] - 36:8 terminated [1] - 27:22 testified [1] - 4:14 testify [1] - 6:4 testing [1] - 36:10 texted [1] - 17:18 THE [45] - 4:3, 4:15, 4:20, 4:23, 5:2, 5:6, 5:8, 5:14, 6:16, 6:19, 6:25, 7:3, 7:9, 7:12, 7:19, 7:22, 7:25, 8:3, 8:6, 8:10, 8:14, 8:18, 8:22, 8:25, 9:6, 9:10, 9:14, 9:17, 9:22, 14:18, 16:4, 21:7, 21:17, 22:2, 22:6, 23:19, 24:25, 25:17, 26:1, 28:3, 28:9, 33:14, 33:24, 34:14, 34:17 they've [2] - 15:2, 32:17 thousands [1] - 27:24 threatened [1] - 7:22 three [5] - 18:2, 18:9, 18:18, 21:5, 21:22 ticket [2] - 31:22, 31:24 today [11] - 4:25, 6:17, 8:7, 8:16, 9:3, 9:23, 10:5, 24:3, 26:14, 32:7, 33:17 together [3] - 16:23, 27:2, 27:9 tone [1] - 18:14 took [9] - 12:2, 16:10, 17:1, 22:24, 23:24, 24:5, 28:13, 28:18, 32:2 top [1] - 14:15 totally [2] - 25:13, 34:5 touch [2] - 24:2, 26:4 towards [2] - 20:13, 23:6 Town [1] - 15:5 tracking [1] - 11:1 tragedy [4] - 34:20,	34:23, 35:5, 35:19 tragic [1] - 34:19 trail [1] - 16:13 training [3] - 29:24, 30:1 Tramadol [3] - 8:12, 28:20, 32:16 Transcript [1] - 1:6 transcript [1] - 37:10 treat [1] - 30:19 treated [1] - 22:19 treatment [1] - 30:18 treats [1] - 32:19 trial [7] - 5:14, 5:15, 6:2, 25:21, 25:23, 26:5, 26:8 trim [2] - 13:13, 13:14 Trim [2] - 27:22, 29:9 trips [1] - 22:14 trooper [1] - 15:10 truck [34] - 11:12, 12:11, 12:23, 13:21, 14:9, 14:14, 14:15, 14:23, 15:16, 16:6, 16:7, 16:14, 16:20, 16:21, 16:25, 17:2, 17:14, 18:9, 18:12, 18:14, 18:17, 18:23, 19:1, 19:2, 19:5, 19:9, 26:18, 26:24, 26:25, 27:1, 27:13, 31:9, 31:12 true [2] - 4:11, 37:9 truly [5] - 33:17, 33:20, 34:4, 34:11, 34:19 trust [1] - 27:23 trying [2] - 18:16, 19:7 turn [1] - 34:7 turned [2] - 11:11, 20:20 two [11] - 11:8, 14:5, 18:14, 19:9, 22:14, 24:11, 26:12, 26:24, 27:11, 30:24, 32:8 two-tone [1] - 18:14 type [1] - 8:10
U				
under [10] - 5:19, 8:6, 8:9, 17:7, 18:15, 31:21, 31:25, 33:4, 34:19, 34:24 undersigned [1] - 37:6 unfortunate [1] - 34:18				

unoccupied [1] - 31:17 up [15] - 6:22, 6:23, 7:7, 11:12, 14:15, 14:21, 15:11, 16:12, 18:14, 18:16, 28:1, 28:12, 28:15, 30:7, 31:5 upset [1] - 31:6	17:7, 17:8, 17:9, 17:11, 18:15, 18:16, 18:24, 18:25, 19:7, 26:19, 31:10, 31:12, 31:13 wish [3] - 6:16, 6:25, 7:19 wishes [1] - 21:4 witness [4] - 20:6, 26:22, 27:7, 27:19 WITNESSES [1] - 2:2 witnesses [5] - 2:5, 6:5, 6:10, 19:24, 26:22 words [1] - 17:9 worse [1] - 33:18 wreck [6] - 17:20, 17:22, 19:19, 20:9, 28:13, 30:25 wrecked [2] - 13:20, 14:9
V	Y
V.A [4] - 30:15, 30:20, 32:19, 33:10 various [1] - 16:18 vehicle [5] - 12:12, 13:4, 15:7, 31:17, 31:18 vendetta [1] - 27:25 versus [2] - 4:4, 4:7 victim [13] - 10:2, 15:14, 15:15, 15:21, 15:22, 16:15, 19:25, 20:9, 20:13, 20:17, 22:1, 34:21, 35:22 victim's [1] - 34:22 video [4] - 11:12, 11:23, 12:3, 13:5 videos [3] - 24:23, 27:11, 27:13 vindication [1] - 35:9 violent [2] - 7:10, 7:13 voice [3] - 24:2, 24:21, 24:22 voluntarily [1] - 21:18	y'all [3] - 33:17, 33:19, 34:6 year [1] - 25:21 years [14] - 6:22, 7:6, 10:12, 11:3, 22:14, 24:11, 25:12, 29:8, 29:11, 32:8, 36:1, 36:5, 36:6, 36:7 young [1] - 31:23 yourself [1] - 5:19
W	
waive [3] - 4:24, 6:2, 6:16 walking [4] - 29:23, 30:5, 33:10 warrant [1] - 19:1 watched [1] - 27:12 ways [1] - 10:6 week [1] - 25:24 welcome [1] - 22:2 well-loved [1] - 22:16 West [2] - 13:12, 26:9 wheelchair [1] - 29:24 whereby [1] - 7:14 whole [1] - 32:9 Wild [1] - 19:22 winch [18] - 14:20, 14:21, 14:22, 17:3,	

45
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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT
2013 DEC 12 AM 11:25 2011GS3201858
2012GS3202625

The State,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

vs.

Randall Houston Nordan,

Defendant.

**MOTION TO VACATE GUILTY PLEAS
OR, IN THE ALTERNATIVE, TO
RECONSIDER SENTENCING**

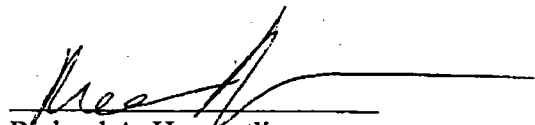
Defendant Randall Houston Nordan, by and through his undersigned attorneys, hereby moves to vacate his guilty pleas entered before The Honorable Robin B. Stilwell on December 9, 2013 or, in the alternative, to reconsider the sentence imposed upon him by the Court.

The grounds of the motion are as follows: first, the Defendant was not fully advised of his constitutional rights by his attorney of record or the potential punishments that he could receive as a result of the guilty pleas; second, the Defendant was not advised of his ability to present mitigating evidence in support of his case during the sentencing phase of the pleas; and third, the court was not provided a full and accurate presentation of the Defendant's history, material facts of the incident and other mitigating circumstances so that the Court in imposing its sentence and exercising its discretion could enter judgment based on fairness, reasonableness, and justice for all of the parties involved.

As a result of the above deficiencies, Defendant prays that the Court vacate his guilty pleas and resulting sentences or, in the alternative, reconsider the sentencing of the Defendant in light of substantial mitigating evidence. The Defendant further prays for a hearing of this motion.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,



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ATTORNEYS FOR THE DEFENDANT

Columbia, South Carolina
December 12, 2013

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

The State,

v.

Randall Houston Nordan,

Defendant.

IN THE COURT OF GENERAL SESSIONS

ELEVENTH JUDICIAL CIRCUIT

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER AND/OR
VACATE HIS GUILTY PLEA**

2011-GS-32-1858

2012-GS-32-2625

This matter comes before me pursuant to the Defendant Nordan's Motion to Reconsider and/or Vacate the Defendant's Guilty Plea. This Court has had the opportunity to review the written submissions of each party to this case together with all Affidavits and documents attached thereto. Furthermore, this Court has reviewed the transcript of record in full. Having had the opportunity to do so, the Court respectfully denies the Defendant's Motions.

This Court specifically finds that the plea proceeding suffers from no material constitutional or procedural defect. The Defendant was fully informed of his constitutional rights and the ramifications of his plea and thereafter freely and voluntarily entered the plea. That plea was entered with the advice of counsel. A review of the record demonstrates that plea counsel made a professional, competent and persuasive argument to the Court in favor of his client's position. The arguments and mitigation made by plea counsel do not differ in any substantial way from those presented in the Defendant's arguments in his Motions to Reconsider or Vacate. The Court was fully advised of those characteristics and that conduct which would commend the Defendant to society in general and those circumstances which would mitigate his conduct. The additional information and Affidavits contained in the Defendant's brief shed no

1052

additional substantial light on the matter which would cause this Court to alter or amend its ruling.

Furthermore, this Court finds that the character of the victim is not relevant to sentencing in this matter. The victim may have very well been an imperfect person; however, that does not make him any less of a person or, tragically, any less dead.

After careful reflection and review, the Defendant's motion is denied.

AND IT IS SO ORDERED.



ROBIN B. STILWELL

February 28, 2014
Greenville, South Carolina

2012

The South Carolina Court of Appeals

The State, Respondent,

v.

Randall Houston Nordan, Appellant.

Appellate Case No. 2014-000622

The Honorable Robin B. Stilwell

Lexington County

Trial Court Case No. 2011GS3201858, 2012GS3202625

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JUN - 2 2014

ATTORNEY GENERALS
OFFICE

ORDER

Appellant has failed to provide a sufficient guilty plea explanation, as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

Joy A. Kiteley
CLERK

Columbia, South Carolina

cc:

Randall Houston Nordan, 358103

Samuel R. Hubbard, III, Esquire

Salley W. Elliott, Esquire

Alan McCrory Wilson, Esquire

Richard A. Harpootlian, Esquire

Robert Michael Dudek, Esquire

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May 29, 2014



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JUN 17 2014

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ATTORNEY GENERALS

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
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June 16, 2014

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557

REMITTITUR

Re: The State v. Randall Houston Nordan
Lower Court Case No. 2011GS3201858, 2012GS3202625
Appellate Case No. 2014-000622

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Randall Houston Nordan, 358103
Samuel R. Hubbard, III, Esquire
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Richard A. Harpootlian, Esquire
Robert Michael Dudek, Esquire

ORIGINAL
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FORM 5

STATE OF SOUTH CAROLINA

County of LexingtonRANDALL Houston NORDAN
Full name and prison number (if any) of Applicant
358103

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS
2014 AUG 11 A 10:22BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

APPLICATION FOR

POST-CONVICTION RELIEF

2014CP3202893

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Allendale CT
2. Name and location of Court which imposed sentence Lexington County
Lexington County Judicial Court
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011 GS 3201858
 - (b) 2012 GS 3202625

A TRUE COPY
[Signature]
Lex. Co. C.C.C.P., G.S. & E.O.

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- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 12/9/13 2014 AUG 11 A 10:22
- (b) 12/9/13
- (c) _____ BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒ _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. Supreme Court of South Carolina
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. May 29, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. No
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: 2014 MAR 11 A 10:22
- (a) See additional page #10 BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See additional page #11
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? 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? _____
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. Direct appeal from Guilty plea
- ii. entered December 9, 2013
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of Appeal South Carolina
- ii. _____
- iii. _____
- iv. _____

FILED

(c) the disposition thereof:

i. dismissed and remitted

2014 AUG 11 A 10:23

ii. _____

iii. _____

iv. _____

DETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

(d) the date of each such disposition:

i. 3/29/2014

ii. _____

iii. _____

iv. _____

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

i. none

ii. _____

iii. _____

iv. _____

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

Y - motion to reconsider sentencing and/or
withdrew guilty plea Feb 2014

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

Judge Robin B. Stilwell

(a) which grounds have been presented:

i. See attached page #15A

ii. _____

iii. _____

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

i. See attached page #15B

ii. _____

iii. _____

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

2014 AUG 11 A 10:23

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

- (a) Ineffectiveness of Counsel
(b) _____
(c) _____

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

- (a) your arraignment and plea? Y - Laurence Simmons
(b) your trial, if any? Y - Laurence Simmons
(c) your sentencing? Y - Laurence Simmons
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Y - Dick Harpottian / Eric Bland
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

none

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. Laurence Simmons
1315 N. Lake Ave - Lex SC 29072
ii. Dick Harpottian
1410 Laurel St - Colo SC 29202
iii. Eric Bland
1500 Calhoun St - Colo SC 29202

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

- i. Laurence Simmons - Plea trial
ii. Motion to Vacat guilty plea
or reconsider Sentencing Harpottian / Bland
iii. _____

ORIGINAL

FILED

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

Removal - I would like to have the
guilty plea withdrawn along
with the term of imprisonment

2014 AUG 11 A 10:23

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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

no

2014CP3202893

STATE OF SOUTH CAROLINA

VERIFICATION

County of

Lexington

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

Kathy Foster POA
Kathy Foster

SWORN to and subscribed before me this 11
 day of August, 2014.

Dina Payne (L.S.)
 Notary Public

My Commission Expires: My Commission Expires December 8, 2018

ORIGINAL FILED

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

2014 AUG 11 A 10:23

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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

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

Kathy Foster POA
Applicant
Kathy Foster

SWORN or affirmed to and subscribed before me this

11 day of August, 2014.

Kim Payne
Notary Public

My Commission Expires: My Commission Expires December 8, 2018

2014CP3202893

#10/#11

ORIGINAL

Received Representation from Counsel beneath the Standard of Care required under circumstances.

Ineffectiveness of Counsel resulted in me being forced to plead guilty to a crime for which I did not commit and the state could not prove required elements, if I went to trial, beyond a reasonable doubt. My attorney did not fully discover and provide Court with evidence which would have shown the biased nature of the testimony provided by April Hughes. Equally as important, my attorney did not timely obtain the requested test and expert opinion in regard to the Physical effects caused by the prescribed Prescription that I was taking after my Military Service. There was no evidence that I was driving under the influence alcohol at the time of the alleged incident, yet Government kept arguing this to the Court and it was not relevant to the Crime Charged. Finally, my attorney did not properly disclose and investigate conduct and activities immediately prior to alleged incident occurred.

FILED

2014 AUG 11 A 10:23

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2014CP3202893

#15A

Judge Robin Stilwell misapprehended the facts which formed the basis of the legal plea because the State and my Attorney did not properly inform the Court of all material facts necessary for said Court to accept my knowingly and Voluntary plea of guilty.

#15B

Lower Court on Motion to reconsider sentence and/or repeal Guilty plea

2014 AUG 11 A 10:23
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

FILED

2014CP3202893

STATE OF SOUTH CAROLINA

COUNTY OF

LexingtonRandall Houston Nordan

358103

Plaintiff

IN THE COURT OF COMMON PLEAS

ORIGINAL

CIVIL ACTION COVERSHEET

FILED

-CP-

vs.

2014 AUG 11 A 10:22

State of SC

BETH A. CARRIG

Defendant

CLERK OF COURT

LEXINGTON, SC

Case #:

Telephone #:

Fax #:

Other:

E-mail:

803 603 0922

803 808 2982

KATNORDAN@AOL.Com

(Please Print)

Submitted By:

Address:

Kathy Foster426 Walter Paul RdLex SC 29072

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____-CP-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
-
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript of Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Commission (991) ☐ Other (999)
-
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator (510)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Foreign Subpoenas (650) ☐ Motion to Quash Subpoena in Out-of-County Action (660)

Submitting Party Signature: Kathy FosterDate: 8/11/14

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

FILED

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

AUG 11 A 10:22

You are required to take the following action(s):

BETH A. CARRIGG
CLERK OF COURT

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.



FILED

RECORDED

AUG 11 AM 10:22

JUN 17 2014

Richard A. Harpootlian, PA.
Calendar

The South Carolina Court of Appeals
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON

JENNY ABBOTT KITCHINGS
CLERKV. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMMIT STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-1830
www.sccourts.org

June 16, 2014

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557

2014CP3202893

REMITTITUR

Re: The State v. Randall Houston Nordan
Lower Court Case No. 2011GS3201858, 2012GS3202625
Appellate Case No. 2014-000622

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Randall Houston Nordan, 358103
Samuel R. Hubbard, III, Esquire
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire
Richard A. Harpootlian, Esquire
Robert Michael Dudek, Esquire

The South Carolina Court of Appeals

The State, Respondent,

v.

Randall Houston Nordan, Appellant.

Appellate Case No. 2014-000622

The Honorable Robin B. Stilwell

Lexington County

Trial Court Case No. 2011GS3201858, 2012GS3202622

ORDER

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2014 JUN 18 PM 2:47

FILED

Appellant has failed to provide a sufficient guilty plea explanation, as required by Rule 203(d)(1)(B)(iv) of the South Carolina Appellate Court Rules. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY

Joy A. Kittles
CLERK

Columbia, South Carolina

cc:

Randall Houston Nordan, 358103

Samuel R. Hubbard, III, Esquire

Salley W. Elliott, Esquire

Alan McCrory Wilson, Esquire

Richard A. Harpootlian, Esquire

Robert Michael Dudek, Esquire

FILED

May 29, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Randall Houston Nordan,	)	C.A. No. 2014-CP-2893
S.C.D.C. No. 358103,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	(counsel has been retained) ¹
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed August 11, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the Department of Corrections pursuant to orders from the Lexington County Clerk of Court. Applicant was indicted for leaving the scene of the accident involving death (2011-GS-32-1859) at the July 2011 term of the Lexington County and reckless homicide (2012-GS-32-2625) at the October 2012 term of Lexington County Grand Jury. He was represented by Lawrence C. Simmons, III., Esq. On December 9, 2013, Applicant pled guilty as indicted before the Honorable Robin B. Stilwell. Judge Stilwell accepted the pleas and sentenced Applicant to a term of twenty (20) years imprisonment suspended ten (10) years active service and five (5) years of probation for leaving the scene of an accident involving death, and to a term of ten (10) years imprisonment for reckless homicide.

A post-plea motion for the reconsideration of the sentences was filed on Applicant's behalf. In an order dated February 28, 2014, and filed March 3, 2014, Judge Stilwell denied the motion.

¹ By notice of appearance dated January 8, 2015, Richard A. Harpootlian, Esq., announced his representation in this matter.

A notice of appeal was filed on Applicant's behalf by Richard A. Harpootlian, Esq., on March 21, 2014. By order filed on May 29, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records.² The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel:
 - a. failure to investigate Applicant's version of the facts: "there was no evidence that I was driving under the influence [sic] alcohol at the time of the alleged incident, yet Government kept arguing this to the Court;"
 - b. failure to investigate Applicant's "conduct and activities immediately prior to alleged incident;"
 - c. failure to consult an independent expert: "my attorney did not timely obtain the requested test and expert opinion in regard to the test and expert opinion in regard to the physical effects caused by the prescribed prescriptions I was taking;"
 - d. failure to advise Applicant to plead guilty: State's evidence did not establish the requisite elements of the offenses
 - e. failure to object and move to withdraw Applicant's plea: no factual basis to support the convictions.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not specifically pled in this PCR application or in timely amendments will be opposed by the State at an evidentiary hearing. S.C. Code '17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by

² A copy of Applicant's guilty plea transcript will be forwarded upon receipt.

inmates will not be considered at the PCR hearing. Respondent intends to move to dismiss Applicant's action absent timely and sufficient amended pleadings.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

IV.

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

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

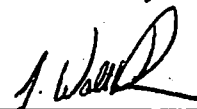
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE

Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

Telephone: (803) 734-3737

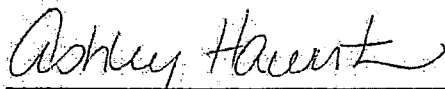
March 18th, 2015

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2014-CP-32-2893
RANDALL HOUSTON NORDAN, #358103)	)	
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:

Mr. Richard A. Harpootlian, Esquire
Richard A. Harpootlian, PA
PO Box 1090
Columbia, SC 29202

DATED this 18th day of March, 2015.



Ashley Haworth, Legal Assistant
 For Respondent

1 State of South Carolina

Court of Common Pleas

2 County of Lexington

3

4 Randall Houston Nordan,)

Transcript of Record

5 Applicant,)

2014-CP-32-02893

6 vs.)

7

The State of South Carolina,)

8

Respondent.)

9

10

January 11, 2016

Lexington, South Carolina

11

12 B E F O R E:

13 The Honorable J. Mark Hayes, II, Judge

14

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

16 Richard A. Harpootlian, Esquire
Attorney for Petitioner/Applicant

17

18 Patrick Schmeckpeper, Assistant Attorney General
Attorney for the State of South Carolina

19

20

21

22

Stacy S. Johnson, RPR
Circuit Court Reporter

23

24

25

I N D E X

WITNESS

PAGE

C. Lawrence Simmons

Direct Examination by Mr. Harpootlian 5

Cross-Examination by Mr. Schmeckpeper 82

Redirect Examination by Mr. Harpootlian 99

James Bartling

Direct Examination by Mr. Harpootlian 104

Cross-Examination by Mr. Schmeckpeper 119

Redirect Examination by Mr. Harpootlian 123

Stephanie Borzendowski

Direct Examination by Mr. Harpootlian 127

Cross-Examination by Mr. Schmeckpeper 141

Redirect Examination by Mr. Harpootlian 145

Randall Houston Nordan

Direct Examination by Mr. Harpootlian 149

Cross-Examination by Mr. Schmeckpeper 168

Redirect Examination by Mr. Harpootlian 184

Samuel R. Hubbard, III

Direct Examination by Mr. Schmeckpeper 187

Cross-Examination by Mr. Harpootlian 199

Redirect Examination by Mr. Schmeckpeper 230

Recross Examination by Mr. Harpootlian 232

Certificate of Reporter 238

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
Petitioner's 1	Medical Report	10	14
Petitioner's 2	Guilty Plea Transcript	11	
Petitioner's 3	State vs. Pittman	28	
Petitioner's 4	Indictment	34	
Petitioner's 5	State vs. Ray	44	
Petitioner's 6	State vs. Rowell	50	
Petitioner's 7	Autopsy Report	53	53
Petitioner's 8	Receipt	55	55
Petitioner's 9	Bartling Resume	105	118
Petitioner's 10	Medical Records	123	123
Petitioner's 11	Borzendowski Resume	127	141
Petitioner's 12	Photograph	140	141
Petitioner's 13	Photograph	161	162
Petitioner's 14	Crash Video	186	186

P R O C E E D I N G S

BAILIFF: All rise. Court is now in session. The Honorable Judge Mark Hayes presiding.

THE COURT: Thank you. You may be seated.

Okay. I've got that this is the case of Randall Houston Nordan versus the State of South Carolina. Is the State ready?

MR. SCHMECKPEPER: Yes, Your Honor.

THE COURT: And is the Applicant ready?

MR. HARPOOTLIAN: Yes, Your Honor.

THE COURT: All right. Yes, sir.

MR. HARPOOTLIAN: If it please the Court, Your Honor, I don't have any opening state -- opening comments to make. I'd like to go ahead and proceed to call witnesses.

THE COURT: Okay.

MR. HARPOOTLIAN: Mr. Lawrence Simmons to the stand, please.

THE COURT: Sir, come on around and let the Clerk of Court swear you in.

C. LAWRENCE SIMMONS, III,

having been duly sworn, testified as follows:

THE COURT: The lady in front of you is the court reporter, as you know, so speak up clearly so she can hear you.

THE WITNESS: I'm gonna try to.

1 **THE COURT:** Okay.

2 DIRECT EXAMINATION

3 BY MR. HARPOOTLIAN:

4 Q. State your full name for the record, please.

5 A. C. Lawrence Simmons, III.

6 Q. And, Mr. Simmons, are you an attorney?

7 A. I am.

8 Q. And how long have you been practicing law?

9 A. Twenty-six years.

10 Q. All right. And you do primarily criminal work and
11 personal injury work?

12 A. No, sir.

13 Q. What do you do?

14 A. I do domestics, criminal, personal injury, including
15 worker's comp, and then we also have businesses we
16 represent.

17 Q. Okay. So you do a variety of different things?

18 A. That would be correct.

19 Q. Do you hold yourself out as a lawyer who handles
20 criminal cases?

21 A. Yes.

22 Q. And, in fact, did you take the case of Randall Houston
23 Nordan?

24 A. I did.

25 Q. And do you remember when that was?

1 A. I think it was around May of 2011.

2 Q. And was that before or after he was arrested?

3 A. Before.

4 Q. Okay. Now he was only arrested initially anyway
5 for --

6 A. Hit and run fatality.

7 Q. -- hit and run fatality. And it was some two years
8 later before he was indicted for reckless homicide?

9 **MR. SCHMECKPEPER:** Objection, Your Honor. Leading.

10 **MR. HARPOOTLIAN:** Well, Your Honor, he's an adverse
11 witness.

12 **THE COURT:** All right. I'm gonna let him. We don't
13 have a jury. This is just some background information.

14 **MR. HARPOOTLIAN:** Thank you.

15 **THE WITNESS:** I don't remember what -- when the date
16 was. I don't think it was two years. I was thinking that
17 it was in 2012.

18 BY MR. HARPOOTLIAN:

19 Q. All right. Now tell me, and tell the Court, please,
20 what you did to investigate this case.

21 A. The first thing I did was I got a call from Kathy
22 Foster saying that basically they were taking Houston -- if
23 that's okay to call him by his first name to distinguish
24 between he and his father -- that the Town of Lexington
25 Police Department was taking Houston to the police

1 department to question him. So after a couple of calls it
2 finally was apparent that she actually wanted me there.

3 This was after-hours. She called on a cell phone.

4 Q. And you went -- you went to the police department?

5 A. I went to the police department where they already
6 had Houston in the interrogation room. If you look at the
7 video, you can see me come in, and I asked Houston what he
8 was going to tell law enforcement. After what he told me,
9 I advised him not to make a statement.

10 Q. Okay.

11 A. So --

12 Q. Had you talked -- had you talked to Houston prior to
13 telling him not to make a statement?

14 A. No, sir.

15 Q. Okay.

16 A. I'm sorry, had I talked to him prior to him being at
17 the police department?

18 Q. Either -- prior to instructing him not to make a
19 statement to the police, had you talked to him at any point
20 to find out what his -- his story was?

21 A. Yes, I talked to him in the interrogation room. I
22 made sure that all of the cameras and microphones were off
23 and he gave me a story.

24 Q. And the story was he had no recollection of hitting
25 anybody; isn't that correct?

1 A. That's not correct.

2 Q. What did he tell you?

3 A. He told me that he was out driving his truck and that
4 he went over a railroad crossing that had a hump in it and
5 that that broke the winch off of his truck, so he had to
6 get it to where he could repair it; that he called a friend
7 who came out to help him and they got it back to his
8 daddy's shop where he then attempted to repair his truck.
9 I told him at that time that I didn't even believe that
10 story and, in any event, it put him behind the wheel, so I
11 said unh-unh, you're not giving a statement today.

12 Q. So at some point did he indicate to you he had no
13 recollection of what occurred on the night in question?

14 A. No, sir.

15 Q. He never told you that?

16 A. He told me that he couldn't recollect part of the
17 night in question.

18 Q. And the part of the night would have been the part of
19 the night where he would have been driving at the scene of
20 the accident; isn't that correct?

21 A. Correct.

22 Q. Okay. Now, as a matter of fact, you tell the judge
23 during the guilty plea he's got no recollection of hitting
24 anybody that night, correct?

25 A. That's right.

1 Q. And you represented that to the court as an officer of
2 the court?

3 A. That's right.

4 Q. And that he had no recollection of committing a
5 reckless homicide or leaving the scene of an accident;
6 isn't that correct?

7 A. Correct. That's correct.

8 Q. And as an officer of the court, you represented that
9 because that's what your client had represented to you; is
10 that correct?

11 A. That is correct.

12 Q. And, as a matter of fact, you hired a physician, one
13 Shawn Fuller --

14 A. Correct.

15 Q. -- to examine the medications he had been under,
16 correct?

17 A. Yeah, he examined all of his medical records from the
18 VA.

19 Q. And let's back up for just a second while she pulls
20 his report. And, again, because we have a judge here, I'm
21 gonna sort of give him a summary. He had been in the
22 Marines?

23 A. That's correct.

24 Q. And he had suffered an injury while he was in the
25 Marines --

1 A. That is correct.

2 Q. -- which broke several vertba -- vertebra in his back;
3 is that correct?

4 A. I don't remember the extent of his injuries. It seems
5 like there was a back injury and a knee injury.

6 Q. Right. And as a result of those injuries, the Marines
7 and then the VA, after he was discharged for disability --
8 he was discharged for disability, correct?

9 A. Correct.

10 Q. He was put on medication?

11 A. Correct.

12 Q. And you got that medication -- a list of that
13 medication, correct?

14 A. Correct.

15 Q. And you gave it to Shawn Fuller, who's a medical
16 doctor?

17 A. Technically, I didn't. Houston did when he went to
18 meet with him.

19 Q. Okay. Produced his VA records?

20 A. Correct.

21 Q. Okay. And --

22 **MR. HARPOOTLIAN:** Could you mark this, please.

23 (Petitioner's/Applicant's Exhibit Number 1, a medical
24 report, was marked for identification.)

25 BY MR. HARPOOTLIAN:

1 Q. Okay. Let me show you this document. Is that
2 the report you received from Shawn Fuller based on the
3 documents given to him?

4 A. I don't remember.

5 Q. You don't remember if this is the report?

6 A. I don't remember if this is the report or not. I
7 remember that we handed in a report during the plea, so
8 that should be something that's in the evidence.

9 Q. Well, actually, if you look at the plea, you showed it
10 to the court, but it was not entered into the evidence.
11 Would you dispute that?

12 A. I don't remember, but I --

13 Q. Okay. Let's --

14 A. -- I knew that we gave it to the judge, yes.

15 **MR. HARPOOTLIAN:** Do you mind if I hand him a copy of
16 the transcript of the plea?

17 **MR. SCHMECKPEPER:** No.

18 **MR. HARPOOTLIAN:** Your Honor, for the record I'm
19 handing -- you know, let's go ahead and mark this.

20 (Petitioner's/Applicant's Exhibit Number 2, a guilty
21 plea transcript, was marked for identification.)

22 **MR. HARPOOTLIAN:** Okay. Take a minute and look --
23 look over this guilty plea transcript. Your Honor, let me
24 get a copy for you.

25 **THE WITNESS:** Would it be possible for you to actually

1 direct me to the page?

2 MR. HARPOOTLIAN: Yes, as soon as I hand this up to
3 the --

4 THE COURT: I think I've got one.

5 MR. HARPOOTLIAN: You've got one?

6 THE COURT: In the package that the Attorney General
7 gave me, it has a transcript of record.

8 MR. HARPOOTLIAN: That -- that would be it. Let me
9 find this for him.

10 BY MR. HARPOOTLIAN:

11 Q. So if you go to page 28, top of page 28, it says,
12 "Now I would like to hand the Court up a couple of
13 documents, if I may", right?

14 A. Okay.

15 Q. Do you see that, Mr. Simmons, page 28?

16 A. Well, which line, Mr. Harpootlian?

17 Q. The first -- top line, line 1. The court says "Have
18 you seen this?", referring to Mr. Hubbard, who's sitting
19 over here, and Mr. Hubbard, "I have". That means he would
20 have seen the document. "Your Honor, my only question is
21 if there's a defense of 'I don't know what happened', I
22 think we need to address that". You say, "That's not
23 what's going on, Your Honor". Court, "Okay. I'll hear you
24 out". And then you go down, line 17, "Here's what Houston
25 did wrong. The medications he took at approximately 11:00

1 that evening included lisinopril, which was for blood
2 pressure, tramadol, which is a very mild painkiller,
3 cyclobenzaprine, which is a muscle relaxer and
4 antiinflammatory drug. This was the reason we hired
5 Dr. Shawn Fuller to give his report. One of the main
6 problems was the lisinopril" --

7 A. Lisinopril.

8 Q. -- "lisinopril can cause blackouts, and that's what
9 our defense was. And we started looking at this case and
10 said, you know what, the problem is that the defense can
11 also convict you, where do you go with this", and then you
12 go into his background.

13 So would that be this report that you showed to the
14 court?

15 A. It appears to be. And I read through it while you
16 were talking, yes.

17 Q. And Shawn Fuller, the expert you hired, he's a medical
18 doctor, testified, the last paragraph, "The changes I see
19 prior to this date", that would be prior to the date of the
20 wreck --

21 **MR. SCHMECKPEPER:** Your Honor, I'm gonna object to
22 this as hearsay. Mr. Fuller is here ready to testify. It
23 doesn't appear that Mr. Simmons can competently testified
24 to what he's introduced.

25 **MR. HARPOOTLIAN:** Your Honor, this is a --

1 **THE COURT:** I'm gonna -- I'm gonna let him go into
2 it. I mean, this is, anybody knows -- I mean, are you
3 contesting that this is not the report that was given to
4 the judge?

5 **MR. SCHMECKPEPER:** Your Honor, it doesn't actually say
6 in here that it was and Mr. Simmons' memory isn't clear
7 that it was the report that was given to the judge. At
8 this point I'm gonna contest that it isn't necessarily
9 clear that it was given to the judge and it is hearsay
10 because it was written by Dr. -- by the doctor.

11 **MR. HARPOOTLIAN:** Your Honor, let me make a point here
12 real quickly. If they're taking the position this report
13 wasn't given to the judge, then let me follow-up with this
14 question.

15 BY HR. HARPOOTLIAN:

16 Q. Show me where you gave a report to the judge.

17 A. I just told you this was the report.

18 Q. Okay.

19 **MR. HARPOOTLIAN:** Now that's all right?

20 **MR. SCHMECKPEPER:** Yeah.

21 **MR. HARPOOTLIAN:** Okay.

22 (Petitioner's/Applicant's Exhibit Number 1, a medical
23 report, was admitted into evidence.)

24 BY MR. HARPOOTLIAN:

25 Q. So let's look at the last -- it wasn't put into

1 evidence, but you showed it to the judge, correct?

2 A. Correct.

3 Q. Okay. The last paragraph or last line said, "The
4 changes I see prior to this date could have also caused
5 cognitive -- could have caused cognitive impairment also.
6 It is, therefore, my medical opinion that Mr. Nordan did
7 suffer from some type of cognitive impairment from the
8 medication, particularly with antidepressants, muscle
9 relaxers, insomnia medications, that led to this accident
10 of 5-9-2011".

11 So Mr. Nordan, according to this, indicated to him
12 he'd had a blackout, didn't remember what happened,
13 correct?

14 A. To my knowledge, that's what he told him.

15 Q. I mean, that's what's written in the report, right?

16 A. Yeah.

17 Q. Do you want me to review that with you?

18 A. No.

19 Q. Okay. And then your expert says, "Based on the
20 medications he took, that's consis -- that blackout is
21 consistent with the medications and the change in
22 medications", correct?

23 A. Correct.

24 Q. And there was no one else -- no one -- no other expert
25 you consulted, no other medical doctor you consulted, that

1 would say something different than what Dr. Fuller said; is
2 that correct?

3 A. That's not correct.

4 Q. Well, who did you talk to?

5 A. I talked to Amy Epps, the cardiologist.

6 Q. She's a cardiologist?

7 A. Yes.

8 Q. And?

9 A. I talked to -- I talked to Alana Williams, a family
10 doctor, and then I talked to several nurses and --

11 Q. Wait, wait, wait, wait. Wait one second. Wait one
12 second before you go into what they said. You stood in
13 front of the court, handed them this report --

14 A. Yeah.

15 Q. -- and represented this to be accurate; did you not?

16 A. Correct, I did.

17 Q. Based on discussions with everybody?

18 A. No, sir.

19 Q. No, no?

20 A. Based on discussion with Dr. Fuller.

21 Q. So you were not telling the court about other
22 information you had? You were asking the court to rely on
23 a report that was false?

24 A. I'm not saying the report was false.

25 Q. Well, you had a -- the only expert -- written expert

1 report you had said that it was consistent with a blackout.

2 A. Correct.

3 Q. You told the court he had blacked out.

4 A. Correct.

5 Q. So did you believe he blacked out?

6 A. Did he believe he had?

7 Q. Yes.

8 A. No, sir.

9 Q. So you made an intentional misrepresentation to the
10 court?

11 A. No, sir. If he told me he blacked out, then he may
12 have blacked out. The problem was that he made a phone
13 call four minutes after the wreck and then he made another
14 phone call and then he sent a text to someone that said
15 "I've been in a bad wreck, I need help".

16 Q. Is that consistent or incon -- I mean, isn't that
17 inconsistent with the fact that he didn't know what had
18 happened during the wreck?

19 A. I don't know because he was also in the Wild Hare
20 prior to that time and -- yeah, this is one of the problems
21 that I had with what the solicitor's office did; was that
22 they said that there was a bartender who was in the Wild
23 Hare who was a bartender at another facility and they
24 stated that she said if he had been at her bar that night
25 she wouldn't have served him, and I had a problem with that

1 because they never revealed that to me.

2 Q. So -- so you didn't even know about it?

3 A. No, I knew that there was a person that Mr. Miller had
4 called and that they had a note in the file that he had
5 done this and I think it was after he had left the bar she
6 was supposed to go in and give the solicitor's office a
7 statement. She never did.

8 Q. Did you go interview her?

9 A. No, because I didn't need to because the only thing it
10 said was that there was a phone call because she had left
11 the bar before Mr. Miller.

12 Q. Okay. What -- while we're on it, what witnesses did
13 you interview? I've looked at your file. Tell me what
14 witnesses you did interview.

15 A. I interviewed Steve Dedugen.

16 Q. Who is?

17 A. That is someone who Kathy Foster called me and told
18 me that Jeff Coates had information that Mr. Miller and
19 someone else were using cocaine at the Wild Hare.

20 Q. Now Mr. Miller would be the deceased?

21 A. That's correct.

22 Q. Okay. And did -- who else did you interview?

23 A. Well --

24 Q. By the way, did you interview that person?

25 A. Yes.

1 Q. Did you make notes?

2 A. Yes.

3 Q. And are they in your file?

4 A. No.

5 Q. Why not?

6 A. I don't know. But Mr. Dedugen --

7 Q. Well, wait, wait, wait, wait, wait. Okay. You've
8 produced your file here today, right?

9 A. I produced my file to you weeks ago.

10 Q. Right, but you brought your original -- the copy of
11 the original you made for me?

12 A. No.

13 Q. You didn't bring it?

14 A. No.

15 Q. It was subpoenaed to be here today?

16 A. I haven't seen the subpoena.

17 Q. Did you give a copy of your file to the attorney
18 general's office?

19 A. I don't know if I gave the file -- a copy of my file
20 to them or not.

21 Q. But have you looked in your file to see if there are
22 notes of your interview with anybody?

23 A. Usually I keep my notes on the computer. Now I know
24 that there are handwritten notes from a review of the file.

25 Q. Of who?

1 A. Notes basically that are in our office between who did
2 what and who talked to who.

3 Q. But you don't have an interview -- notes about
4 somebody saying I interviewed so and so, Witness A, and
5 this is what they said?

6 A. No.

7 Q. There's nothing like that in the file, is there?

8 A. No.

9 Q. No, you agree with me there's nothing?

10 A. I agree with you.

11 Q. And you've not -- I've asked or subpoenaed the entire
12 file, correct?

13 A. I have not seen the subpoena, so I don't know who you
14 served.

15 Q. Well, didn't I -- you produced to me at my request the
16 entire file?

17 A. To my knowledge, yes.

18 Q. How about look at this document. Have you seen that
19 document --

20 A. No, sir.

21 Q. -- served on Friday to produce your entire file?

22 A. No, sir.

23 Q. Okay. Well, at the lunch break can you go get your
24 file and bring it?

25 A. I guess that's fine.

1 **MR. HARPOOTLIAN:** Your Honor?

2 **THE COURT:** Okay.

3 **THE WITNESS:** Do you want it right now or --

4 **MR. HARPOOTLIAN:** No.

5 **THE COURT:** When we take a break.

6 **MR. HARPOOTLIAN:** When we take a break is fine.

7 BY **MR. HARPOOTLIAN:**

8 Q. Your office isn't far from here, is it?

9 A. No.

10 Q. Okay. But you would concede that there are no notes
11 of any interviews with any witness in this file that you
12 produced to me?

13 A. That's correct.

14 Q. Okay. Now in terms of this interview with Mr. Nordan
15 where you say he said something about being in a bad wreck
16 and -- who did he -- did he say that to you?

17 A. No, he sent a text message to his on again, off again
18 girlfriend, Brooke Ayers.

19 Q. Is that in the file, that text message?

20 A. Yes.

21 Q. Okay. And that text message was sometime after --
22 about an hour after the collision with Mr. Miller; was it
23 not?

24 A. Correct.

25 Q. And there's no question he's indicated to you that he

1 noticed that his winch was dragging under the car at some
2 point and pulled over, right?

3 A. Right.

4 Q. And he thought he hit something, didn't know what he
5 hit, correct?

6 A. The first story was that he hit a railroad track
7 crossing which caused the winch to break.

8 Q. Right, but -- but he knew that he'd hit something at
9 some point, but he never said -- he never told you he hit
10 Mr. Miller, correct?

11 A. No, he didn't.

12 Q. He told you he blacked out; that he doesn't have a
13 recollection of hitting anything, correct?

14 A. Right.

15 Q. Did you show him the videotape?

16 A. Yes, sir.

17 Q. Okay. And in the videotape -- after seeing the
18 videotape, did he at that point say, "Oh, my God, that's
19 me"? Or he still didn't know?

20 A. No, he just -- he just kept silent.

21 Q. Okay. Now -- but -- but you handed to the court this
22 report that he had a blackout?

23 A. Correct.

24 Q. Everything you have is consistent with him having a
25 -- when I say everything you have, his statements are

1 consistent with him having a blackout at the time of the
2 collision?

3 A. Correct.

4 Q. And your medical report, which you represented to
5 the court as being true, indicates that the medication he
6 took and had changed was consistent with him having some
7 cognitive impairment up to having a blackout, correct?

8 A. Correct.

9 Q. Okay. Now let's -- let's go to the guilty plea. Now
10 you say -- let me make sure I don't mess this up. So
11 looking at page 8, and go down to line 6, the court says,
12 "Are you under the influence of any drugs or alcohol
13 today?", and he says "No, Your Honor". You interrupt and
14 say, "He is under medication"; is that correct?

15 A. Correct.

16 Q. And the court says, "Okay. What type of medication?",
17 he says "tramadol, sir, cyclo -- baclofen and meloxicam",
18 right?

19 A. Meloxicam.

20 Q. Right. And then the court says, "All right. Do
21 those drugs actually help you understand, remain calm? Are
22 they affecting you in any meaningful way today?", and he
23 says, "No, Your Honor"; is that correct?

24 A. Correct.

25 Q. Now you knew he was on drugs how?

1 A. He told me.

2 Q. Okay. Did he have those drugs with him at the office
3 that morning?

4 A. First, I'm not sure it was the morning --

5 Q. At some time prior to the plea.

6 A. -- and --

7 Q. Well, let me see if I can refresh your recollection.

8 A. I don't remember if I saw the actual medication or if
9 I was just provided a list. The main medication that he
10 brought to my attention in our first meeting in the office
11 was the lisinopril.

12 Q. Right. The morning of the plea or --

13 A. No, that was -- no, that was before he was ever
14 charged.

15 Q. Right, right. I'm talking about the morning of the
16 plea. Didn't he bring his medication with him so that if
17 he went to jail that it could be gotten to him at the jail?

18 A. I don't remember.

19 Q. Okay. But if somebody said that was true, you
20 wouldn't dispute it, would you?

21 A. No.

22 Q. Okay. And so you knew he had taken these medications
23 that morning before he went to plead guilty? You knew he
24 had taken them that day?

25 A. According to him, yeah. I was not right there to

1 watch him take his medication.

2 Q. And prior to his guilty plea, you're the one that --
3 when the judge said are you on drugs, you remind him that
4 he's on these drugs, right?

5 A. Correct.

6 Q. Okay. Now you knew that he was on tramadol, right?

7 A. When? I mean, I don't --

8 Q. Prior to the plea. He was taking it every day, right?

9 A. I don't know. I'm not with him every day.

10 Q. You knew -- you knew he had taken medications that
11 morning?

12 A. Yes.

13 Q. And you knew one of those drugs --

14 A. Let me rephrase, sir. I assumed, that's why I brought
15 it up, and then he told what he was on.

16 Q. Right. And you had done extensive research in looking
17 at your file, very extensive research, on these drugs,
18 including tramadol, right?

19 A. That's correct.

20 Q. And you had told him he was on -- 50 milligrams was
21 the maximum dose you're supposed to take, right?

22 A. I don't remember.

23 Q. But he was on the maximum dose?

24 A. Okay.

25 **MR. SCHMECKPEPER:** Objection, Your Honor. The

1 witness is not an expert. If he wants somebody to testify
2 as to the maximum dose of any drug or its side effects,
3 Mr. Harpootlian can call an expert.

4 **MR. HARPOOTLIAN:** We have one.

5 **THE COURT:** All right. Go ahead, sir.

6 BY MR. HARPOOTLIAN:

7 Q. So -- but there's no dispute in your mind. You let
8 him represent to the judge he was on these drugs and he was
9 on those drugs at the time of his guilty plea?

10 A. I believed him to be, yes.

11 Q. Okay. Did you have any question about his ability to
12 answer the questions of the judge?

13 A. No, sir.

14 Q. Okay. Now what -- let me ask you this. Did he have
15 any sort of deal going in?

16 A. No.

17 Q. Was he pleading straight up?

18 A. Yes.

19 Q. So -- and his maximum exposure was twenty?

20 A. I think twenty-five.

21 Q. Okay. And the judge gave him two ten's or ten and ten
22 concurrent --

23 A. No, twenty --

24 Q. -- or twenty suspended on ten?

25 A. -- suspended to ten.

1 Q. Right. And he has to serve eight and a half of that
2 basically?

3 A. Correct.

4 Q. Did you represent to him that he had any deal going
5 in; there was any reason to plead guilty --

6 A. No.

7 Q. -- based on a deal?

8 A. On a deal, no.

9 Q. So what did you -- what was -- I mean, did you feel
10 that the evidence of his guilt was overwhelming?

11 A. I -- at first I looked at this lisinopril case like an
12 Ambien case, but he didn't take the drug, go to sleep and
13 then get up and drive a truck like other people have done,
14 and we've handled plenty of Ambien cases. There is a
15 statement in there from Brooke Ayers' mother saying that
16 since Houston had been on these new drugs that he had
17 become lethargic. So she was one of the witnesses we were
18 gonna subpoena in to testify as to that. Then -- and we
19 -- we staffed this case where the whole office would review
20 things and then we would talk about it and we figured out,
21 A, he took the drug knowing that he was going to sleep.
22 The expert on cross-examination if he were asked if
23 consuming alcoholic beverages would enhance the chance of
24 a blackout, the answer would be "yes", and Houston had
25 admitted to me to consuming an alcoholic beverage. I

1 didn't think a jury was gonna believe that after he ran
2 over someone that within four minutes he would be making a
3 phone call to them and within an hour he would be texting
4 his girlfriend. Now had he turned around and just gone
5 home and gone to bed, it's more believable that way.

6 Q. Well, do you think the blackout is a defense?

7 A. Yes.

8 Q. Okay. Are you familiar with the Pittman case?

9 A. Yeah.

10 Q. And what does the Pittman case say?

11 A. Which Pittman case?

12 Q. The so-called -- I guess it was the Zoloft defense.

13 Is that what it was, Pittman? Can I have it?

14 **MR. HARPOOTLIAN:** Could I have this marked, please.

15 (Petitioner's/Applicant's Exhibit Number 3, State v.
16 Pittman, was marked for identification.)

17 BY MR. HARPOOTLIAN:

18 Q. Take a look at that, please. I want to make sure
19 that's the Pittman case you say you're familiar with.

20 A. Without reading through the whole case. I mean, I
21 guess the defense to me was he didn't have the capacity to
22 commit the crime.

23 Q. He raised the defense that the Zoloft so distorted his
24 mental condition that it rendered him incapable of the
25 mens rea, if you will, of committing the crime, right?

1 A. Correct.

2 Q. And what did the Supreme Court say about that?

3 A. I don't remember because I haven't read it.

4 Q. Well, let me -- let me give you a suggestion.

5 Mr. Pittman is still in jail for life, so they probably
6 didn't think too much of it, right?

7 A. Right.

8 Q. Okay. So involuntary intoxication, that was his
9 defense, is not really a defense, is it? The fact that he
10 was blacked out.

11 A. It seems like I ran across case law that would have
12 helped him.

13 Q. Okay. But -- but let's -- let's -- I mean, you
14 indicate on page 27 of the guilty plea that he had not been
15 drinking, correct?

16 A. Correct.

17 Q. Okay. So we have somebody that -- you have an expert
18 that says that he would have -- that it was consistent with
19 the medical evidence, if he's gonna testify he blacked out,
20 had no recollection of it --

21 A. Right.

22 Q. -- the expert's gonna say he blacked out, had no
23 recollection of it?

24 A. Right.

25 Q. And you tell the court and represent to the court as

1 an officer of the court he hadn't been drinking, correct?

2 A. The last story he told me is that he had not been
3 drinking.

4 Q. Well, that's not what you say. You say, "So here we
5 have no DNA, conflicting witness reports, he'd not been
6 drinking", okay?

7 A. Right.

8 Q. You didn't say he said he hadn't been drinking, you
9 said he hadn't been drinking, correct?

10 A. I was representing what he told me.

11 Q. Okay. So he had no recollection is your position of
12 what happened; that you have nothing -- you may have some
13 circumstantial evidence here and there that a prosecutor
14 could point out, but his story was he didn't remember
15 blackout, expert confirmed blackout, you represented to the
16 court blackout?

17 A. Correct.

18 Q. And Mr. Hubbard -- when you raised it, Mr. Hubbard,
19 knowing the Pittman case, interjected, maybe -- interjected
20 that -- that, you know, if he's raising that defense, you
21 say no, you're not, right?

22 A. Right.

23 Q. Okay. So maybe then at that point you knew about the
24 Pittman case.

25 A. I don't remember what was going through my mind at

1 that point.

2 Q. Okay. Now -- so when you got ready to plead him
3 guilty, you knew he had no memory of what occurred?

4 A. No, I relied on him telling me he had no memory of
5 what occurred.

6 Q. Right. But he says I don't remember what happened?

7 A. That's right.

8 Q. Okay. And is it your position that someone can plead
9 guilty if they have no memory of what occurred? Is that --
10 just tell me yes or no.

11 A. Yes.

12 Q. Okay. And what legal principle did you rely on? Are
13 there cases that say they can plead guilty if they don't
14 know?

15 A. Well, it depends on what type of crime it is.

16 Q. Okay. Does reckless homicide involve a specific
17 mens rea?

18 A. I think that it does, yes.

19 Q. And leaving the scene of a hit and run -- a hit and
20 run and leaving the scene of personal injury or death?

21 A. That doesn't seem to, no. I was looking at that and
22 I couldn't find a case that said it was a general intent,
23 specific intent or no intent.

24 Q. Okay. So you can accidentally leave the scene of a
25 personal injury accident and not be guilty?

1 A. That's -- hold on. I didn't understand that question.

2 Q. I mean, if it's not mens rea, there's no specific
3 mens rea, then you can just hit -- not know you hit
4 somebody and -- and hurt them or kill them and drive off
5 and still be guilty of the offense?

6 A. I'm still not understanding your question.

7 Q. Okay. Well, if it's not specific mens rea, no
8 criminal intent is required, what is required?

9 A. Just that you hit someone, you kill them and you drive
10 off.

11 Q. Without -- without -- you don't have to show that they
12 knew they hit somebody?

13 A. Right.

14 Q. Okay. And is that one of the reasons you pled him
15 guilty? That he said I don't know if I hit anybody or
16 not and drove off and, therefore, since no mens rea is
17 required, you're definitely guilty of that?

18 A. I pled him guilty because he looked through the
19 discovery material and I told him I'd go to trial or we'd
20 plead him guilty, whichever one he wanted, so he and his
21 mother went into my conference and went through the entire
22 file and the next day he called and informed me that he
23 wanted to plead guilty.

24 Q. Now did you -- he -- he and his mother went in there
25 unsupervised. You didn't sit there while he went through

1 the file, right?

2 A. I didn't, no.

3 Q. Did anybody from your office sit in there with him?

4 A. I'm not sure. I think they did.

5 Q. Who?

6 A. At that time it would have been Dani.

7 Q. Dani. Okay.

8 A. It was -- her office was in the conference room.

9 Q. So your analysis or review with him of whether he
10 should plead guilty or not was based on putting him and
11 his mother in a room with the file and the file is, if you
12 include the pictures, about that -- about -- I'm showing
13 about two feet of file, right?

14 A. Right.

15 Q. Okay. And saying when you get done looking at it, let
16 me know what you want to do?

17 A. No, that's not correct.

18 Q. Well, what did you tell him?

19 A. Well, the two of us went over different theories,
20 different evidence, throughout my entire representation
21 with him.

22 Q. When?

23 A. From May of 2011 through December of 2013.

24 Q. Okay.

25 A. And it was in -- or after June of '12 that he decided

1 -- we decided we should work on a plea.

2 Q. You indicated you may have interviewed a witnesses and
3 had computer --

4 A. Notes.

5 Q. -- notes. Are those are still in existence?

6 A. I don't know. I haven't looked at it in a while.

7 Q. Did you review those with Mr. Nordan or his mother?

8 A. You know, I don't think I did.

9 Q. Okay.

10 **MR. HARPOOTLIAN:** Mark that, please. Wait a minute.

11 Actually let's mark this one right here.

12 (Petitioner's/Applicant's Exhibit Number 4, an
13 indictment, was marked for identification.)

14 **MR. HARPOOTLIAN:** That's Exhibit Number --

15 **THE COURT REPORTER:** 4.

16 **MR. HARPOOTLIAN:** -- 4.

17 BY MR. HARPOOTLIAN:

18 Q. Mr. Simmons, have you seen this document before?

19 A. I have.

20 Q. And what is this?

21 A. It's an indictment.

22 Q. For?

23 A. Reckless homicide.

24 Q. Okay. And it -- it outlines a number of A, B, C, D,

25 E, F, G, H that were -- allegedly constituted reckless

1 homicide; is that right?

2 A. Correct.

3 Q. Okay. So let's -- did you review these with
4 Mr. Nordan?

5 A. Yes.

6 Q. Okay. Is it your position that any one of these or
7 any several of these in concert constitute the elements
8 necessary to convict somebody of reckless homicide?

9 A. I believe so, yes.

10 Q. Okay. So let's -- if somebody drives a motor -- A,
11 drives a motor vehicle while his license to drive is
12 suspended, does that constitute the recklessness required
13 for reckless homicide?

14 A. I believe so, yes.

15 Q. Okay. If somebody -- so somebody driving a motor
16 vehicle with his license suspended, hit somebody, kills
17 them, that's enough for reckless homicide?

18 A. Yes, sir.

19 Q. Okay.

20 A. Either -- either singularly or in combination with
21 something else. I didn't review the statute before I came
22 in here today, so I can't remember which it is.

23 Q. When you met with Mr. Nordan, what did you tell him?

24 A. I don't remember.

25 Q. Okay. Let me get you the statute.

1 **MR. HARPOOTLIAN:** May it please the Court, Your Honor,
2 you've got the Code right behind you. Do you have 56.05?
3 I'm sorry. I'd like to show it to the witness. Apparently
4 I didn't anticipate --

5 **THE COURT:** (Hanging.)

6 **MR. HARPOOTLIAN:** Thank you. For the record, the
7 Court has handed me a copy of Title 56. Let me make sure
8 we go to 05-2910. Let me make sure it's the same in the
9 supplement. No change.

10 BY MR. HARPOOTLIAN:

11 Q. This is 56-5-2910 I'm handing you now, which is the
12 statute under -- under which he's charged.

13 **MR. SCHMECKPEPER:** And, Judge, I believe the statute
14 has been amended since then, but I don't think it's
15 anything serious.

16 **MR. HARPOOTLIAN:** Well, I looked at the pocket part.

17 **MR. SCHMECKPEPER:** I meant since Mr. Nordan pled
18 guilty in --

19 **MR. HARPOOTLIAN:** Well, this would be 2012 is when he
20 pled.

21 **MR. SCHMECKPEPER:** I beg your pardon.

22 **MR. HARPOOTLIAN:** Right. I think that's the statute
23 in effect, but the elements we would concede have not
24 changed.

25 **MR. SCHMECKPEPER:** Correct.

1 **MR. HARPOOTLIAN:** As a matter of fact, this is --
2 (handling).

3 **THE WITNESS:** Okay.

4 BY MR. HARPOOTLIAN:

5 Q. Okay. So is driving under suspension something that
6 would give rise to recklessness under that statute?

7 A. I don't think so.

8 Q. Okay. So that's one of the things they relied on.
9 Did you tell Mr. Nordan that that was something that they
10 could not rely on?

11 A. I believe I did. I don't believe it was the basic
12 thing because I -- I explained recklessness to him as
13 compared to just ordinary negligence.

14 Q. And what -- and what did you tell him?

15 A. That negligence was failure to use due care, that
16 gross negligence meant that you are neglect to the extreme
17 to where it was almost intentional.

18 Q. Okay.

19 A. And gross negligence equals criminal negligence.

20 Q. Okay. And what fact pattern here -- assume for the
21 sake of argument he doesn't remember it, the only thing you
22 have to rely on basically is that videotape, correct?

23 A. Well, and what he told me.

24 Q. He told you he didn't remember hitting anybody.

25 A. Well, I understand that, but he also told me he took

1 lisinopril and other drugs before going out to drive and
2 even for a DUI it doesn't have to be an illegal drug, it
3 can be legal drugs that impair you.

4 Q. Was he charged with felony DUI?

5 A. No, he was not.

6 Q. Okay. So he's charged with reckless homicide?

7 A. Right.

8 Q. Now what about the fact that he blacked out, the fact
9 that -- that he says I don't remember? Would that be a
10 defense to reckless homicide?

11 A. I think it's possible that it could because I don't
12 think that that's a no intent crime. But still I go back
13 to the problem of him making the phone call just minutes
14 after the wreck.

15 Q. Well, you can be black -- you can be blacked out as
16 it were. You can be a blackout drunk or black out and
17 still -- obviously he was still driving a vehicle. There's
18 nothing inconsistent about driving the vehicle and blacking
19 out. That is not having a memory of what occurred.
20 They're not saying he passed out.

21 **MR. SCHMECKPEPER:** Objection. I think he's testifying
22 for the witness at this point, Your Honor.

23 **THE COURT:** I'm sorry?

24 **MR. SCHMECKPEPER:** Your Honor, I think he's testifying
25 for the witness at this point.

1 **THE COURT:** I'm gonna let him lead. Go ahead.

2 **MR. HARPOOTLIAN:** Thank you.

3 BY MR. HARPOOTLIAN:

4 Q. He didn't say he was passed out. He said he was
5 blacked out, correct?

6 A. Correct.

7 Q. And that meant he has no recollection of what
8 occurred, right?

9 A. Correct.

10 Q. So he could have called five people or ten people or
11 twenty people. He just says he has no recollection of it,
12 correct?

13 A. Correct.

14 Q. And so his story is consistent with the non -- no
15 recollection of hitting anybody and driving off.

16 Consistent. I'm not saying whether you believe it or not,
17 but consistent, correct?

18 A. Yes. Correct.

19 Q. Okay. Now the fact that he -- did you do any
20 research? Let's go through the rest of these elements in
21 here. B, drove a motor vehicle while under the influence
22 of drugs or a combination of both.

23 A. Yes.

24 Q. Is that -- is that an element of reckless homicide?

25 A. Yes.

1 Q. C, failed to reduce the speed when approaching and
2 crossing an intersection.

3 A. Depending on what his speed is, it could be.

4 Q. Well, we know that the accident reconstruction expert
5 for the MAIT team said how fast he was going, right?

6 A. I don't remember how fast it was.

7 Q. 36 to 44 in a 35 mile an hour speed limit, right?

8 A. Right.

9 Q. So in their range, one mile an hour over the speed
10 limit at that intersection is consistent with their report?

11 A. Correct.

12 Q. Okay.

13 A. And there were no skid marks.

14 Q. I'm sorry?

15 A. And there were no skid marks.

16 Q. And there were no skid marks?

17 A. Right.

18 Q. Failure to reduce the speed and drive in a reasonable
19 and prudent manner. Is that an element of reckless
20 homicide?

21 A. Depending on the facts and circumstances, it could be.

22 Q. And in this case, the facts and circumstances?

23 A. I don't think so.

24 Q. Okay. So that -- D would not apply. E, drove without
25 regard to actual and potential hazards then existing.

1 A. There was a moped in the intersection, so, yeah, I
2 think that applies.

3 Q. Okay. We'll talk about that in just a minute.
4 And, F, failed to keep and maintain a proper lookout.

5 A. Correct.

6 Q. Was that an element of reckless homicide?

7 A. It can be depending on the extent of it.

8 Q. In this case?

9 A. Yeah, I think so because he actually had his light bar
10 on.

11 Q. He had what?

12 A. A light bar on the truck from what I remember and it
13 was turned on.

14 Q. A light bar on the truck. Where is that?

15 A. On the roof.

16 Q. No, no. Where is that in the report?

17 A. I'm pretty sure it shows it in the video.

18 Q. Okay. I've looked at the video and I don't remember
19 seeing that, but -- but if the light bar were not turned
20 on, would that --

21 A. No, sir.

22 Q. If it were not on, that -- that wouldn't apply,
23 correct?

24 A. Right.

25 Q. Okay. Failed to keep a proper control of his vehicle.

1 A. It depends on the circumstances.

2 Q. Now the video of this collision shows that he's in his
3 lane, he's not weaving.

4 A. Right.

5 Q. It shows, according to the highway patrol, he was in
6 the range, but maybe being a mile an hour over the speed
7 limit, right?

8 A. Correct.

9 Q. And goes -- hits the moped, goes through the
10 intersection and stops for a moment, correct?

11 A. I didn't see on the video where he stopped.

12 Q. Well, there were witnesses that say he stopped up the
13 road, correct?

14 A. Well, there were witnesses that said that there were
15 two people in a truck --

16 Q. Right.

17 A. -- that stopped up the road, but the DNA evidence only
18 showed that there was one person in the truck. I wish it
19 had showed that there were more.

20 Q. Well, and by the way, there was no DNA evidence of the
21 victim on the truck, was there?

22 A. No, and that's -- and I said something about that
23 during the plea as well and the only thing that makes
24 sense, and from looking at the video, was that the victim
25 never hit the truck or the truck never hit him. The truck

1 hit the moped, the moped went down, the victim was on it,
2 the victim hit the pavement.

3 Q. Okay. And then, H, failed to drive with due care to
4 others on the road, right?

5 A. Correct.

6 Q. So they have a series of -- of things and you -- your
7 testimony is you reviewed these with Mr. Nordan?

8 A. I did.

9 Q. And tell him why he should -- tell me why he should
10 plead guilty to that indictment if you already agree that
11 driving under suspension is not an element of it. Go
12 ahead.

13 A. Well, because they wouldn't take one plea and -- and
14 drop the other, so I told him the worst case scenario was
15 that it was listed under the hit and run fatality involved.

16 Q. Wait. I don't -- I'm sorry.

17 A. In other words, if he had gone to trial on one and
18 pled on the other, I don't think it would have changed
19 anything.

20 Q. Okay. When you say wouldn't have changed anything,
21 and let me -- let me sort of approach this in an analytical
22 way. Did you do any research on these elements of reckless
23 homicide?

24 A. Yes.

25 Q. And did you find any cases which indicated that --

1 somebody that didn't remember what happened?

2 A. I don't remember.

3 Q. Well, wouldn't that have been important if you had a
4 case?

5 A. Yes..

6 Q. Okay. Let me hand to you --

7 **MR. HARPOOTLIAN:** Mark that for me, please.

8 (Petitioner's/Applicant's Exhibit Number 5, State v.
9 Ray, was marked for identification.)

10 BY MR. HARPOOTLIAN:

11 Q. How about look at this case for a second. Just take a
12 second and read it, please. (Handing.)

13 **MR. SCHMECKPEPER:** Could I get a copy of the case?

14 **MR. HARPOOTLIAN:** Oh, I apologize.

15 **THE COURT:** I have an extra one.

16 **MR. HARPOOTLIAN:** Your Honor, I have extra one, too.
17 I just -- wait a minute. I've got it right here. Hold on
18 one second. Maybe I don't. Yeah, I've got it right here.
19 I'm sorry.

20 **MR. SCHMECKPEPER:** I appreciate it.

21 **MR. HARPOOTLIAN:** I've marked it up.

22 **MR. SCHMECKPEPER:** That's fine.

23 BY MR. HARPOOTLIAN:

24 Q. Have you read it, sir?

25 A. Yes.

1 Q. Now in that case a young man was in a wreck and as a
2 result of the injuries he had in the wreck had no memory of
3 what occurred, right?

4 A. Correct.

5 Q. And the Supreme Court in 1991 ruled that -- let me
6 make sure I don't misquote this. Again, I'm disorganized
7 here. I apologize, Your Honor. I just had it here. Here
8 we go. Quote: The only evidence we have here is the
9 physical factor, the collision; which is what we have here,
10 right?

11 A. Uh-huh.

12 Q. I'm sorry?

13 A. Yes.

14 Q. With the cars coming to rest on Ellenburg's side of
15 the road, the State would have this court view this
16 physical fact, then address the defendant: It appears you
17 may have been at fault here; prove to us you were not. The
18 State may not rest upon such inferences and shift the
19 burden of proof onto the defendant. Too many unanswered
20 questions exist in this case, none of which the State has
21 answered. Stacy A. could have blacked out, could have
22 swerved and missed a pedestrian in his traffic lane, could
23 have blown a left tire, which caused his car to swerve.
24 Instead of presuming any of these scenarios and requiring
25 the State to present evidence making them less probable,

1 the trial judge presumed that Stacy A. drove recklessly and
2 required him to disprove it. This is a presumption of
3 guilt rather than innocence and may not be allowed to
4 stand. And they reversed the case, right?

5 A. Right.

6 Q. Okay. Isn't that what we have here?

7 A. No.

8 Q. Why?

9 A. Because we've got a videotape where there's someone in
10 an intersection and you have a truck that just plows right
11 through it.

12 Q. Okay. How long was that moped sitting in that
13 intersection after the light turns green?

14 A. Yeah --

15 Q. No, no.

16 A. Yeah, there was some gap.

17 Q. How long? How long?

18 A. It was about, I think, three seconds.

19 Q. How about 20 seconds?

20 A. Okay.

21 Q. Would you disagree with that?

22 A. No.

23 Q. We're gonna show it in a minute.

24 A. No, I wouldn't disagree with that.

25 Q. Okay. So the light turns green. The moped now --

1 was the moped -- was he sitting on the moped or had he put
2 the kickstand down?

3 A. I think from my view it looked like he was sitting on
4 the moped.

5 Q. Okay. Did you have anybody -- did you hire an
6 accident reconstruction expert?

7 A. No.

8 Q. Did you tell them you were gonna hire an accident
9 reconstruction expert?

10 A. No.

11 Q. Did you hire a human factors expert?

12 A. No.

13 Q. Did you tell them you were gonna hire a human factors
14 expert?

15 A. No.

16 Q. So your sole conclusions about that videotape are
17 based on your expertise, not an engineer, not a human
18 factors expert?

19 A. Correct.

20 Q. And the fact that he's sitting on that moped for
21 20 to 22 seconds, one, did that in any way factor into your
22 analysis?

23 A. Yes.

24 Q. In what way?

25 A. Well, one of the leads we got was that, excuse me,

1 Miller was using cocaine at the Wild Hare and had gotten in
2 a fight. I thought that maybe he was actually dying while
3 he was there as opposed to proceeding on his moped, so that
4 was a factor there as far as cause of death and that would
5 have affected the hit and run. Once I got the documents
6 in, I saw that he was high as a kite on marijuana and had
7 like a .18 alcohol level, but no cocaine in his system, and
8 I don't believe it said anything about cardiac arrest in
9 his -- as a cause of death, and the lead I tried to run
10 down showing that he had been in a fight, I was not able to
11 prove.

12 Q. So there was no evidence of cardiac arrest or heart
13 attack?

14 A. I -- it seems like at one time I saw cardiac arrest in
15 a document, but cause of death was from fractures to the
16 skull and a brainstem injury.

17 Q. So -- but this guy's sitting on a moped --

18 A. Yeah.

19 Q. -- for 20 seconds --

20 A. Uh-huh.

21 Q. -- after the light changes --

22 A. Right.

23 Q. -- out in an area that's not well-lit, correct?

24 A. I don't know if it's well-lit or not.

25 Q. Did you ever go out there and ride out and look and

1 see whether it was well-lit at 2:00 in the morning?

2 A. Not at 2:00 in the morning, no, but I've been through
3 there plenty of times.

4 Q. Yeah, but -- but this happened at 2:00 in the morning.

5 A. Right.

6 Q. There's a gas station on the corner. What time does
7 it close?

8 A. I have no idea.

9 Q. So you weren't aware of the lighting out there. You
10 were aware that he sat there for 20 seconds; green light?

11 A. Right.

12 Q. And you're aware that he had twice -- over twice the
13 legal limit of alcohol in his system?

14 A. Well, you say legal limit. It was a .18, so.

15 Q. So a .08 is the legal limit --

16 A. Yeah.

17 Q. -- which would be .16 and then add a couple of tenths?

18 A. Correct.

19 Q. So over two times the legal limit, right?

20 A. Right.

21 Q. And he had marijuana in his system?

22 A. Correct.

23 Q. And didn't he have a bottle of Southern Comfort found
24 with him either in a backpack or laying next to him in the
25 road?

1 **MR. SCHMECKPEPER:** Objection, Your Honor. I don't see
2 how any of this is relevant.

3 **MR. HARPOOTLIAN:** Well, I'll tie it up, Your Honor.

4 **THE COURT:** I'm gonna allow it. Go ahead.

5 **MR. HARPOOTLIAN:** Thank you.

6 BY MR. HARPOOTLIAN:

7 Q. Is that true?

8 A. I don't remember --

9 Q. Okay.

10 A. -- but it sounds correct.

11 Q. Okay. So when we look again at Stacy Ray, aren't our
12 facts even better than Stacy Ray's?

13 A. Without the phone call afterwards, yeah.

14 Q. Well, again, the -- the phone call afterwards, if he's
15 blacked out, not passed out -- I'm talking about at the
16 moment of the collision aren't they better than Stacy
17 Ray's?

18 A. Yes. At that moment, yes.

19 Q. Okay. You would concede you never looked at the Stacy
20 Ray case before pleading him guilty?

21 A. No, I didn't.

22 Q. Okay. Now also -- let me hand you another case.

23 **MR. HARPOOTLIAN:** Mark this for me, please.

24 (Petitioner's/Applicant's Exhibit Number 6, State v.
25 Rowell, was marked for identification.)

1 BY MR. HARPOOTLIAN:

2 Q. The name of this case is State versus Karen Rowell.

3 Do you remember looking at this case? Sir?

4 A. I'm looking at it.

5 MR. SCHMECKPEPER: Can I get a copy?

6 MR. HARPOOTLIAN: (Handing.)

7 BY MR. HARPOOTLIAN:

8 Q. Did you look at it prior to the guilty plea?

9 A. I don't remember which cases I looked at.

10 Q. Are they in your file? Did you make copies of them?

11 A. Some I did, some I didn't. Some I read on the
12 computer and that was it.

13 Q. I represent to you I've looked through your file and I
14 don't see any cases.

15 A. All right. Then I read them on the computer.

16 Q. Okay. And didn't print them out?

17 A. (Shakes head.)

18 Q. I'm sorry?

19 A. No, sir.

20 Q. And if you didn't print them out, you couldn't have
21 reviewed them with your client; is that correct?

22 A. That's correct.

23 Q. Okay. Let me, just so we can save a little time here,
24 at page 317 it says, quote, the State cannot rely on civil
25 concepts of negligence and recklessness, that is, statutory

1 violations, to meets its burden of proving the defendant's
2 state of mind. The import of the terms negligence and
3 recklessness as used in civil law and in criminal are
4 neither equivalent nor interchangeable, and then they go on
5 and talk about Stacy Ray, about the -- clarify what they
6 said in Stacy Ray, but don't reverse Stacy Ray.

7 So the fact that they said -- now you recognize doing
8 some personal injury that B, C, D, E, and F of that
9 indictment are basically statements you put in a civil
10 complaint.

11 A. Right.

12 Q. Failure to keep a proper lookout --

13 A. Right.

14 Q. -- those kinds of things, correct?

15 A. Correct.

16 Q. In this case, Rowell says that's not enough, right?

17 A. Correct.

18 Q. So when you earlier said that you thought that those
19 particular things were sufficient, after reading Rowell you
20 would agree with me that they're not; isn't that correct?

21 A. No.

22 Q. You would not agree with me?

23 A. No.

24 Q. Why not?

25 A. The same reason I answered earlier.

1 Q. Which was?

2 A. Which was it depends upon the facts and circumstances.

3 Q. Okay.

4 A. Yeah, you're looking at it in a tunnel, and I'm not.

5 Q. So I guess what I'm saying is when Rowell says you
6 can't use those statutory violations, then it doesn't
7 necessarily -- it not only not necessarily flows from
8 failure to keep a proper lookout isn't a predicate, you've
9 got to show some recklessness, correct?

10 A. Correct.

11 Q. Okay. Now let's move on to -- well, let me maybe
12 address a couple of other things real quickly sort of. I
13 had somebody find this and let me show it. I only have one
14 copy.

15 **MR. HARPOOTLIAN:** Your Honor, I only have one copy of
16 this, but I'm gonna mark it. I'll show it to you and then
17 show it to the witness, okay?

18 (Discussion between counsel.)

19 (Petitioner's/Applicant's Exhibit Number 7, an autopsy
20 report, was marked and admitted into evidence.)

21 **MR. HARPOOTLIAN:** Your Honor, the only one I want to
22 look at is the cause of death. That's an autopsy report.

23 BY MR. HARPOOTLIAN:

24 Q. This is Exhibit Number 7. If you look right up here,
25 it says impressions, cause of death.

1 A. Yeah, there was the cardiac arrest. I believe I had
2 seen that.

3 Q. Okay. And that's the document you're talking about
4 where you were looking for the -- the cocaine and the fight
5 thinking he might have died of natural causes, cardiac
6 arrest?

7 A. Right.

8 Q. Did you hire an expert to determine whether or not the
9 cardiac arrest occurred prior to or after the wreck?

10 A. No, I relied on this report that said preliminary was
11 traumatic injury and that the primary was cardiac arrest.

12 Q. So he -- the primary, what killed him, was cardiac
13 arrest?

14 A. Right.

15 Q. Now do you know whether that was due to getting hit or
16 whether he had a cardiac arrest?

17 A. I have no idea.

18 Q. Okay. But you didn't hire any expert to look at that?

19 A. No, but they didn't have the money to hire experts
20 either.

21 Q. Well, they gave you money to hire an expert when you
22 asked for it.

23 A. One.

24 Q. And how much did you get from them for that?

25 A. I think it was a thousand dollars for Dr. Fuller.

1 Q. Okay. But did you ever ask them for more money?

2 A. Yeah.

3 Q. In writing?

4 A. No.

5 Q. Okay. But when you asked them for the thousand
6 dollars for Dr. Fuller, they gave it to you?

7 A. Yeah. Actually they gave it to Dr. Fuller.

8 Q. They gave it directly to him?

9 A. Correct.

10 Q. Okay.

11 **MR. HARPOOTLIAN:** Mark this, please. Mark it on the
12 back.

13 (Petitioner's/Applicant's Exhibit Number 8, a receipt,
14 was marked and admitted into evidence.)

15 BY MR. HARPOOTLIAN:

16 Q. Do you want to reconsider your previous statement
17 under oath just a moment ago?

18 A. Well, I was mistaken.

19 Q. You were wrong.

20 A. Yeah, I was wrong.

21 Q. Okay. You were pretty adamant about it a minute go.

22 A. Well, usually our standard operating procedures is
23 that when we have experts you have a contract with that
24 expert so that it does not go through us.

25 Q. Did you have a contract with Shawn Fuller?

1 A. No, I -- I don't remember having one with him, no.

2 Q. He's a personal friend of yours, right?

3 A. Yeah.

4 Q. Okay. And did you pay him the thousand dollars?

5 A. This shows that my law partner took a thousand dollars
6 from Mr. Nordan for Shawn Fuller.

7 Q. That's not my question.

8 A. To my knowledge, he was paid.

9 Q. Okay. Okay. So he should have a receipt for being --
10 having been paid?

11 A. I don't know what he has.

12 Q. Okay.

13 **MR. HARPOOTLIAN:** I beg the Court's indulgence for one
14 moment.

15 BY MR. HARPOOTLIAN:

16 Q. When you were doing your research on this reckless
17 homicide, did you review a case called Dobson or a case
18 called Tucker?

19 A. Actually, I don't remember at this time.

20 Q. Okay. So what was the -- the recklessness that was
21 the proximate cause of the decedent's death? What was the
22 recklessness?

23 A. It was running over someone in the middle of the road
24 who was stationary.

25 Q. Okay. Nothing else?

1 A. Well, and possibly the -- the drugs that was in his
2 system. That was in Mr. Nordan's system.

3 Q. Okay. Okay. You would agree with me that the State
4 must prove culpability to reckless homicide in a manner
5 which, quote, excludes the theories of an unavoidable
6 accident or one brought on by intervening cause?

7 A. That's correct.

8 Q. That's a correct statement of the law, correct?

9 A. I think so, yes, sir.

10 Q. Okay. So did you want to hire an accident
11 reconstruction expert?

12 A. I don't remember.

13 Q. So there's no memory of discussing with them the fact
14 you wanted to hire a human factors expert? You never
15 communicated that -- I mean, an accident reconstruction
16 expert. You never communicated that to them?

17 A. I don't remember.

18 Q. You have no memory of asking them to do that?

19 A. Correct.

20 Q. And there's certainly no letter in your file?

21 A. No.

22 Q. Okay. And as to a human factors expert, again, do you
23 remember or not remember whether you wanted to do that?

24 A. I don't think I even wanted to do that, no.

25 Q. Okay. And so there wouldn't be a letter?

1 A. No.

2 Q. Okay. And in terms of the cardiac arrest, you never
3 even thought about hiring an expert to do -- review the
4 autopsy results; is that correct?

5 A. I considered it.

6 Q. Did you talk to the Nordans?

7 A. Yeah, I think that I talked with Houston about it.

8 Q. You did or did not?

9 A. Did.

10 Q. Okay. And did you write him a letter telling him
11 this?

12 A. No, I didn't.

13 Q. Did you ask him for money for that?

14 A. No, I didn't.

15 Q. Okay. So now let's talk a little bit about -- okay.
16 So -- let me get rid of this stuff.

17 **MR. HARPOOTLIAN:** I'm sorry, Your Honor. I'm having
18 to do a little housekeeping here.

19 **BY MR. HARPOOTLIAN:**

20 Q. Let's talk a little bit about the guilty plea and how
21 that came about. As I understand it, he was initially
22 indicted for what we call hit and run, right?

23 A. Correct.

24 Q. It was in 2'12, about a year later, in the fall of
25 2'12, that he was indicted for reckless homicide, correct?

1 A. I don't --

2 Q. Approximately.

3 A. Stand by. I thought you handed me a copy of it. I
4 was right, yeah. It was in -- it appears to be October of
5 '12.

6 Q. October of '12. Okay. So -- and he was originally
7 arrested in May of --

8 A. '11.

9 Q. -- '11 and indicted for the -- leaving the scene in
10 June, I think?

11 A. That sounds about right.

12 Q. Okay. June of '11.

13 A. (Nods head.)

14 Q. Was there any discussion between June of '11 and his
15 indictment for reckless homicide to plead him to the
16 reckless -- to the leaving the scene of a personal injury
17 accident?

18 A. No, sir.

19 Q. No one ever offered that and you never discussed it?

20 A. Between May of '11 and June of '11?

21 Q. Well, no. Between when he was charged with the hit
22 and -- I'm gonna call it the hit and run --

23 A. Okay.

24 Q. -- and when he was subsequently indicted for reckless
25 homicide, were you ever offered the opportunity to plead to

1 the hit and run?

2 A. Yes.

3 Q. Okay. Just the hit and run?

4 A. Correct.

5 Q. And did you discuss that with Mr. Nordan?

6 A. I did.

7 Q. And did you offer -- do you think he should have done
8 that?

9 A. We didn't like the offer because it was plead straight
10 up and we could pick the judge, so.

11 Q. Okay. And -- and straight up to -- what does hit and
12 run carry?

13 A. I think it's up to twenty-five.

14 Q. Hit and run death?

15 A. Uh-huh.

16 Q. Up to twenty-five. Okay. And who made that offer to
17 you? Was it Mr. Hubbard?

18 A. Either Rick Hubbard or Rick Collins. I can't remember
19 which one it was because I didn't think it was very good.

20 Q. Was that in writing or verbally?

21 A. Verbally.

22 Q. And did you and Mr. Nordan meet and firmly decide not
23 to take that plea?

24 A. Yes, we did.

25 Q. Okay. Are there any notes in your file about such a

1 meeting?

2 A. No.

3 Q. Okay. So you would not have written down offer of
4 pleading to this one charge and met with Mr. Nordan on such
5 and such a date and we rejected it because of such and such
6 and such?

7 A. Correct.

8 Q. Did you ever -- did you in writing reject that plea
9 offer to the solicitor's office?

10 A. No, I did not.

11 Q. Okay. And this hit and run death, is that an
12 85 percent?

13 A. It is.

14 Q. Okay. As is reckless homicide?

15 A. Correct.

16 Q. Now at -- did you then -- once the reckless homicide
17 indictment came down, you prepared to go to trial?

18 A. We had been preparing to go to trial the whole time.

19 Q. Now when you say preparing, again, I don't see any
20 witness interviews.

21 A. No.

22 Q. You indicate you interviewed somebody, but they're on
23 the computer?

24 A. Right.

25 Q. But you didn't produce those me?

1 A. Correct.

2 Q. Why?

3 A. I don't know.

4 Q. Okay. Could you -- if we take a break over lunch, can
5 you produce any of those?

6 A. If I can go back and look on the computer, yes.

7 Q. I mean, are they in a file?

8 A. I don't know.

9 Q. Well, who types them up?

10 A. Whenever I make my notes, I make them up on my own
11 computer. So Steve Dedugen, I'll tell you now right, I
12 didn't take any notes because now he denied everything.

13 Q. Okay. Who else?

14 A. Jeff Coates was giving me leads to Steve Dedugen.

15 Q. And that's about the fight the dead man had at the
16 bar?

17 A. Correct.

18 Q. Okay. What else?

19 A. Randy Nordan, I talked with him, and I had his
20 statement and they had said that Randy told the Town of
21 Lexington police officer, I think it was -- I'm sorry, I
22 can't remember his name, it was like Montessori or
23 something of that nature, that he had told him that Houston
24 had got sent home from work that morning for drinking and
25 that we then got the Sherwin-Williams receipt where Randy

1 Nordan had sent Houston Nordan that morning to go and get
2 supplies.

3 Q. And, matter of fact, the Nordans went and got that
4 receipt, you didn't go get that receipt; isn't that
5 correct?

6 A. I think Randy got it, yes, sir.

7 Q. Right. So you saw a statement in the file?

8 A. Yeah.

9 Q. And who is Randy Nordan?

10 A. That's Houston Nordan's father.

11 Q. Okay. And you talked to him and said is this true and
12 he said no, I wouldn't have done that because -- I mean, I
13 wouldn't have said that because I sent him that morning.
14 He was -- he didn't smell of alcohol or I wouldn't have
15 sent him to go to the Sherwin-Williams store and pick up
16 the paint, right?

17 A. Right.

18 Q. Okay. So you talked to his father --

19 A. Uh-huh.

20 Q. -- and you got him to go get the Sherwin-Williams
21 receipt?

22 A. (Nods head.)

23 Q. Okay. What else? What other witnesses?

24 A. I can't remember. I know one witness I wish I would
25 have talked to.

1 Q. Who was that?

2 A. Brandy Crocker.

3 Q. And who is that?

4 A. That was the person that Mr. Miller called to see if
5 she was okay because she had left the bar before he did and
6 there was nowhere in any notes that she had ever told law
7 enforcement or anybody else anything besides she got that
8 phone call, but then in the plea it was brought out that
9 she said she was a bartender at a different place and if
10 Mr. Nordan had been at her place that night that she would
11 not have served him any alcohol.

12 Q. Did she say she saw Mr. Nordan that night?

13 A. Yeah.

14 Q. Okay.

15 A. Well, of course -- I mean, excuse me, that's what was
16 brought out in the plea.

17 Q. But that -- you had no statement to that effect?

18 A. No.

19 Q. And you -- but you did have a statement she had gotten
20 a call from the deceased before he got hit and killed?

21 A. Correct.

22 Q. And you didn't interview her?

23 A. No.

24 Q. Why not?

25 A. I didn't see the need to because all she had was a

1 phone call. There was nothing in there about her seeing
2 Houston Nordan in there drinking and, in fact, when you
3 compared that with the bartender from the Wild Hare, the
4 bartender from the Wild Hare didn't see him drinking. She
5 said he went in and out -- basically in and out of the
6 establishment, that she thought he was drinking outside,
7 but I don't think that would come in as evidence.

8 Q. But she was the last person to have spoken to the
9 deceased as far as you know prior to the wreck?

10 A. I've no idea.

11 Q. But as far as you knew, that was the last person. She
12 talked to him on the phone.

13 A. But I have no idea if that's the last person he talked
14 to or not.

15 Q. Well, who said that was the person he talked to?

16 A. That was in the notes from --

17 Q. Law enforcement.

18 A. -- law enforcement.

19 Q. Law enforcement says this is the last person to talk
20 to the deceased before the wreck, right?

21 A. I don't remember if they said that was the last
22 person.

23 Q. But a person that spoke to him the night of the
24 wreck --

25 A. Somebody spoke to him just prior to him getting hit,

1 yes.

2 Q. Okay. And you didn't think it was relevant to find
3 out what he said to her? Like he could have said man, I'm
4 so drunk I can't drive any further, I'm just gonna park
5 right here. Or I'm -- you know, I'm -- I can't -- I'm so
6 stoned, I can't -- I've smoked too much pot and drunk too
7 much liquor I don't know where I am. I mean, that wouldn't
8 have been relevant?

9 A. That would have been if that's what somebody would
10 say.

11 Q. But you don't know.

12 A. Well, in the notes it said that he was looking for
13 another place to party.

14 Q. All she talked about was -- she indicated she talked
15 to Miller, the deceased --

16 A. Uh-huh.

17 Q. -- prior to the -- that night just prior to the wreck
18 and then she goes on to talk about Nordan. Now that was
19 Miller's friend, right?

20 A. That's correct.

21 Q. So you at least want to be able to impeach her if she
22 took the stand. Didn't you want to go interview her and
23 find out what their -- was she boyfriend/girlfriend with
24 him?

25 A. In hindsight I probably should have, yes.

1 Q. Okay. You think that affected -- I mean, you heard
2 what the Solicitor said at the plea.

3 A. Yeah.

4 Q. You don't think it would be important for you to be
5 able to impeach that even at the plea?

6 A. Yeah.

7 Q. Okay.

8 A. And at that point in time I think that what I should
9 have done was withdraw the plea and then get that
10 straightened out with the solicitor's office and actually
11 contact her.

12 Q. Okay.

13 A. But you're right. I didn't do that.

14 Q. And you would have -- you should have withdrawn the
15 plea in your judgment?

16 A. Yeah, I should have.

17 Q. Okay. Now let's talk about that plea. So, again, I'm
18 not gonna beat a dead horse here, Mr. Nordan indicates to
19 you he had no knowledge of committing -- he had no memory
20 of committing a reckless homicide or leaving the scene,
21 right?

22 A. Right.

23 Q. Okay. He had no memory of that?

24 A. (Unh-unh.)

25 Q. So -- and you pled him guilty, right?

1 A. Right.

2 Q. And he -- do you believe that he -- he had knowledge
3 that he committed the offense? The answer would be "no",
4 right, because --

5 A. Based on what he would tell me, that's a "no". Based
6 upon the phone call, I would say a "yes".

7 Q. But your client was telling you "I don't remember".

8 A. Right.

9 Q. Your expert witness says it's consistent he doesn't
10 remember.

11 A. Right.

12 Q. And when you pled him guilty he didn't remember.

13 A. Okay. Right.

14 Q. And you tell the court that, he has no memory, right?

15 A. Right.

16 Q. So how does he have a knowing and intelligent waiver
17 of his rights if he doesn't know if he committed the crime?

18 A. Then he doesn't.

19 Q. Pardon me?

20 A. He doesn't.

21 Q. Okay. So when you pled him guilty, he shouldn't have
22 been pled guilty, correct? You made an error by pleading
23 him guilty without him knowing he was guilty, right?

24 A. I'm not saying that I made the error, but if he didn't
25 understand what was going on and he was still sticking to

1 that story, yeah, I shouldn't have pled him guilty.

2 Q. Okay. I mean --

3 A. And, in fact, I think he deserves a trial.

4 Q. Okay. So at that point when he pled guilty, and let
5 me make sure the record's clear on this, he did not know --
6 at least what he told you was "I don't know whether I'm
7 guilty or not because I don't -- I blacked out", right?

8 A. Right.

9 Q. Okay.

10 **MR. HARPOOTLIAN:** Judge, could we take about a
11 two-minute recess?

12 **THE COURT:** All right. We'll step down just for a
13 couple minutes. Sir, you may step down. I need to remind
14 you, you are under oath.

15 **THE WITNESS:** I understand. Can I talk to my law
16 partner to tell her to have someone bring the file over?

17 **THE COURT:** You can have -- you can have that
18 conversation, but you can't have any substantive
19 discussions about the nature of your testimony.

20 We'll step down.

21 (Recess taken.)

22 **BAILIFF:** All rise. Court is now in session.

23 **THE COURT:** Thank you. You may be seated.

24 Sir, I just need to remind you that you remain under
25 oath.

1 **THE WITNESS:** Thank you.

2 **MR. HARPOOTLIAN:** May it please the Court, Your
3 Honor? I'm gonna try to cut out some stuff I had. I think
4 maybe based on the last answer we got I can move a little
5 more expeditiously.

6 BY MR. HARPOOTLIAN:

7 Q. So, Mr. Simmons, in terms of Mr. Nordan's pleading
8 guilty when he didn't know he was guilty, you would concede
9 with me that should not have happened, correct?

10 A. Yeah.

11 Q. Okay. And that you would have -- you knew that he
12 knew or claimed he didn't know if he was guilty and so when
13 you pled him guilty, were you ineffective?

14 A. I'm sorry, you answered {sic} the question in a very
15 confusing way.

16 Q. Okay. Let's -- let's -- the foundation is this.
17 Based on what he was saying, he could not -- he blacked
18 out, he doesn't know whether he hit anybody or left the
19 scene of a crime, correct?

20 A. That's what he said.

21 Q. Okay. And that's what he said as he walked in the
22 courtroom. That's what you represented to the court?

23 A. Correct.

24 Q. Based on that fact, that he did not know if he was
25 guilty, he could not have waived his right to a trial.

1 That wasn't a knowing, intelligent waiver of his rights,
2 was it?

3 A. Probably not.

4 Q. Okay. And as a result of doing that, allowing him to
5 do that, were you ineffective?

6 A. Under those factual -- under those facts, yes.

7 Q. And when I say -- you say under those facts, those
8 were the facts represented to the court that he did not?

9 A. During -- during --

10 Q. I mean, it's on the record.

11 A. During the plea, correct.

12 Q. You -- during the plea you tell him he blacked out, he
13 doesn't know what happened?

14 A. Uh-huh.

15 Q. Is that a yes? I'm sorry.

16 A. Yes.

17 Q. Okay. So let me -- let me make -- just take that one
18 step further. There are ways to plead somebody guilty who
19 doesn't know whether they committed the crime or not; is
20 that correct?

21 A. Correct.

22 Q. One would be --

23 A. A nolo contendere --

24 Q. A nolo con -- a no contest --

25 A. -- or an Alford.

1 Q. -- or North Carolina versus Alford. Both -- both are
2 alternatives where you can say I don't know whether I did
3 it, but I want to plead guilty. And Alford typically is
4 predicated on the evidence either being overwhelming or the
5 deal they're offering is so good, right?

6 A. Correct.

7 Q. Now the evidence you would concede with me in this
8 case was not overwhelming. That he was reckless.

9 A. Well, I tend to disagree with you on that part,
10 Mr. Harpootlian.

11 Q. And did -- well, let me ask you this. Did you ever
12 explain to Mr. Nordan, Alford?

13 A. No.

14 Q. Okay.

15 A. Nor did I explain nolo contendere.

16 Q. Okay. So he was never given the option to walk
17 through that analysis?

18 A. Correct.

19 Q. Okay.

20 A. And then there are also some judges who believe that
21 you can't plead nolo contendere to a felony.

22 Q. Okay. And I understand that, but you could plead
23 Alford?

24 A. Correct.

25 Q. But that option was never -- you never offered that

1 option to Mr. Nordan?

2 A. Correct, and we were never offered that option either.

3 Q. But you never --

4 A. Likewise, I didn't ask for it.

5 Q. There you go. Okay. So you never asked for it. So
6 you were ineffective by not -- by pleading him guilty when
7 he didn't know if he was guilty, I guess, is --

8 A. Right.

9 Q. Okay. And you agree with me on that?

10 A. Under those facts.

11 Q. Okay. Now let's talk about the second piece of that,
12 which is that he was on a number of drugs that morning,
13 correct?

14 A. Correct.

15 Q. It's in the record --

16 A. Right.

17 Q. -- what he's on. Did you have any -- I mean, you had
18 a -- strike that, all that, that right there.

19 Okay. Let me begin again. You had a report from
20 Shawn Fuller indicating that these drugs he was on were
21 powerful drugs, correct?

22 A. Correct.

23 Q. And the morning of the plea you knew and at the plea
24 you outlined to the judge or had Mr. Nordan outline to the
25 judge that he is taking those same drugs basically?

1 A. About the same that he had taken that morning.

2 Q. Right. And you don't know whether -- well, y'all --
3 you had them in your office early that morning, right,
4 9:00, 9:30?

5 A. I think so. I'm not really certain.

6 Q. But the plea didn't happen until that afternoon.

7 A. Okay. I'll have to take your word for it.

8 Q. Okay. You wouldn't disagree with that factual
9 scenario?

10 A. No.

11 Q. And so you don't know whether he had -- you knew he
12 had taken them, you didn't know how much he had taken?

13 A. Correct.

14 Q. Okay. And did it give you any concern that he was on
15 drugs when he took his guilty plea?

16 A. Yes. Yes.

17 Q. And did you do anything to ascertain whether he
18 understood what was going on or not? Did you have a
19 physician examine him, did you --

20 A. No, I didn't have a physician examine him. I mean, we
21 talked for a good long while. Every time we talked he was
22 on his medication to my knowledge because he was still on
23 the lisinopril.

24 Q. So every time you talked to him in preparation for a
25 plea or trial he was on drugs?

1 A. Correct.

2 Q. He was on drugs at his guilty plea?

3 A. Correct.

4 Q. So you never made any independent determination of
5 whether in any of those meetings or his guilty plea he was
6 medically certifiably cognizant of what he was doing?

7 A. Correct. We wanted Dr. Fuller to be at the plea, but
8 he was not able to be there.

9 Q. Okay. And he would have merely testified about the
10 blackout piece of it, not about his condition that day at
11 the plea?

12 A. If there was a question about his condition that day
13 of the plea, he could have testified to it.

14 Q. But you couldn't -- you didn't have Dr. Fuller there?

15 A. I didn't have him there, no.

16 Q. Did you subpoena him?

17 A. I didn't subpoena him. I asked him to be there.

18 Q. If you'd subpoenaed him, he would have had to be
19 there, right?

20 A. That's correct.

21 Q. Were you ineffective for not subpoenaing him there?

22 A. I can't say that I was.

23 Q. You can't say what?

24 A. I cannot say that I was ineffective for not
25 subpoenaing him.

1 Q. Was there anything else then that you consider that
2 you did -- that you did or did not do that may -- that
3 would -- would indicate to you or would help you concede
4 that Mr. Nordan deserves a trial?

5 A. Yes.

6 Q. What were they?

7 A. He was charged in 2011. In 2012, an opposing party
8 set my office on fire. That case was pending before this
9 court and the solicitor's office decided there was a
10 conflict, so they sent out the case where I was the victim
11 to Aiken and they kept the Nordan case here. In my
12 opinion, I should have moved for somebody else to prosecute
13 the Nordan case. It was during this time as well -- part
14 of the reason that there were no plea deals was because of
15 that, that I was a victim in a case and he was a defendant
16 in a case and he might go to jail, and then at the same
17 time my expert's daughter died.

18 Q. You're talking about Shawn Fuller?

19 A. Shawn Fuller's six-year-old daughter died and it seems
20 like the trial had to be continued and then Mr. Miller's
21 family began calling people in the solicitor's office
22 racists and this and that, so I felt like he just really
23 had everything pushed against him at that time for no fault
24 of his own and I wish now that I had filed a motion to
25 change his venue.

1 Q. Did anyone in the Solicitor's office indicate to you
2 they couldn't give you a deal because you were a victim in
3 another case?

4 A. It wasn't stated like that. It was more so of the
5 racist allegations.

6 Q. Okay. So --

7 MR. HARPOOTLIAN: I beg the Court's indulgence. I
8 may be almost through.

9 BY MR. HARPOOTLIAN:

10 Q. During the guilty plea there's a mention of an April
11 Hughes who --

12 A. Correct.

13 Q. -- made a statement about Mr. Nordan; she smelled
14 alcohol or thought he was impaired the next morning, right?

15 A. Right.

16 Q. Did you at some point find that that was an employee
17 of Mr. Nordan's father, right?

18 A. Correct.

19 Q. Did you know that she had been arrested for stealing
20 money from Mr. Nordan's father?

21 A. I did.

22 Q. At the time of the plea?

23 A. Yes.

24 Q. Okay. And did you point that out to the court at the
25 plea?

1 A. I don't -- I don't remember if it's in there or not.

2 Q. Okay. So before I sit down I want to understand. You
3 indicate that you believe you were ineffective for pleading
4 him guilty when he didn't know if he was guilty, right?

5 A. Under those facts, yes.

6 Q. Right. Well, the facts are what he says, "I don't
7 remember".

8 A. Okay.

9 Q. Right?

10 A. Correct.

11 Q. And then ineffective for pleading him guilty not
12 knowing the level of impairment of the drugs that he was on
13 that morning, right? I mean, you knew he was on drugs.
14 You just didn't know how -- whether he was impaired or not,
15 you knew he was on these drugs?

16 A. He didn't appear to be impaired to me.

17 Q. Okay. But every time you've met with him before he
18 was on drugs?

19 A. Yeah, but I've also seen him impaired, too.

20 Q. Okay. But -- but he's on drugs that Shawn Fuller
21 indicated --

22 A. Were very powerful, correct.

23 Q. Right. And you knew he was on those?

24 A. Correct.

25 Q. And yet when the court said, "You're just taking those

1 to relax yourself", did you tell the court that they were
2 -- he was taking them just to relax himself?

3 A. I don't remember.

4 Q. Let's look at page -- I believe it's page 8. If you
5 go down to line 14, the court, "All right. And do those
6 drugs actually help you understand and remain calm? Are
7 they affecting you in any meaningful way today?" No, Your
8 Honor.

9 Why would the court think that they somehow were there
10 to just make him understand and remain calm or is that just
11 a conclusion the court draws without any factual basis?

12 A. I have no idea why the court asked that.

13 Q. Okay. When they said it though, you didn't interrupt
14 them and say Judge, tramadol is a very powerful drug?

15 A. No, sir.

16 Q. And you knew -- I've seen the research in your --

17 A. Yeah.

18 Q. So he was taking the maximum or twice the maximum
19 amount of tramadol along with other drugs that had caused
20 him to black out --

21 A. Right.

22 Q. -- and you did not interrupt the judge. Was that --
23 were you ineffective for not interrupting the judge?

24 A. Probably so.

25 Q. Okay. Now if you had -- first of all, if you had

1 appreciated the fact that he had not -- well, first of all,
2 if you were aware of the Ray case and these other cases we
3 talked about reckless homicide, would that have affected
4 your decision to advise him to plead guilty or at least
5 cause you to hesitate and investigate further?

6 A. It would cause to hesitate and investigate further,
7 yeah.

8 Q. Okay. And as to the -- and that would -- could have
9 made a difference in the outcome of the case?

10 A. Possibly, yes.

11 Q. Okay. Now if you had insisted -- well, if you had --
12 you should have not have pled -- I think you've admitted
13 you should not have pled him guilty knowing he didn't --
14 his representation was he didn't know whether he committed
15 the crime or not, right?

16 A. Correct.

17 Q. So that obviously would have affected the outcome of
18 the case?

19 A. Correct.

20 Q. He either would have entered an Alford plea or gone to
21 trial?

22 A. Right, or no contest.

23 Q. Or no contest if the judge had allowed it. But we
24 know this. If you had been effective in insisting -- well,
25 if you'd been effective, you would not have pled him guilty

1 knowing he didn't know he committed the crime, correct?

2 A. Correct.

3 Q. Okay. And then the drug issue is that it would have
4 -- you would have -- you should have taken further steps to
5 make sure the drugs didn't affect his judgment?

6 A. Correct.

7 Q. Okay. And given all of those issues do you believe,
8 and are you telling this court, you were ineffective in a
9 number of ways and he should get a new trial?

10 A. Correct.

11 **MR. HARPOOTLIAN:** I think that does it, but let me --
12 let me just make sure that the peanut gallery doesn't have
13 any other questions.

14 **THE COURT:** Let me ask the lawyers to approach for a
15 moment.

16 **MR. HARPOOTLIAN:** Oh, you want me?

17 **THE COURT:** Yes, sir.

18 **MR. HARPOOTLIAN:** Okay. I'm sorry. I thought you
19 said his lawyers. I was ready for an ex parte conference.

20 (Proceedings held at the bench; not reported.)

21 **THE COURT:** And so you're finished?

22 **MR. HARPOOTLIAN:** Yes, Your Honor.

23 **THE COURT:** Okay. Is the State ready?

24 **MR. SCHMECKPEPER:** Yes, sir, Your Honor.

25 **THE COURT:** Yes, sir.

1 MR. SCHMECKPEPER: May it please the Court?

2 | **THE COURT:** Uh-huh.

3 CROSS-EXAMINATION

4 BY MR. SCHMECKPEPER:

5 Q. Good afternoon -- or morning, Mr. Simmons. Almost
6 afternoon. Now Mr. Harpootlian asked you a number of
7 questions. I'm gonna try and be as organized as possible,
8 but please forgive me if I jump around a little bit.

9 Let's start at the beginning. You testified earlier
10 as to how you got this case. Could you go over that real
11 quick?

12 A. Yes. Kathy Foster called me, excuse me, and told me
13 -- and I'm just giving you a summary -- that the law
14 enforcement officers were taking Houston to the Town of
15 Lexington to question him, and I think that they had
16 already taken possession of the truck at that time.

17 Q. And you said you went and met with him and he told you
18 a story; is that correct?

19. A. Correct.

20 Q. What was that story?

21 A. He told me that he was out, he was looking for his
22 girlfriend Brooke and that while he was driving around he
23 hit a railroad crossing that had a -- a hump in it that
24 caused his winch to break off the front of his truck. So
25 he called somebody to come out there and help him, they got

1 the winch into the truck and then he went to his daddy's
2 shop.

3 Q. Now at that time did he tell you anything about
4 tramadol or being unable to remember anything?

5 A. No, sir.

6 Q. Did he tell you any other stories before he told you
7 about tramadol?

8 A. No, sir.

9 Q. So his next story was I was on tramadol, I don't
10 remember anything?

11 A. No, sir. It was I was on lisinopril.

12 Q. I'm sorry, lisinopril. Please excuse me.

13 A. Okay.

14 Q. So first he told you he remembers what happens, then
15 he told you oh, no, I was on lisinopril; is that correct?

16 A. That's correct. And what he told me then was that
17 he had taken his lisinopril and I believe the other
18 medications, that he left to go find Brooke, he went to
19 Five Points, he saw where there were friends, he had a
20 drink, an alcoholic beverage, he thought that Brooke's
21 friends were laughing at him and so then he finished his
22 drink and left and didn't remember anything until he was at
23 his daddy's shop.

24 Q. Is that the last story he told you?

25 A. No.

1 Q. Were there any stories in between that story and the
2 last story he told you?

3 A. What he told me that -- that I just -- the second
4 story, it changed periodically. We were trying to get
5 ahold of two people, one being Brooke Ayers, and the other
6 one being -- I believe the guy's name was Will Taylor.
7 Will Taylor never called us back, Brooke Ayers never called
8 us back, and one of the things that Houston has said was
9 that he thought maybe one of Brooke's friends put something
10 in his drink. So it was a long shot, but if Brooke would
11 have admitted to that, that would, I think, have helped us.
12 Well, what we didn't know was that she had already given a
13 videotaped interview to the Town of Lexington in which she
14 said that she didn't see Houston that night. Houston then
15 changed his story and told me that he did not actually --
16 he saw her, but she didn't see him.

17 Q. Was that the last story he told you?

18 A. No. The last one was it had changed to where he had
19 had nothing alcoholic to drink at all and nobody brought up
20 the going to Sherwin-Williams until probably two weeks or
21 so before the plea.

22 Q. So he kept changing his story to you, his attorney, up
23 until two weeks before the plea?

24 **MR. HARPOOTLIAN:** Objection, Your Honor.
25 Mischaracterization.

1 **THE COURT:** I'll allow it. He's on cross-examination
2 technically.

3 **THE WITNESS:** He didn't change the story, not two
4 weeks before.

5 BY MR. SCHMECKPEPER:

6 Q. But his story kept developing to you, his attorney?

7 A. Yeah. I mean, I was told that until two weeks prior
8 and we had already been scheduled for trial before.

9 Q. In his conversation with you, what was the last thing
10 Mr. Nordan remembered before blacking out?

11 A. Leaving the bar in Five Points.

12 Q. Did he remember taking his medications?

13 A. Yes.

14 Q. He remembered taking his medications that day?

15 A. Yes.

16 Q. Did you ever ask him what the side effects were of his
17 medications?

18 A. Yes.

19 Q. What did he say?

20 A. Well, the main thing with the lisinopril was that in
21 rare cases it can cause you to black out.

22 Q. And did he find out about that side effect before or
23 after the accident?

24 A. He knew that it made him feel lethargic, but he didn't
25 tell me that there were any other blackouts.

1 Q. Let's go over some of the State's evidence in this
2 case.

3 A. Okay.

4 Q. Now you said Mr. Nordan at one point said he had had
5 an alcoholic beverage and at one point he hadn't; is that
6 correct?

7 A. Correct.

8 Q. Did the State have any evidence that Mr. Nordan had
9 been drinking that night; circumstantial or direct?

10 A. Yes.

11 Q. What was it?

12 A. It was Brady Crocker -- excuse me, Brandy Crocker.

13 Q. That was the bartender at the other bar?

14 A. Yeah, and I think the bar that she -- where she works
15 in was Goodfellas, and then there was Rebecca --

16 Q. Let me -- let me stop you right there. Ms. Crocker --

17 A. Yeah.

18 Q. -- and you said that was circumstantial evidence that
19 he had been drinking. Did you -- if you had gone to trial,
20 would you have cross-examined Ms. Crocker?

21 A. Oh, yes.

22 Q. What would you have brought out on cross-examination?

23 A. Well, for one, she said she was going in to give a
24 statement, and she never did. Two, that she apparently was
25 friends with Mr. Miller because the phone call was about

1 finding the next party spot. Three, we had a witness --
2 well, there was a witness who was the bartender at the Wild
3 Hare who didn't say she saw Houston drinking, but that she
4 saw him going outside, she thought he was going outside to
5 drink, but I don't think that she could have testified as
6 to what she thought, so she would have been a good witness
7 for us to put up that she did not see him drinking.

8 Q. And did you discuss this with Mr. Nordan?

9 A. Yes.

10 Q. What was some other circumstantial evidence that
11 Mr. Nordan had been drinking that night?

12 A. That was his father's statement from the next morning.

13 Q. And his father recanted that; is that correct?

14 A. I'm sorry, do what?

15 Q. His father went back on that statement; is that
16 correct?

17 A. That's correct.

18 Q. And would you have brought that up at trial had it
19 proceeded to trial? Had it proceeded to trial --

20 A. I would have put Randy Nordan up to say that my son
21 wasn't drinking, I run a business and I sent him to
22 Sherwin-Williams. You know, his testimony would have been
23 I wouldn't send him if he was drunk.

24 Q. Was there anybody else who testified that Mr. Nordan
25 seemed to have been drinking that previous night -- or who

1 gave a statement to that effect? Specifically, I'm --
2 specifically I'm talking about April Hughes and --

3 A. Oh, yes, April Hughes said that he had been drinking,
4 but even before she got charged with breach of trust, I
5 confirmed with both Houston and Randy Nordan that the
6 relationship between April and Houston was not very good to
7 say the least.

8 Q. So you're saying there was evidence that Mr. Nordan
9 had been drinking, but you did research -- you investigated
10 each piece of that evidence; is that correct?

11 A. That I knew about. I mean, I wish that I had called
12 Brandy Crocker because that came as a surprise to me at the
13 plea.

14 Q. I'll get to her in a moment, but each of these
15 statements that you went over and you investigated, did you
16 discuss those with Mr. Nordan?

17 A. Oh, yeah.

18 Q. You said you investigated all sorts of defenses; is
19 that correct?

20 A. Yeah, we looked at a lot of different things. We
21 looked at the lack of DNA evidence. I was hoping that
22 there would be more DNA than just his in that truck. Then
23 there were the witnesses -- there were two who had the
24 color of the truck wrong that said that there were two
25 individuals working on the truck; one was inside flashing

1 the lights on and off. Only finding a single set of DNA
2 contradicts their testimony.

3 Q. Now as far as -- now you said there was a witness you
4 wish you had talked to. Who was that?

5 A. That was Brandy Crocker.

6 Q. What did she say that you think changed the outcome?

7 A. That was in the plea that she said that had she been
8 the bartender that night that she would not have served
9 Houston indicating that he was highly intoxicated.

10 Q. Now if that had proceeded to trial and Ms. -- and
11 Ms. Houston {sic}, she had testified to that effect, what
12 would you have brought up on cross-examination?

13 A. You already asked me that.

14 Q. I'm sorry. Could you repeat what it was?

15 A. One, she and Mr. Miller were friends. Two, they were
16 looking for the next party spot, so apparently she had been
17 drinking. And I would have looked for her criminal -- see
18 if she had a criminal record as well. And then -- and then
19 I would have asked her, you know, trying to get into the
20 part about the other bartender or the bartender at the Wild
21 Hare did not actually see Houston drinking.

22 Q. And you're saying the existence of that testimony
23 would have changed your advice as to whether or not
24 Mr. Nordan should have pled guilty?

25 A. Correct.

1 Q. Why is that?

2 A. Well, because if he was on a blackout, then other
3 people would have seen him, but they didn't say anything
4 really, where Brandy Crocker saw him consuming alcohol.
5 You know, you've got a bartender at the Wild Hare who
6 obviously did not see him consuming alcohol and so,
7 therefore, the blackout is more believable. There still
8 would have been problems in my opinion with the phone call
9 coming shortly after the incident.

10 Q. And what were those problems? Go over that evidence
11 real quick for me, if you could.

12 A. Well, you say you blacked out. Mr. Hubbard did a good
13 job of isolating the photographs of the truck to where it
14 appeared as though a brake light came on, so that if a
15 brake light came on, then there's awareness; you know
16 you've hit somebody. It could have easily been argued that
17 it was simply the reflection of light because as you go
18 through the intersection there's a light that, of course,
19 brightens things more as you go through. And then if Will
20 had called us back, we could have asked him was Houston
21 slurring his words, was he making sense, anything of that
22 nature.

23 Q. And what about those text messages?

24 A. You know what, I really didn't know how to get around
25 the text message with Brooke.

1 Q. Why is that?

2 A. Well, because it's not only a text message that says,
3 you know, I need you or please call me. It said I've been
4 in a bad wreck.

5 Q. As far as other evidence the State had against
6 Mr. Nordan, let's go over the phone records. He called
7 his buddy shortly after the wreck; isn't that correct?

8 A. That's right. That's Will that I'm thinking about.
9 At least I think that was his name.

10 Q. And what was the timing of those phone calls?

11 A. I don't remember.

12 Q. Roughly an hour after the hit and run?

13 A. Oh, it was less than an hour.

14 Q. Less than an hour?

15 A. Yes.

16 Q. And there were multiple phone calls; is that correct?

17 A. Right.

18 Q. Were there any gaps in between those phone calls?

19 A. Small gaps.

20 Q. Small gaps. Now there's a witness who saw the truck;
21 is that correct?

22 A. I'm sorry, you speak a little fast for me.

23 Q. I apologize. You said there was a witness who saw the
24 truck; is that correct?

25 A. When?

1 Q. Who saw the truck after the accident pulling a winch.

2 A. There were two witnesses who said that they saw the
3 truck.

4 Q. And what was the context of that? What did they say?

5 A. Well, those were the witnesses that were saying that
6 there were two people out there working on the truck and
7 they got the color of the truck wrong.

8 Q. And would you have brought that up on
9 cross-examination?

10 A. Oh, yes. Most certainly. Not to mention the fact
11 that there was only one set of DNA found out there.

12 Q. And you discussed all of this with Mr. Nordan?

13 A. Yes.

14 Q. So he was fully aware. He didn't hide the ball with
15 any of this?

16 A. No.

17 Q. Now I know Mr. Nordan's story was he had a blackout;
18 is that correct?

19 A. Correct.

20 Q. The State had a pretty good case that he wasn't
21 blacked out or that he had been drinking; is that correct?
22 There was at least some evidence that he could have been
23 convicted of that?

24 MR. HARPOOTLIAN: Your Honor, he is talking real
25 quick. What -- what was the question?

1 **THE COURT:** If you would just rephrase or state the
2 question again.

3 **MR. SCHMECKPEPER:** Sure.

4 BY MR. SCHMECKPEPER:

5 Q. But the State did have evidence to refute that; is
6 that correct?

7 A. Yes.

8 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

9 **THE COURT:** Uh-huh.

10 BY MR. SCHMECKPEPER:

11 Q. The State also had evidence he was aware of what was
12 going on vis-a-vis text messages and phone calls, correct?

13 A. Correct.

14 Q. And you investigated all of those except for the one
15 witness you were talking about?

16 A. Well, yes, but there were two witnesses who would not
17 call me back either.

18 Q. Correct. Let's go back and talk about Mr. Nordan's
19 decision to plead guilty.

20 A. Okay.

21 Q. Now you said you reviewed the -- or you left him in
22 a room with the discovery and his mom and said, you know,
23 just let me know what your decision is; is that right?

24 A. We discussed the possibilities beforehand, the
25 problems with the case, went over all the different

1 theories we had, and basically I left the ultimate decision
2 up to him and he also relied on his mother.

3 Q. And this is after going over the discovery with him
4 exhaustively for the past several months or years,
5 correct?

6 A. He and I did not sit down and go through every
7 piece of paperwork. We sat down and discussed what every
8 witness said, what every law enforcement officer said and
9 everything that happens.

10 Q. And you discussed any possible theories you could
11 present at trial?

12 A. Correct.

13 Q. Did you discuss every piece of case law or every piece
14 of research you conducted?

15 A. No.

16 Q. Do you normally do that with clients?

17 A. No.

18 Q. Do you normally discuss case law with clients?

19 A. No.

20 Q. Do you have a perfect recollection of everything you
21 did in this case today?

22 A. No.

23 Q. So it's fair to say that your recollection and your
24 understanding of the case law and the statutes were better
25 in 2012 when this plea happened than today; is that

1 correct?

2 A. Probably.

3 Q. Let's talk about Alford. Have you ever done an Alford
4 plea?

5 A. Yes.

6 Q. How many times have you done Alford pleas?

7 A. I would be guessing, but it's been many.

8 Q. What is an Alford plea?

9 A. That's where you're saying I'm not guilty, but the
10 evidence against me looks so bad or the deal looks so good
11 that I'm gonna take it.

12 Q. So a person who's not -- who doesn't believe that
13 they're guilty of something can plead guilty pursuant to
14 Alford of something they're not guilty of?

15 A. Correct.

16 Q. What's the difference between an Alford plea and a
17 regular plea in terms of sentence?

18 A. Nothing, but what I've noticed as a practical matter
19 is that when you do not accept guilt the sentence tends to
20 be higher.

21 Q. You're saying had he pursued under Alford plea, the
22 sentence could have been higher in this case?

23 **MR. HARPOOTLIAN:** Objection, Your Honor. Calls for
24 speculation.

25 **THE COURT:** I mean, I'll allow it.

1 BY MR. SCHMECKPEPER:

2 Q. So in your experience, you believe that had the Alford
3 plea gone forward he could have gotten more time?

4 A. Correct. I've actually had times when somebody pled
5 guilty to one thing and then nolo or under Alford to
6 another one and explained to the judge why we were doing
7 it.

8 Q. But even under regular circumstances, not talking
9 about an Alford plea, if a client said to you hey, I didn't
10 do it and you turned around and said well, there's a lot
11 of evidence against you, would it be appropriate for that
12 client to plead guilty to taking advantage of a plea offer?

13 A. Yes.

14 Q. Did you have any reason at any point during your
15 representation of Mr. Nordan to question his competency?

16 A. No.

17 Q. And you met with him extensively; is that correct?

18 A. Yes.

19 Q. Do you know approximately how many hours you spent
20 with him working on this case?

21 A. Hours spent working on the case were between like
22 fifty and seventy-five, I think. You know, it's kind of
23 hard to say because the way I am, I'll be at home, I'll
24 think something. My wife is my law partner and we were
25 gonna try this case together, so we would think of

1 something, then bring the laptop out and then research
2 it, and specifically we were looking for a lot of
3 other lisinopril cases that were like Houston's, but
4 unfortunately we didn't really find any. But as far as
5 how much time I spent with Houston, I have no idea.

6 Q. But enough to make a value -- enough to know whether
7 or not you needed to recommend a competency evaluation,
8 correct?

9 A. Oh, God, yes. Yes.

10 Q. And he was on the same medication the entire time
11 throughout your representation?

12 A. I -- I think so.

13 Q. And at the time he pled guilty, did you talk to him
14 that morning?

15 A. You know, like I told Mr. Harpootlian, I believe so.

16 Q. And from your recollection you don't have any reason
17 to believe he may not have been competent, he may -- may
18 have been under the influence of drugs affecting his
19 ability to --

20 A. I have no reason to believe that, no.

21 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

22 **BY MR. SCHMECKPEPER:**

23 Q. Did you explain Mr. Nordan's constitutional rights to
24 him?

25 A. Yes.

1 Q. Did you do it before the guilty plea?

2 A. Yes.

3 Q. And did you hear the judge explain all his
4 constitutional rights to him at the guilty plea?

5 A. Yes.

6 Q. Did you hear the judge explain to him he had the right
7 to trial?

8 A. Yes.

9 Q. I'm sorry to jump around. Let's talk about the expert
10 for a moment. You said you hired an expert to discuss the
11 effects of lisinopril; is that correct?

12 A. Correct.

13 Q. And what did he tell you? What did the expert tell
14 you about the effects of lisinopril?

15 A. That it was rare, but that it could cause a blackout
16 and that it was more likely to cause a blackout if you'd
17 consumed alcohol.

18 Q. And, in fact, you said you talked to other people
19 about it, too? Other doctors?

20 A. Correct.

21 Q. Is that consistent with what they told you?

22 A. Yeah. There is one thing that I've learned afterwards
23 though.

24 Q. But you learned that afterwards; is that correct?

25 A. Uh-huh.

1 Q. Okay.

2 MR. SCHMECKPEPER: I beg the Court's indulgence.

3 Thank you, Your Honor. I have no further questions.

4 THE COURT: Any redirect on what he went into it?

5 MR. HARPOOTLIAN: Briefly, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. HARPOOTLIAN:

8 Q. So the Attorney General just asked you about a series
9 of stories; their pluses and minuses. Did Mr. Nordan, the
10 defendant, ever tell you that he had a recollection of
11 hitting somebody on a moped and then leaving the scene of
12 the accident?

13 A. No.

14 Q. Every story in which -- or every rendition he
15 indicated to you about that evening, except when he said he
16 thought he tore off the winch crossing the railroad track,
17 every rendition indicated he had no memory. We talked
18 about a blackout. That's no memory, right?

19 A. To my knowledge, yeah.

20 Q. I mean, every story was he had blacked out.

21 A. Right.

22 Q. And a blackout doesn't make you unable to drive,
23 unable to text, unable to phone call. You just have no
24 memory of it, right?

25 A. I have no idea.

1 Q. You don't --

2 A. I think you're correct.

3 Q. But you didn't research what a blackout was?

4 A. I don't remember. I don't think I did. I think --

5 Q. So today you can't tell me whether a blackout would
6 render you capable of texting, phone calling, driving,
7 doing all those things?

8 A. Correct.

9 Q. You would not -- you couldn't tell me whether it would
10 or wouldn't?

11 A. Right.

12 Q. Okay. Now the Supreme Court, our court, recognizes
13 that you can't plead guilty unless you know you're guilty.

14 A. Right.

15 Q. Unless you admit your guilt and know that you're
16 admitting your guilt, correct?

17 A. Right.

18 Q. So when you were asked by the Attorney General about
19 the effects of pleading guilty even though you didn't know
20 you were guilty, as you indicated before you can't plead
21 somebody guilty that doesn't know they're guilty.

22 A. Right.

23 Q. And what Mr. Nordan told you was I don't know if I'm
24 guilty, right?

25 A. Correct.

1 Q. So when he pled guilty, in your opinion you were
2 ineffective for pleading him guilty?

3 A. Correct.

4 Q. Okay. I wanted to make sure I didn't miss something
5 there. And you went over evidence about whether he had a
6 drink or didn't have a drink previously. That doesn't
7 affect the -- the fact he didn't know whether he was guilty
8 or not, correct?

9 A. Well, I kind of disagree there.

10 Q. Well, how -- if he's blacked out, he's blacked out.

11 A. Yeah, but --

12 Q. I'm not talking about as a defense.

13 A. Yeah.

14 Q. I'm talking about knowing he was guilty.

15 A. Okay. Sure.

16 Q. Right. So whether he had a drink or whether he was
17 snorting cocaine and all, it might affect his guilt, but
18 it would not affect his ability to admit his guilt if he
19 blacked out, right?

20 A. Right.

21 Q. And in terms of the drugs he took that day -- well,
22 strike that. You hired an expert who confirmed that
23 blackouts are consistent on some occasions with the drugs
24 he was taking, correct?

25 A. Correct.

1 Q. And that's Dr. Fuller who's seated right back there?

2 A. He's been here. That's correct.

3 Q. Okay. And so I don't think there's anything -- we've
4 seen his report. He indicated to you that the drug that --
5 the drug cocktail he was taking, especially if he'd had a
6 drink, could render a blackout?

7 A. Correct.

8 Q. Okay. And just for the -- just for the record, for
9 edification, you believe you were ineffective and he
10 deserves a new trial?

11 A. Yeah.

12 Q. And it prejudiced him -- your ineffectiveness
13 prejudiced him?

14 A. That's correct.

15 **MR. HARPOOTLIAN:** I beg the Court's indulgence. Thank
16 you, Your Honor.

17 **THE COURT:** All right. I usually don't allow a
18 recross --

19 **MR. SCHMECKPEPER:** Okay.

20 **THE COURT:** -- unless he brought up something new.
21 Thank you, sir. You may step down.

22 **THE WITNESS:** Thank you, Your Honor.

23 (Witness excused.)

24 **THE COURT:** Any reason why he has to stay?

25 **MR. HARPOOTLIAN:** No, sir, not for the Plaintiff.

1 **MR. SCHMECKPEPER:** Your Honor, if he can be on
2 standby in case we need him for rebuttal after Mr. Nordan
3 testifies.

4 **THE COURT:** All right. Just be sure they have your
5 telephone number.

6 **THE WITNESS:** Thank you, Your Honor.

7 **MR. HARPOOTLIAN:** Your Honor, he is gonna produce --
8 somebody is gonna produce the file for the Court for the
9 record, right?

10 **MS. SIMMONS:** He's -- I think he's here now and I can
11 go through it and find what you were looking for.

12 **MR. HARPOOTLIAN:** Well, I want the whole file. I --

13 **THE COURT:** You subpoenaed in the whole file?

14 **MR. HARPOOTLIAN:** Right.

15 **THE COURT:** All right. Lawyers approach a moment.

16 **MR. HARPOOTLIAN:** Yes, sir.

17 (Proceedings held at the bench; not reported.)

18 **THE COURT:** We'll step down until 1:30. We'll stand
19 at ease.

20 (Whereupon, a luncheon recess taken.)

21 **BAILIFF:** All rise. The court is now in session.

22 **THE COURT:** You may be seated. The Petitioner is not
23 in the courtroom.

24 **MR. HARPOOTLIAN:** We're ready, Your Honor.

25 **THE COURT:** Are they gonna bring him in?

1 **MR. HARPOOTLIAN:** I'm sorry. Yes.

2 (Whereupon, the Petitioner/Applicant returns to the
3 courtroom.)

4 **THE COURT:** Is Applicant ready to call their next
5 witness?

6 **MR. HARPOOTLIAN:** May it please the Court, Your Honor,
7 Dr. James Bartling.

8 **THE COURT:** Just come right up here and let the Clerk
9 of Court swear you in.

10 JAMES W. BARTLING,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. HARPOOTLIAN:

14 Q. State your full name for the record, please.

15 A. James W. Bartling.

16 Q. And, Dr. Bartling, where do you live?

17 A. I live in Atlanta, Dunwoody, Georgia.

18 Q. And where are you employed?

19 A. Mercer University.

20 Q. What do you do for Mercer University?

21 A. I work for the College of Pharmacy. I'm on the
22 faculty there. I'm also associate dean for student affairs
23 and admissions.

24 Q. And are you what we call a pharmacologist?

25 A. Well, I'm a pharmacist and I've got a great deal of

1 training in pharmacology and know a lot about it.

2 Q. And have you ever been qualified to testify in a court
3 on the issue of pharmacology?

4 A. I have.

5 Q. Okay. On how many separate occasions?

6 A. I've been involved in probably -- in terms of
7 pharmacology, ten times.

8 Q. Okay.

9 **MR. HARPOOTLIAN:** Can you mark this for me, please.

10 (Petitioner's/Applicant's Exhibit Number 9, Bartling
11 resume, was marked for identification.)

12 BY MR. HARPOOTLIAN:

13 Q. Okay. Can you tell me what this document is?

14 A. It's a copy of -- a copy of my resume.

15 Q. All right. And is that an accurate depiction of your
16 academic and professional achievements?

17 A. It is.

18 Q. And tell the Court, please, what pharmacology is.

19 A. Pharmacology is the study of how drugs work in the
20 body and different organ systems and how they impact on
21 them.

22 Q. And have you been retained by me, my office, in
23 Mr. Nordan's matter?

24 A. I have.

25 Q. Am I paying you to do that?

1 A. Yes, you are.

2 Q. Okay. And have you examined certain records for me;
3 that is, his records from the Veterans Administration
4 and/or any other medical records concerning what he was
5 being prescribed, by whom and when?

6 A. Yes, I have.

7 Q. And did you examine the prescriptions that were being
8 written for him prior to May of 2011?

9 A. Yes, I looked at those.

10 Q. Okay. And that would have been when this wreck --

11 A. The incident took place, yes.

12 Q. Okay. And have you also examined the report of -- let
13 me do this first.

14 **MR. HARPOOTLIAN:** Your Honor, I move he be qualified
15 as an expert in the area of pharmacology.

16 **MR. SCHMECKPEPER:** No objection.

17 **THE COURT:** Without objection, he may be qualified in
18 that area.

19 **MR. HARPOOTLIAN:** Can I see Dr. Fuller's -- I'm not
20 sure what exhibit that is. Okay. Great.

21 BY MR. HARPOOTLIAN:

22 Q. Okay. I'm referring you to Exhibit Number 1, which is
23 the report of Dr. Fuller.

24 A. Yes, I've seen this.

25 Q. Now you had access to Mr. Nordan's VA and other

1 medical records, correct?

2 A. I did.

3 Q. And those records --

4 **MR. HARPOOTLIAN:** Your Honor, for the record, and
5 for the Attorney General's information, those records are
6 contained in Mr. Simmons' file. That's where we procured
7 them from.

8 BY MR. HARPOOTLIAN:

9 Q. And as a result of looking at those records and what
10 was prescribed, and looking at Dr. Fuller's report, do you
11 have an opinion as to whether or not Dr. Fuller's report is
12 accurate? And by accurate, I mean concluding that based on
13 the drugs he was taking in May of 2011 and how many of them
14 he'd been put on recently, do you agree with his conclusion
15 that a blackout would be -- or could be caused by that
16 combination and frequency of drugs?

17 A. Yes, I agree with the report.

18 Q. Okay. Now how about tell the Court, please -- now if
19 I am blacked out, am I laying on the floor?

20 A. Not necessarily, no. You could be walking around just
21 like you are now.

22 Q. Okay. And what would -- when I say somebody's had a
23 blackout, what does that mean?

24 A. That means that you do not recall that period of time
25 while you're in the blackout.

1 Q. Okay. So could you make phone calls?

2 A. Yes.

3 Q. Could you text people?

4 A. Yes.

5 Q. Could you drive a vehicle?

6 A. Yes.

7 Q. Could you do -- perform ordinary functions yet not
8 have any recollection of it sometime after these
9 occurrences?

10 A. Yes, that's the definition of a blackout.

11 Q. Okay. And that is your opinion to a degree of medical
12 certainty, more probably than not?

13 A. Yes, it is.

14 Q. And your opinion that Dr. Fuller's report is accurate,
15 is that -- and you concur to a degree of medical certainty,
16 more probably than not?

17 A. Yes.

18 Q. Now let's talk about -- you've also been furnished
19 additional medical records around the time of the guilty
20 plea in this case, right?

21 A. Yes, I have.

22 Q. And those come from the Veterans Administration?

23 A. They do.

24 Q. And in reviewing those -- and let me -- have you had a
25 conversation with Mr. Nordan?

1 A. Yes, I have.

2 Q. Okay. Now did you determine -- first of all, was he
3 prescribed -- have a prescription for a drug called Ambien?

4 A. Yes, he did from the VA.

5 Q. I'm sorry?

6 A. He had one from the VA, yes, sir.

7 Q. Around -- what's the date of the guilty plea?
8 November 9th -- December 9, 2013.

9 A. Yes, he did.

10 Q. And you also saw in the record, if you read his guilty
11 plea, you saw he was taking three other drugs; is that
12 correct?

13 A. (Nods head.)

14 Q. What were those?

15 A. He was. He was taking tramadol, baclofen, and
16 meloxicam.

17 Q. Okay. Now at his guilty plea, the judge asked him are
18 you on drugs, he says no. He's interrupted by Mr. Simmons
19 and Mr. Simmons asks him to correct and he states those
20 three drugs, right?

21 A. Yes, that's right.

22 Q. Now did you determine what the prescribed level of
23 those drugs -- first of all, as to the Ambien, if he took
24 it at night, how much was he supposed to take?

25 A. My understanding is that it was written for

1 5 milligrams at bedtime, but that he could take two of
2 them if he needed to really get some sleep, so he could
3 take anywhere from 5 to 10 milligrams, one or two. And
4 from what I understand, he did not take it every night,
5 but he did the night before the plea.

6 Q. And you understand that from talking to Mr. Nordan?

7 A. Yes.

8 Q. And when you spoke to Mr. Nordan, did he indicate to
9 you what time he took the dosages of the three drugs that
10 are mentioned in the guilty plea?

11 A. He was taking tramadol, 50 milligrams. He took two
12 of those around 8:00 in the morning, based on what he said,
13 8:00 or 9:00 in the morning. He also took a baclofen,
14 20 milligrams. Recently, three weeks prior, the dose of
15 the baclofen had been increased from 10 to 20 milligrams,
16 the muscle relaxer. And the meloxicam was taken once a
17 day. He had taken it that morning as well. So he took
18 two tramadol, one baclofen, and the meloxicam.

19 Q. And you're supposed to take those every four to six
20 hours?

21 A. Well, the tramadol you take every four to six hours.
22 The baclofen was every eight hours, and the meloxicam, once
23 a day.

24 Q. Okay. Now have you talked to Mr. Nordan about what he
25 took later on that day?

1 A. I did.

2 Q. And what did he indicate to you?

3 A. Well, my understanding was he had -- they had moved
4 the plea hearing to that afternoon and so they went home
5 about 10:00 and when he got home he took two more tramadol
6 and then came back to the court. I believe the plea
7 hearing started at one.

8 Q. Okay. Now -- excuse me one second. Now tell the
9 Court, please -- let's take these drugs one by one. What
10 is Ambien and what does it do? How does it affect the
11 human body?

12 A. Well, Ambien is very commonly used sleep medication.
13 It puts -- helps people sleep at night and works very well.

14 Q. Does it affect the central nervous system?

15 A. Absolutely. It's a central nervous system depressant.
16 It typically lasts for eight hours.

17 Q. Okay. Now what is -- what was the other one?
18 Tramadol?

19 A. Tramadol is an analgesic very similar to the opiates.
20 So it's a strong analgesic. Again, used commonly. It is
21 a central nervous depressant as well and it is used
22 primarily to treat pain.

23 Q. And Mr. Nordan had pain because he had a back injury
24 and a knee injury; is that correct?

25 A. Yes, from his term in service, the Marines.

1 Q. And these were prescriptions being written by the
2 Veterans Administration?

3 A. Yes, that's correct.

4 Q. So -- and then the next drug he was taking during the
5 guilty plea was what?

6 A. Baclofen.

7 Q. What is that?

8 A. Baclofen a muscle relaxer. It's also a central
9 nervous depressant and often when you have back pain it
10 gets to spasming and so he was taking that as well.

11 Q. At what level?

12 A. He had just recently increased it to 20 milligrams,
13 double the dose, I think three weeks prior to the hearing.

14 Q. And that's one, one time a day?

15 A. No, he would take that eight times. Excuse me, every
16 eight hours, three times a day.

17 Q. Okay. And then -- so it's effective for eight hours?

18 A. Yes, typically.

19 Q. Okay. And then what was the third drug?

20 A. The third drug was meloxicam, and that's a
21 nonsteroidal antiinflammatory. It reduces inflammation,
22 helps with pain. Again, helping with the back. It's a
23 central nervous system depressant as well. It's taken once
24 a day.

25 Q. Okay. So based on -- we know from the court record he

1 had taken those drugs that day, right?

2 A. Yes.

3 Q. And if he had -- and we know that he had taken the
4 Ambien the night before because he said he took the Ambien
5 the night before. And it was prescribed, right?

6 A. Yes, it was.

7 Q. So do you have an opinion to a degree of medical
8 certainty, more probably than not, having the pattern and
9 the amount of drugs taken, of these drugs, prior to the
10 guilty plea on the afternoon of December 9, 2013, whether
11 or not Mr. Nordan could exercise free will? That is, could
12 he have entered a guilty plea willingly and knowingly and
13 been cognizable of his answers to each and every question?

14 A. No, I don't believe he could have.

15 Q. And that's your opinion to a degree of medical
16 certainty, more probably than not?

17 A. Yes.

18 Q. Even without the Ambien, okay, just based on the drugs
19 that we see in the record, would he have been -- would your
20 opinion be the same; that is, that he could not exercise
21 the judgment necessary to enter his guilty plea in a
22 knowing and voluntary fashion?

23 A. Yes. Actually when I looked at the records, the
24 records indicated he had taken the three medications. I
25 did not know until this morning or just recently talking to

1 him that he also took the Ambien. So based on what I had
2 seen in the records and taking those medications and the
3 dosages, I felt his judgment was impaired on those alone.
4 And the Ambien certainly adds to it. Another central
5 nervous system depressant could certainly have impacted his
6 decision-making.

7 Q. And did it affect his decision-making?

8 A. Yes, it did.

9 Q. Now he took these drugs virtually every day; is that
10 correct?

11 A. Well, he didn't take the Ambien every day. From my
12 understanding, he took it periodically. Of course, he
13 took it the night before because he had a plea hearing the
14 next day, I'm sure he wanted to get some sleep. And we
15 also know that he did take the other medications every day.
16 The dosage of the tramadol, two tablets every four to
17 six hours, 50-milligram tablets, were at the maximum dosage
18 of tramadol.

19 Q. Now you've read the guilty plea transcript in this
20 case, right?

21 A. I did.

22 Q. Okay. And on page 8, the defendant has indicated
23 the drugs he's taken, that's at line 12. At line 14 the
24 court says, "All right. Do these drugs actually help you
25 understand and remain calm? Are they affecting you in any

1 meaningful way today?" Now two questions about that. Do
2 these drugs help you remain calm?

3 A. That's not what they're designed for, no, sir.

4 Q. So they have no calming effect. That's not what
5 they're for?

6 A. There may be some impact, but that's not what they're
7 for, no. He's taking them for pain and that's why he's
8 taking them.

9 Q. Okay. Now the court asks him are these affecting you
10 in any way, and he says no. Is that -- can we rely on that
11 to be an exercise of his own free will and judgment or is
12 that an answer that's affected by the drugs he's on?

13 A. Oh, it's affected by the drugs. He didn't know -- I
14 mean, he apparently didn't know he was impaired, but I
15 believe he was.

16 Q. And let me give you an analogy. If somebody sits here
17 and -- and like Mr. Hubbard, for instance, were to do five
18 shots vodka, which is not out of the realm of possibility,
19 and then was called upon to participate in a court
20 proceeding and his blood alcohol because -- I mean, we can
21 do based on his weight and the period of time over which he
22 drank it, you as a -- I've had you do this on occasion, you
23 can project what his blood alcohol would be, right?

24 A. I can do that, yes, sir.

25 Q. And if it's a .12, which is over the presumption in

1 the state that you're impaired, would that vodka affect his
2 ability to exercise judgment?

3 A. Absolutely.

4 Q. But it may not be visible because he drinks a lot,
5 right? I mean, if he's a habitual drinker.

6 A. Oh, yes. That's true. A lot of -- people that drink
7 a lot and if they're impaired, you can't see it visibly
8 looking at them.

9 Q. But it would affect, at the minimum, their mental
10 faculties. Maybe not their physical faculties, but --

11 A. Cognitively.

12 Q. -- cognitively. Okay.

13 **MR. HARPOOTLIAN:** And, for the record, I'm making all
14 that up about Mr. Hubbard.

15 **MR. HUBBARD:** Maybe.

16 **MR. HARPOOTLIAN:** Maybe.

17 BY MR. HARPOOTLIAN:

18 Q. So the question then becomes, when we talk about these
19 drugs, if Mr. Nordan's on these drugs virtually every day,
20 would it be -- necessarily follow that he would appear to
21 be impaired?

22 A. No, not -- it would not be.

23 Q. And in addition to that, would -- would you still have
24 the belief that he could not enter a guilty plea or make
25 any important decisions, sign a will, buy or sell a house,

1 any important decision, enter a guilty plea, or decide to
2 go to trial?

3 A. I agree with that.

4 Q. Could he -- could he make any of those decisions --
5 do you have an opinion to a degree of medical certainty,
6 more probably than not, could he make any of those
7 decisions -- have cognitive ability to make those
8 decisions?

9 A. No.

10 Q. And should he have pled guilty that day?

11 A. No.

12 Q. Even if he was guilty?

13 A. No.

14 Q. I mean, you wouldn't -- he shouldn't have pled
15 guilty --

16 A. He shouldn't have pled guilty, no.

17 Q. -- because of his mental state at the time of the
18 guilty plea?

19 A. He was not in a position to make that kind of a
20 decision that day.

21 Q. If you'd been contacted by Mr. Simmons and he had
22 given you this regimen of drugs he was on every day,
23 would you have any cautions to him about how to proceed in
24 dealing with Mr. Nordan, about how to advise him, how to
25 get -- what would you have told him to do in reference to

1 taking the guilty plea? How could they go forward with the
2 guilty plea?

3 A. Well, I'm not -- I don't understand the legal parts
4 of it. I've learned a lot today, but I would just tell
5 him that based on what he's taking that his judgment was
6 impaired.

7 Q. And would you tell him to get him off the drugs for
8 the guilty plea?

9 A. Well, if he -- in terms of making a prudent decision
10 in terms of the future, he should have not been on those
11 drugs.

12 Q. Okay.

13 **MR. HARPOOTLIAN:** I beg the Court's indulgence. No
14 further questions.

15 **THE COURT:** What about Applicant's 9? Do you intend
16 to admit that? That's the resume.

17 **MR. HARPOOTLIAN:** Yes, sir. I'm sorry.

18 **THE COURT:** Any objection?

19 **MR. SCHMECKPEPER:** No objection, Your Honor.

20 **THE COURT:** All right.

21 **MR. HARPOOTLIAN:** I apologize, Your Honor. It slipped
22 my mind. Thank you.

23 (Petitioner's/Applicant's Exhibit Number 9, Bartling
24 resume, was admitted into evidence.)

25 **MR. HARPOOTLIAN:** No further questions.

1 **MR. SCHMECKPEPER:** May it please the Court?

2 **THE COURT:** Yes, sir.

3 CROSS-EXAMINATION

4 BY MR. SCHMECKPEPER:

5 Q. Good afternoon, Dr. Bartling.

6 A. Bartling, yes.

7 Q. Bartling?

8 A. L-I-N-G.

9 Q. All right. I appreciate it. So you've had an
10 opportunity to review the note written by the medical
11 expert in this case; is that correct?

12 A. Dr. Fuller?

13 Q. Yeah.

14 A. Yes.

15 Q. Have you had an opportunity to review all of the
16 Applicant's medical records?

17 A. I reviewed a large number of them. I'm not sure
18 they're all of them.

19 Q. Have you talked to the Applicant?

20 A. Yes, I have.

21 Q. Was he taking any of these drugs when you talked to
22 him?

23 A. I don't know that.

24 Q. Do you know if he's on any drugs today?

25 A. I do not.

1 Q. Now the record doesn't reflect that he took Ambien.
2 Do you know what time he took Ambien the night before?

3 A. He indicated he took it before he went to sleep the
4 night before.

5 Q. You said it lasts about eight hours?

6 A. Typically, yes. And he also said that he took two
7 tablets, 10 milligrams, because he needed to get asleep.

8 Q. So assuming he took them, even if he went to bed kind
9 of late at midnight, the effects would have worn off by
10 8:00 AM the next morning?

11 A. Well, in terms of the sleep effects, but the impact,
12 the half life, is longer than that.

13 Q. How much of Mr. Nordan's medical history did you go
14 over? Just the -- just the prescriptions?

15 A. No, I looked at records from his service in the
16 Marines and a variety of the medical records and looked
17 largely at the medications that he was taking.

18 Q. Did you talk to a prescribing doctor?

19 A. I did not.

20 Q. Did you talk to the primary health care provider?

21 A. No.

22 Q. Did you talk to any of his other health care
23 providers?

24 A. No.

25 Q. So you're only going off of what Mr. Nordan's told

1 you; is that correct?

2 A. And the medical records and the information that I
3 read from the court records.

4 Q. And you're saying a combination of these drugs would
5 have impaired Mr. Nordan's thinking; is that correct?

6 A. Yes.

7 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

8 BY MR. SCHMECKPEPER:

9 Q. So at the end of the day, you don't know whether or
10 not Mr. Nordan was actually taking the medications that he
11 said he was taking; is that correct?

12 A. As far as I'm understanding from the records that he
13 was seen taking medications in Mr. Simmons' office that
14 morning of the plea deal.

15 Q. You don't know what he was taking?

16 A. No.

17 Q. And you don't know what he was taking when you were
18 talking to him?

19 A. That's correct.

20 Q. He -- he could have been on all sorts of different
21 drugs when you were talking to him and he wouldn't have
22 known if he was capable of telling you the truth; is that
23 correct? Did these drugs have any physical manifestations?

24 A. They're mostly mental as opposed to physical and they
25 will cause respiratory depression, they'll cause some

1 dizziness, confusion, those type types of things, but you
2 usually see them in terms of mental before you see the
3 physical.

4 Q. But he's been -- he's been on these drugs for a while,
5 right?

6 A. He had taken --

7 Q. For a substantial period of time.

8 A. Well, he had been taking tramadol for quite some time,
9 he'd been off of it for a while. He had not been taking
10 the baclofen that long, the meloxicam that long, and he had
11 taken other sleep medications earlier, so I don't believe
12 he had been on the Ambien that long either.

13 Q. Let's talk about competency. I mean, you said he
14 wasn't competent to take a guilty plea. What was he
15 competent to do under these drugs? I mean, should he just
16 be laying in bed all day, was he able to drive a vehicle?
17 I mean, can he go to work, can he fill out paperwork for a
18 Social Services card? What kind of things can he do on
19 these pills?

20 A. Well, he was working, apparently doing so effectively
21 from what I understand. What we're talking about here is a
22 situation making a decision that affected his -- his life,
23 taking a plea deal on a criminal case.

24 Q. Can you -- can you be on tramadol and open a bank
25 account?

1 A. Pardon?

2 Q. Can you be on tramadol and open a bank account?
3 Where's the line? What can you do on tramadol and what
4 can't you do?

5 A. Well, I -- I don't know that.

6 **MR. SCHMECKPEPER:** I beg the Court's indulgence. I
7 have no further questions.

8 **THE COURT:** Any redirect?

9 **MR. HARPOOTLIAN:** Just a couple of questions, Your
10 Honor.

11 **THE COURT:** Uh-huh.

12 REDIRECT EXAMINATION

13 BY MR. HARPOOTLIAN:

14 Q. Are these the records that we forwarded to you to
15 examine? I'll represent that's what we sent you.

16 A. Yes.

17 **MR. HARPOOTLIAN:** Can I have these marked, please?
18 Any objection?

19 **MR. SCHMECKPEPER:** No objection.

20 **THE COURT:** Without objection.

21 (Petitioner's/Applicant's Exhibit Number 10, medical
22 records, was marked and admitted into evidence.)

23 BY MR. HARPOOTLIAN:

24 Q. Now let me ask a couple of follow-up questions here.
25 One, on the date of guilty plea, on page 8 of the guilty

1 plea, the court says, "Are you under the influence of any
2 drugs or alcohol today?" He says, "No, Your Honor".

3 Mr. Simmons then says, "He is under medication", right?

4 A. Yes.

5 Q. So Mr. Simmons is affirmatively telling the court that
6 he's taking medications?

7 A. He did.

8 Q. And then the court is asks what kind, the defendant
9 lists the three drugs you just talked about, right?

10 A. Yes.

11 Q. And so the -- the lawyer, who we believe would not
12 have been under the influence of any drugs on the day and
13 time in question, is representing to the court that he's on
14 these medications, correct?

15 A. That's correct.

16 Q. So in terms of knowing what he took that day, it's on
17 the record and the defense lawyer on the record in front
18 of the judge, at least by his silence, if nothing else,
19 affirmed he'd taken these three drugs; is that correct?

20 A. He had said he didn't, but his attorney said he did.

21 Q. Right. So his attorney's even correcting him?

22 A. Correct.

23 Q. But for his attorney the record would be there were no
24 drugs that day?

25 A. That's right.

1 Q. Now you were asked by the Attorney General what can
2 you do and not do, okay? And these drugs were being --
3 were they all being prescribed by the same physician or
4 different physicians?

5 A. It was in the VA system, so I imagine they were
6 different physicians, but -- or a group of physicians.

7 Q. All right. And is it necessarily that one physician
8 would know what the other physician was --

9 A. Oh, yes. In his medical record they knew what he was
10 taking.

11 Q. Okay. And so I guess the question becomes was there
12 something about the day of the plea that would make it
13 more likely that he didn't understand because of these
14 medications than any other day is what he's getting at, and
15 was there? What factors would there be?

16 A. Well, I think you have the factor that he took the
17 Ambien the night before. Apparently he took 100 milligrams
18 of tramadol in a very short period of time together right
19 before the plea, closer together than he would normally
20 take it every six to eight hours, and that clearly could
21 have had an impact on his judgment.

22 Q. And based on your study of these drugs, is it your
23 opinion to a degree of medical certainty, more probably
24 than not, that it did impact his ability to enter a guilty
25 plea knowingly and intelligently on the day in question?

1 A. Yes, it did.

2 MR. HARPOOTLIAN: Okay. Thank you.

3 THE COURT: Thank you, sir. You may step down.

4 (Witness excused.)

5 MR. HARPOOTLIAN: Your Honor, we need to set up the
6 video.

7 THE COURT: Okay.

8 MR. HARPOOTLIAN: It will take just a couple of
9 minutes. Do you want to take a break or --

10 THE COURT: Yeah, I'll step down for a minute or two.
11 Now I don't know how to do that, so.

12 MR. HARPOOTLIAN: We brought a -- we brought a screen
13 if that doesn't work. Does anybody know how to make it
14 come down?

15 THE COURT: We'll take a short break.

16 (Recess taken.)

17 BAILIFF: All rise. Court's now in session.

18 THE COURT: You may be seated.

19 MR. HARPOOTLIAN: Stephanie Borzendowski.

20 THE COURT: Ma'am, just come up here and let the Clerk
21 of Court swear you in.

22 STEPHANIE BORZENDOWSKI,

23 having been duly sworn, testified as follows:

24 THE COURT: You'll need to spell your name for the
25 court reporter.

25 | A. I did --

1 Q. From?

2 A. -- in applied psychology with a concentration in human
3 factors from Clemson University.

4 Q. And then did you obtain a Ph.D.?

5 A. I did.

6 Q. In what?

7 A. Human factors psychology.

8 Q. Okay. And what is human factors?

9 A. In a nutshell, human factors examines human
10 interaction with technology, the environment, other
11 humans, and that's grounded in an understanding of human
12 capabilities and limitations.

13 Q. Okay. And you've testified in previous cases?

14 A. I've given deposition testimony in two cases.

15 Q. Okay. And you have -- but you've been trained, you've
16 got a Ph.D. in human factors?

17 A. I do, which is simply an advanced degree in the field.

18 Q. What's Applied Building Sciences?

19 A. It is a small consulting firm with an office in
20 Charleston, Chapin, and Charlotte, and it's made up of a
21 pretty diverse group of individuals, including engineers
22 and architects, and I am one of two practicing human
23 factors professionals.

24 Q. Okay. And have you examined certain videotapes and
25 documents and reports in this case for me?

1 A. I have.

2 MR. HARPOOTLIAN: Your Honor, I move she be qualified
3 as an expert in human factors.

4 MR. SCHMECKPEPER: Your Honor, I don't think a
5 sufficient basis has been established for her to be
6 qualified as an expert in human factors. I'm not even
7 sure it's been adequately explained what human factors is
8 or how it would even relate to this accident.

9 THE COURT: I would disagree on the first one. On
10 the last one I probably do agree with because I don't
11 understand why she's being called, but that's something
12 that he gets to bring out in his presentation of the facts
13 of the case. I would -- do you wish to examine her further
14 on her qualifications as a human factors expert?

15 MR. HARPOOTLIAN: I mean, Your Honor, she's got a
16 Ph.D. in it, she's qualified, she's -- and the question as
17 to whether she's applied those in this particular case is
18 another question, but I believe she's qualified.

19 THE COURT: All right. I'm gonna -- I think a
20 sufficient foundation has been laid for her to be qualified
21 as a human factors expert, so I'll allow her to testify as
22 to that.

23 MR. HARPOOTLIAN: Thank you, Your Honor.

24 BY MR. HARPOOTLIAN:

25 Q. Now in this case you were retained by me to look at

1 issues involving human factors, correct?

2 A. Correct.

3 Q. And to do that, what did you look at?

4 A. I looked at a number of things, including a lot of
5 photographs, the video that you're about to show, the
6 full MAIT file from the, I believe, Lexington police, and
7 I also reviewed some relevant human factors research in
8 conjunction with the file that you provided.

9 Q. Okay. Now is it rare to have a videotape of the
10 actual occurrence?

11 A. Yeah.

12 Q. Okay. But we have that here?

13 A. We do.

14 Q. And was that of assistance?

15 A. It was.

16 Q. Okay. Did you determine the make and model of the
17 vehicles involved, the moped and the truck?

18 A. Yes, from the file; not from the video.

19 Q. Okay. And did you also assume that the MAIT report
20 was correct and estimated the speed of the vehicle, the
21 truck, was somewhere between 36 miles an hour and 43 to 44
22 miles an hour; is that correct?

23 A. I had no reason to doubt that conclusion.

24 Q. Okay. So you -- I guess what I'm saying is you used
25 the MAIT -- you didn't doubt -- you're not here to question

1 the MAIT report?

2 A. No, absolutely not.

3 Q. Okay. Now did you look at the videotape and look at
4 the timestamp on the videotape?

5 A. I did.

6 Q. And can you -- did you determine if the -- if the
7 moped pulled up to a green light in the videotape?

8 A. My understanding is that he comes to a stop at a red
9 light, which subsequently turns green, and after it turns
10 green, he fails to move from that stopping point.

11 Q. For how long?

12 A. My guess -- or my count, I guess, based on the
13 timestamp was about 21, 22 seconds.

14 Q. Okay. So the -- the light turns green and he
15 continues to sit there for 22 seconds?

16 A. Approximately, yes.

17 Q. Okay. Now have you visited this area?

18 A. I did.

19 Q. And have you determined what the lighting conditions
20 out there are?

21 A. I went out there earlier than the collision occurred
22 and at that time the gas station was still open for
23 business, so all of their lights were on and the
24 intersection was somewhat illuminated from their lighting,
25 their exterior lighting, but I did place a follow-up call

1 to the gas station and determined that they close at
2 10:00 PM and so based on that information and from the
3 video it's evident that the majority of their exterior
4 lights were off at the time of the collision.

5 Q. And did you determine from the MAIT report that the --
6 the individual, Mr. Miller, was wearing dark clothes on the
7 night?

8 A. Yeah, that's my understanding.

9 Q. And that the moped was a red color?

10 A. Correct.

11 Q. So it was a darker color?

12 A. It was.

13 Q. Now I asked you to determine if you could reach an
14 opinion to a degree of engineering or psychological
15 expertise, more probably than not, whether Mr. Nordan or
16 any driver would have been able to appreciate the fact that
17 the moped was stopped at the intersection. Is that what I
18 asked you to do?

19 A. Correct.

20 Q. And did you come to an opinion about that?

21 A. I did.

22 Q. Okay. And what was that opinion?

23 A. My opinion, and it's based on a couple of factors, is
24 that the fact that the moped was not in motion would not
25 have been appreciable to a driver until a distance that was

1 likely to result in a collision.

2 Q. All right. And tell us why you came to that
3 conclusion.

4 A. For a couple of reasons. The first is that -- just
5 to kind of give a basic overview, a visual perception, that
6 we have to rely on a number of factors when we're driving
7 to determine how quickly we're closing in on a leading
8 vehicle and when you're driving at night, you can be sort
9 of robbed of some of those cues because you're facing lower
10 illumination conditions that are inherent at night, and
11 when that's coupled with the fact that this was a moped
12 with one red tail lamp we sort of have a problem because
13 part of how drivers determine how quickly they're closing
14 in on a vehicle at night is they are able to perceive the
15 size of the gap between two taillights and as that gap
16 gets larger a driver has the perception that they are
17 getting closer to that vehicle. What we're dealing with
18 here is a single red tail lamp and so that cue is no longer
19 available.

20 Q. Well, let me ask you this. Was there any evidence
21 that a turn signal was on or an emergency light was on?
22 Anything to draw a driver's attention to that vehicle that
23 might be stopped in that intersection.

24 A. Not as far as I could tell.

25 Q. Okay. So go ahead. I'm sorry.

1 A. So just basically that a driver approaching this
2 particular scenario would have had to rely on just that
3 single red tail lamp and given its rather small size it
4 may have created the sort of visual illusion that it was
5 a distant vehicle and it certainly wouldn't have been
6 appreciable as a stopped vehicle.

7 Q. Okay. And that's your opinion to a degree of
8 psychological or engineering certainty, more probably than
9 not?

10 A. Correct.

11 Q. And if you had been called to testify in a trial of
12 Mr. Nordan, would you have testified to that?

13 A. Yes.

14 Q. And as a result of your opinion, Mr. Nordan -- or
15 whether an individual was impaired, not impaired, awake,
16 blacked out, would your opinion be the same; that any
17 driver would not have had the ability to appreciate the
18 fact the vehicle wasn't moving until it was too late not
19 to hit him?

20 A. It would have been difficult for any driver.

21 Q. Okay. And so --

22 **MR. HARPOOTLIAN:** I beg the Court's indulgence.

23 BY MR. HARPOOTLIAN:

24 Q. Okay. It was pointed out to me I forgot to ask you a
25 question.

1 A. Uh-huh.

2 Q. You're driving down the road, you're in a rural part
3 of the county not well-lit, you see a green light and you
4 see a red dot.

5 A. Right.

6 Q. Do you have any expectation -- should a person have
7 expectations about what they're seeing?

8 A. Yes, and that's the second part of my opinion.

9 Thank you. You would expect as you're approaching a green
10 light, that even if that red light symbolized a stopped or
11 slow-moving vehicle, you wouldn't expect that they would
12 have been -- they would remain stopped for the duration
13 that this individual did given the green light, and so that
14 coupled with the lack of perceptual cues just led to kind
15 of a perfect storm of conditions for this type of collision
16 to happen.

17 Q. Caused by the person stopped in the intersection
18 improperly --

19 A. Right.

20 Q. -- for 20 seconds, 21 seconds after the light changes?

21 A. Correct.

22 Q. Now do you know if it's illegal to stop in a roadway?

23 A. I'm not familiar with the law, I'll leave that to you,
24 but I would imagine that you should not be stopped in a
25 roadway, particularly when you have the right-of-way.

1 Q. Okay.

2 MR. HARPOOTLIAN: Your Honor, we'd like you to show
3 you the videotape so she can comment on it.

4 THE COURT: Without objection?

5 MR. SCHMECKPEPER: No objection.

6 MR. HARPOOTLIAN: And, Your Honor, what we'd like to
7 do is we have a memory stick here. It's not clean in the
8 sense it's got other stuff on it. We'd like the right to
9 substitute a specific copy of what you're about to see at a
10 later date after today, tomorrow perhaps. Any objection?

11 MR. SCHMECKPEPER: I have no objection.

12 THE COURT: Okay. Without objection. How long is
13 this?

14 MR. HARPOOTLIAN: 25 seconds, 30 seconds.

15 Okay. And, Your Honor, if you can't see it clearly,
16 we have the lights off, what we'll do is we'll just give
17 you the laptop and you can look at it at the desk -- at the
18 bench. Is that okay?

19 THE COURT: Sure.

20 MR. HARPOOTLIAN: Because it's not of great quality.

21 BY MR. HARPOOTLIAN:

22 Q. Okay. So let me -- before we crank this up, is this
23 the timestamp you used down here?

24 A. It is.

25 Q. Now this video is not second for second?

1 A. Correct.

2 Q. It is not -- it's sort of time lapsed but quicker than
3 that, correct?

4 A. My guess would be, just given my experience with this
5 type of footage, that the rate at which the camera is
6 sampling the scene is slower than real time is actually
7 moving, so it won't perfectly match, no.

8 Q. So if you -- if you just timed it based on this, it
9 would be five or six seconds?

10 A. Correct, but if you watch the actual timestamp, you
11 would see a more accurate depiction of how long we're
12 dealing with here.

13 Q. That's this right here, right?

14 A. Correct.

15 Q. Okay. So I'm going to -- and you timed from -- let's
16 go to the part where the moped pulls up to the red light.

17 Okay. So we see a light go green to red?

18 A. Uh-huh.

19 Q. Okay. Stop it right there. Okay. Now we saw a
20 little white light pull up right here --

21 A. Yes.

22 Q. -- right? And the red light's up here, right, and
23 that's the moped?

24 A. Correct.

25 Q. Okay. Go forward until the light turns green. Okay.

1 Now he's sitting at that red light. Green. Okay, stop.

2 Okay. At that point the light is green?

3 A. Uh-huh.

4 Q. And this says 20:34:41 right here, right?

5 A. It does.

6 Q. Okay. Go ahead and run it until the time he gets hit.

7 Now. Okay. So that says 20:35:06, which would be more
8 than 21, 22 seconds, but somewhere in that range; is that
9 right?

10 A. Yes.

11 Q. Okay. Depending on where you start it and stop it?

12 A. Correct.

13 Q. But at least 21, 22 seconds. Okay. Go ahead and
14 continue. Okay. And the truck just keeps on going,
15 right?

16 A. It does.

17 Q. Okay. You can go ahead and stop that.

18 **MR. HARPOOTLIAN:** Your Honor, was that clear enough
19 or would you like to see it again or do you want to see it
20 on the laptop?

21 **THE COURT:** I mean, I think it was clear, but I'd
22 welcome the opportunity to see it up close on the laptop.

23 **MR. HARPOOTLIAN:** Okay. Go ahead and do that. Could
24 we have the lights on again, please?

25 (Whereupon, the video was played again for the Court.)

1 **MR. HARPOOTLIAN:** Your Honor, are you ready?

2 **THE COURT:** Yes, sir, thank you.

3 BY MR. HARPOOTLIAN:

4 Q. So -- and we see -- we see the vehicle strike the
5 moped. Or at least the lights of that vehicle hit the
6 moped. Does -- it doesn't seem to slow down, veer, move
7 in any direction. It just keeps on going, right?

8 A. It definitely does not appear to swerve. There may
9 have been a slight slowing down, but that's not really
10 detectible in the video.

11 Q. Okay. And you can't see whether he hit his brake
12 lights or not?

13 A. No.

14 Q. Okay. So it just kept on going?

15 A. It does appear that way.

16 Q. Okay. Now is that a big vehicle? Well, let me put
17 it this way. Is Mr. Nordan's vehicle big? Is it a tall
18 -- tall truck?

19 A. It appeared to be, yeah, from the photos and the
20 video.

21 **MR. HARPOOTLIAN:** And let me --

22 (Discussion between counsel.)

23 **MR. HARPOOTLIAN:** No objection?

24 **MR. SCHMECKPEPER:** Yeah, why don't you put it up
25 there. Is that the only picture?

1 **MR. HARPOOTLIAN:** Yeah.

2 **MR. SCHMECKPEPER:** No objection.

3 **MR. HARPOOTLIAN:** Can you mark this for me, please.

4 (Petitioner's/Applicant's Exhibit Number 12, a
5 photograph, was marked for identification.)

6 **MR. HARPOOTLIAN:** Your Honor, I'm sorry. I only have
7 one copy of this here today, but this is what I'm going to
8 show here.

9 **THE COURT:** Okay.

10 BY MR. HARPOOTLIAN:

11 Q. Is this a picture from the MAIT file of the vehicle
12 that Mr. Nordan was driving?

13 A. It is.

14 Q. You heard testimony earlier from Mr. Simmons about
15 there being some light bar on top.

16 A. Correct.

17 Q. Is there a light bar on top of this?

18 A. There is a series of lights on the roof of the truck
19 that are probably some kind of light bar.

20 Q. But does that -- do they illuminate what's in front of
21 it?

22 A. Not to a useful extent. I believe it's more for
23 appearance.

24 Q. More what?

25 A. More for the appearance of the truck.

1 Q. Okay. It's ornamental?

2 A. I think so.

3 Q. Okay.

4 MR. HARPOOTLIAN: Thank you. Please answer any
5 questions of Mr. --

6 THE COURT: So without objection, we do the photograph
7 and the resume?

8 MR. HARPOOTLIAN: Yes, Your Honor. I thought -- no
9 objection to the resume or the photograph?

10 MR. SCHMECKPEPER: No objection, Your Honor.

11 THE COURT: Okay.

12 MR. HARPOOTLIAN: I apologize. I thought I introduced
13 them.

14 (Petitioner's/Applicant's Exhibit Number 11,
15 Borzendowski resume, and Number 12, a photograph, were
16 admitted into evidence.)

17 MR. SCHMECKPEPER: May it please the Court?

18 THE COURT: Yes.

19 CROSS-EXAMINATION

20 BY MR. SCHMECKPEPER:

21 Q. Good afternoon.

22 A. Good afternoon.

23 Q. You said you're an expert in -- or you have your
24 background in human factors; am I correct?

25 A. Correct.

1 Q. We just saw this video. It seemed like a pretty --
2 well, so you actually went to the intersection; is that
3 correct?

4 A. I did.

5 Q. And what time did you go there?

6 A. Arrived there around 8 PM.

7 Q. At 8 PM?

8 A. Yes.

9 Q. Do you have in your report of what type of -- what
10 kind of weather was going on on the date of the actual
11 incident?

12 A. I did pull historical weather data and it suggests
13 that it was maybe a little overcast, but there was no
14 precipitation or anything of note.

15 Q. Do you know about what kind of -- what level of
16 darkness there was?

17 A. I looked at the moon phase, as well as moonrise and
18 moonset time, and from what I gathered there was -- the
19 moon had already set and it was only, I believe, in the
20 neighborhood of 30 to 40 percent illuminated even if it
21 had been present.

22 Q. Are you saying that any driver under these
23 circumstances driving down the road sees a green light,
24 sees a moped, they're not gonna recognize -- no driver is
25 gonna recognize that there's a moped sitting in the middle

1 of the road and they're gonna plow right on through that
2 intersection and run over them?

3 A. I believe what I said was that it would have been
4 extremely difficult to appreciate that not only it was a
5 moped stopped at the intersection, but that it was stopped.

6 Q. But a driver paying attention is gonna be able to
7 at least figure out either right before the accident or
8 sufficiently enough to be able to take some sort of evasive
9 measure, right?

10 A. It's not as simple as that because it takes time to
11 perceive a potential threat, react and execute a decision,
12 and then it takes time to physically stop a vehicle or
13 swerve. So given the point at which someone would have
14 detected that this was a stopped moped, there was probably
15 not sufficient time or distance to complete all of those
16 actions.

17 Q. There probably wasn't?

18 A. I mean --

19 Q. How much?

20 A. -- I didn't reconstruct the accident before I came
21 here, but --

22 Q. How much time or -- how much time was there -- how
23 much time was there?

24 A. Well, that depends on travel speed, as well as the
25 amount of time that it would take someone to perceive

1 the hazard, the amount of time it takes to reach your
2 foot to the brake, slam on the brakes. These things all
3 take time.

4 Q. So all those are factors though?

5 A. Right.

6 Q. So if someone was going over the legal speed limit,
7 that might be a factor. It's also a factor whether it's
8 gonna be slow -- or it's gonna be harder; is that correct?

9 A. Harder to do what?

10 Q. Stop in time. Harder to perceive that threat and
11 stop -- stop in time.

12 A. It doesn't make a difference. It doesn't change
13 the difficulty of perception. It would take more time
14 and distance to stop the vehicle.

15 Q. And if somebody is impaired, say he's under the
16 influence of alcohol or drugs, would that have an
17 impact?

18 A. I mean, it depends on what kind of drug we're talking
19 about and the level of impairment, but, I mean, there's
20 certainly research to suggest that impairment slows
21 reaction time.

22 **MR. SCHMECKPEPER:** I beg the Court's indulgence. I
23 have no further questions.

24 **THE COURT:** Any redirect on what he went into?

25 **MR. HARPOOTLIAN:** Yes, sir, just very briefly.

1 REDIRECT EXAMINATION

2 BY MR. HARPOOTLIAN:

3 Q. You could with some empirical ability, if the highway
4 patrol said been 36 and 44 miles an hour, determine how
5 many feet per second the vehicle was going?

6 A. Yeah. I mean, I have some numbers in front of me if
7 you want me to pull them.

8 Q. Yeah, go ahead.

9 **MR. SCHMECKPEPER:** Your Honor, I'm gonna object right
10 here. I'm not sure if this is within the context of her
11 expertise. She's a human -- I'm not sure I remember the
12 -- human factors expert, not an accident reconstruction
13 expert. That's what she told me.

14 **THE COURT:** I don't know what she's gonna answer, but
15 if -- I'm gonna allow her to go into it if it's part of her
16 research.

17 **THE WITNESS:** Right. And, I mean, I'm just gonna
18 provide the values in feet per second. So travelling at
19 35 miles an hour, the vehicle would be travelling at about
20 51 feet per second, and at 45 it would be 66 feet per
21 second.

22 BY MR. HARPOOTLIAN:

23 Q. Okay. So -- and as a human factors expert, do you
24 ever do calculations on how long it would take somebody
25 once they appreciate that there's a problem to react?

1 A. Sure. Those calculations are doable.

2 Q. And is there some general -- how long it takes for
3 someone to appreciate and then get their foot on the brake?

4 A. There's some sort of rules of thumb, but with the
5 caveat that there's a lot of individual differences that
6 go into that, but what you'll see commonly cited for
7 someone driving at night is about two and a half seconds
8 to perceive and react.

9 Q. Okay.

10 A. But that does not include time to physically stop the
11 vehicle.

12 Q. Okay. So two and half seconds going 44 miles an hour
13 would be how long?

14 A. Two and a half seconds at 45, let's say, so we would
15 be looking at like 145, 145 feet in two and a half seconds,
16 if I'm doing that correctly.

17 Q. And on 35?

18 A. 35? If you'll assume 50 feet to make that easier,
19 125 feet.

20 Q. Okay. So the first thing you have to do is
21 appreciate?

22 A. Correct.

23 Q. It takes some time to do that?

24 A. Uh-huh.

25 Q. Then after you appreciate the fact there's something

1 in the road, it takes some period of time to get your foot
2 to the brake?

3 A. Right.

4 Q. Okay. And so in this instance based on what we see,
5 the person never appreciated the fact there was something
6 in the road?

7 A. It doesn't appear that that was the case, no.

8 Q. And the fact they didn't appreciate something was in
9 the road indicates this one red light under a green light
10 that's been green for 22 seconds, I mean, are there some
11 assumptions people make as they're driving down the road
12 and they see a green light and it's been green for 22
13 seconds?

14 A. Sure. I think that any driver who has even a little
15 bit of driving experience anticipates that a green light
16 that has been green for that long would have cleared some
17 of that traffic out and, as I said, with the red light
18 being such a small target the fact that it wasn't moving
19 wouldn't have been noticeable right away.

20 Q. Couldn't have appreciated that until the last moment?

21 A. Probably, yeah.

22 **MR. HARPOOTLIAN:** Thank you. No further questions.

23 **MR. SCHMECKPEPER:** Your Honor, at this point I'm
24 gonna move to strike all of this witness's testimony in
25 terms -- at least as far as -- at least as far as couched

1 in expert testimony. Most of her testimony has been
2 along the lines of may, might, probably, we're talking
3 about rules of thumb. We haven't heard really anything
4 about reasonably -- a reasonable degree of scientific
5 certainty.

6 **MR. HARPOOTLIAN:** Your Honor, I thought I asked that
7 question three different times.

8 **THE COURT:** I thought you had as well.

9 **MR. SCHMECKPEPER:** Your Honor, even -- I mean, even
10 when she's asked whether or not she can answer a question
11 to any degree of reasonable scientific certainty, her
12 testimony has been couched in may, might, rules of thumb.

13 **MR. HARPOOTLIAN:** She said yes.

14 **THE COURT:** Okay. Well, I will listen to the
15 testimony and give it the appropriate weight that it
16 requires.

17 **MR. HARPOOTLIAN:** Thank you, Your Honor.

18 **THE COURT:** All right. Now on those last series of
19 questions, do you have any that you wanted to ask her
20 about?

21 **MR. SCHMECKPEPER:** Nothing, Your Honor.

22 **THE COURT:** Okay. Thank you, ma'am. You may step
23 down.

24 (Witness excused.)

25 **MR. HARPOOTLIAN:** May it please the Court, Your Honor?

1 I call the Petitioner, Mr. Nordan, to the stand, please.

2 **THE COURT:** Sir, just come up right over here and let
3 the Clerk of Court swear you in.

4 RANDALL HOUSTON NORDAN,
5 having been duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. HARPOOTLIAN:

8 Q. Houston, can you -- how about say your full name for
9 the record, please.

10 A. Randall Houston Nordan.

11 Q. Okay. Mr. Nordan, how old are you, please?

12 A. 28.

13 Q. Mr. Nordan, tell us a little about yourself. Where
14 were you born?

15 A. I believe Richland Hospital. I grew up in Lexington,
16 South Carolina. I went to Lexington High School. I had a
17 short stint in college, went in the military, and worked in
18 West Columbia.

19 Q. Okay. Well, that's more than I asked you, but let me
20 see if I can back up on that. When did you go into the
21 Marines?

22 A. I believe the exact date was 8-8-08.

23 Q. And did you volunteer?

24 A. I did.

25 Q. And while you were in training, or soon thereafter,

1 did you get injured?

2 A. Yes, sir, I did.

3 Q. And how did you get injured?

4 A. It was a training accident.

5 Q. Okay. And as a result of the training accident, what
6 injuries did you incur?

7 A. I believe I was told it was eleven compound wedge
8 fractures.

9 Q. In what?

10 A. In my back, in two separate locations, some soft
11 tissue damage in my right knee, and my right ankle as well.

12 Q. Okay. As a result of your injuries, did you separate
13 from the Marines?

14 A. Yes, sir.

15 Q. Honorably discharged.

16 A. Honorably with medical conditions.

17 Q. Okay. And after going into -- after getting out of
18 the Marines -- prior to getting out of the Marines, were
19 you prescribed medications to deal with -- did you have any
20 pain?

21 A. Yes, sir.

22 Q. Was it extreme?

23 A. Sometimes more than others, but extreme would be a
24 good word, yes, sir.

25 Q. And where?

1 A. In my back.

2 Q. Okay. And did the physicians in the Marine Corps
3 prescribe medicine for you?

4 A. Yes, sir.

5 Q. What kind of medicine back -- that would have been in
6 '09?

7 A. Yes, sir.

8 Q. Okay. And what were they prescribing?

9 A. It started out different antiinflammatories and ended
10 up being tramadol.

11 Q. Okay. And did you continue to take that medication
12 once you separated from the Marine Corps?

13 A. Yes, sir, with a short break.

14 Q. Okay. Why did you have a short break?

15 A. The time it took for the military and the VA, two
16 different parties, to take over my medical care.

17 Q. And so the VA took over your medical care?

18 A. Correct.

19 Q. Did you go to the Dorn Center to get that?

20 A. Yes, sir.

21 Q. And physicians saw you there for your condition?

22 A. Yes, sir.

23 Q. Was there any surgery that could be had or what --

24 A. They discussed it, but the benefits didn't -- they
25 weren't quite as good as it seemed.

1 Q. Okay. So they continued to prescribe medication?

2 A. Yes, sir.

3 Q. Tramadol being one of those?

4 A. Yes, sir.

5 Q. Now when you took the tramadol and these other
6 medications, how did it make you feel?

7 A. Sometimes hazy.

8 Q. Okay.

9 A. Depending on the frequency of when I took them
10 determined the haziness.

11 Q. Okay. Now let's go to -- let's go to the day -- let
12 me back up for just a second. Did you have discussion with
13 Mr. Simmons about what had occurred in reference to this --
14 this homicide, this death?

15 A. Yes, sir.

16 Q. Okay. Did you ever indicate to him -- ever indicate
17 to him you had any recollection of what occurred on the
18 night that Mr. Miller was hit?

19 A. Certain parts of it, yes; certain parts, no.

20 Q. What about the part where Mr. Miller gets hit and
21 killed?

22 A. No, sir.

23 Q. Have you ever had any memory of that?

24 A. No, sir.

25 Q. As you sit here today, do you have a memory of that?

1 A. No, sir.

2 Q. Did you ever indicate to Mr. Simmons or anyone else
3 that you had a memory of that?

4 A. No, sir.

5 Q. Do you have a memory of texting anybody or calling
6 anybody that night?

7 A. No, sir.

8 Q. Okay. Now you were on a drug cocktail of tramadol and
9 what else?

10 A. During which event?

11 Q. The -- the death of Mr. Miller.

12 A. If I'm not mistaken, it was the tramadol,
13 cyclobenzaprine -- I'm not quite sure off the top of my
14 head.

15 Q. Have you seen the opinion letter by Dr. Shawn Fuller?

16 A. I have.

17 Q. And is his letter accurate as to what you were taking?

18 A. Yes, sir. It was compared directly to the notes from
19 the VA.

20 Q. Okay. And you met with Dr. Fuller?

21 A. Correct.

22 Q. And he reviewed those records with you?

23 A. Correct.

24 Q. And they were accurate?

25 A. Yes, sir.

1 Q. So Dr. Fuller's opinion that you had a blackout is
2 consistent with the drugs that you took?

3 A. To my understanding, yes, sir.

4 Q. Okay. So do you -- I mean, have you ever blacked out
5 before?

6 A. Not to this extent, no, sir. There's been times I
7 might not recall watching the end of a TV show, but nothing
8 to this extent.

9 Q. Okay. Where you didn't recall watching the end of a
10 TV show because you fell asleep or you just don't have any
11 recollection of it?

12 A. I'm unaware, sir. I don't know.

13 Q. Okay. And so the day of the plea, the guilty plea,
14 were you taking the three medications you told the judge?

15 A. Yes, sir.

16 Q. Had you taken anything the night before?

17 A. I took Ambien because I couldn't sleep.

18 Q. And how many pills did you take?

19 A. Two 5-milligram tablets.

20 Q. Okay. Now did Mr. Simmons or anybody indicate to you
21 you shouldn't take any -- any drugs prior to your guilty
22 plea?

23 A. No, sir.

24 Q. Okay. And the Ambien, did you take it every night or
25 just when you needed -- needed help?

1 A. Just when I couldn't sleep.

2 Q. How often was that?

3 A. Maybe three to five times a month at the most.

4 Q. Okay. So this was a somewhat unusual situation?

5 A. Correct, and -- and I couldn't sleep due to stress
6 knowing I had a court appearance the next day.

7 Q. Okay. Now when you got up that morning, did you take
8 any medication?

9 A. Yes, sir.

10 Q. When did you take it?

11 A. It was roughly, I would say, in the earlier part of
12 the 8:00 hour.

13 Q. And where did you take it?

14 A. Mr. Simmons' office in his waiting room.

15 Q. And why were you taking it then?

16 A. Just a nerve shot. I had pain from days on end. I
17 hadn't taken it yet that morning.

18 Q. Now did stress exacerbate the pain in your back?

19 A. Significantly, yes, sir.

20 Q. And did you take it that morning because you were
21 having pain?

22 A. Yes, sir.

23 Q. And what did you take?

24 A. Two, 50-milligram tramadol, one 20-milligram baclofen,
25 and one meloxicam.

1 Q. ... Okay. And did you then stay at his office or did you
2 go somewhere?

3 A. For a short period of time. We were told the -- the
4 hearing had been delayed until I believe 1:00 and so we
5 parted ways for -- until later on that day and went back to
6 the house.

7 Q. Did you take anything else before you came back to
8 court?

9 A. Yes, sir. Closer to -- I would say right before we
10 left, maybe -- I would say 12:00, two more 50-milligram
11 tablets of tramadol.

12 Q. Now were you allowed to do that under your
13 prescription?

14 A. Yes, sir. It -- it says on the bottle and in the
15 medical files four to six hours as needed. Generally I
16 didn't have to take them that frequent, but I guess with
17 the stress-induced I felt it necessary.

18 Q. So you took another hundred milligrams of tramadol?

19 A. Correct.

20 Q. And then you went to Mr. Simmons' office?

21 A. No, sir. We met directly at the --

22 Q. Lexington County? This -- this building?

23 A. This building here, yes, sir.

24 Q. Okay. And how long was it after you got here that you
25 went into the courtroom?

1 A. We walked directly in. A matter of minutes.

2 Q. Okay. Now was your condition -- having taken the
3 tramadol, the two doses, were you -- was it affecting you?
4 Was it affecting your decision-making ability at that
5 point? Did you feel affected by it?

6 A. I would have to say yes, back to the somewhat of a
7 foggy feeling. Now that I've been off of it I can
8 definitely say yes.

9 Q. Now how long have you been off the drugs?

10 A. Since December 9, 2013.

11 Q. So you're not on drugs today?

12 A. No, sir.

13 Q. Do you have pain?

14 A. Yes, sir, every day.

15 Q. So you can compare how you are today with the way you
16 were on December 9th?

17 A. Yes, sir.

18 Q. And you say you were fuzzy. Did you appreciate what
19 was going on?

20 A. At the time I don't believe so.

21 Q. Okay. Now the judge asked you what you're on -- or
22 are you on drugs. You say no, right?

23 A. Correct.

24 Q. And then who told you to tell him about the medicine?

25 A. Mr. Simmons had stated that I was.

1 Q. Okay. And did you tell the judge what you were on?

2 A. Correct.

3 Q. And he asked you -- he asked you if you were guilty,
4 whether you committed the crime; did he not?

5 A. Yes, sir.

6 Q. Do you know whether you're guilty or not?

7 A. The whole time I've said I don't like using the word
8 "guilty" because I don't know if I did it or not.

9 Q. And that's because you have no memory of it?

10 A. Correct.

11 Q. Did you tell Mr. Simmons that?

12 A. Correct.

13 Q. And did you consistently tell him that?

14 A. Correct.

15 Q. And did he tell you to go ahead and plead guilty
16 anyway?

17 A. He said he thought that would be the best opinion --
18 or in his opinion that would be the best route.

19 Q. And did you tell him I don't -- I don't remember
20 having committed the crime?

21 A. Correct.

22 Q. Either one of the crimes, you have no recollection of
23 it?

24 A. Correct.

25 Q. And as you sit there today, you have no recollection?

1 A. Yes, sir.

2 Q. Now as you're standing in front of the judge and
3 saying yes or no, was anyone assisting you to say that?

4 A. Beforehand I was told to kind of -- I forget the exact
5 words, but something along the lines of "follow my lead",
6 and a lot of times I looked to my left for -- I was getting
7 a nodding of "yes" or a nodding of "no" and that was the
8 answer that I was taking.

9 Q. Did Mr. Simmons indicate to you he thought the range
10 of what you would get?

11 A. Originally it was a few years and when I questioned
12 a few years, it was two to three, but it was no deal. He
13 said it was a possible range of two to three years.

14 Q. So when the judge asked you if anybody's guaranteed
15 you anything, when you said "no" that was true?

16 A. Correct.

17 Q. When the judge asked you if you understood what you
18 were doing there that day and you said "yes", that was not
19 correct?

20 A. It happened.

21 Q. You didn't understand what you were doing?

22 A. Correct.

23 Q. And you were under the influence of these drugs?

24 A. Yes, sir.

25 Q. And more under the influence than on other days,

1 right?

2 A. Right, due to the abnormal amount of stress and
3 restlessness and it just had a compound effect on my
4 situation.

5 Q. So do you remember noticing that the -- that the winch
6 on the front of your bumper come loose?

7 A. Could you repeat that?

8 Q. Do you remember when or if you noticed that the winch
9 on the front of your bumper come loose?

10 A. Yes, sir. That's what I remember from that night was
11 the actual noise of grinding and upon exiting the vehicle,
12 that's what I seen, was the winch dangling by two wires and
13 a cable under the front of the truck.

14 Q. Do you know how -- what you hit or what you may have
15 hit?

16 A. I do not, no. What -- the only thing that come to my
17 mind was due -- it had fallen due to it being improperly
18 installed.

19 Q. Did you think maybe you went over a bump or something?

20 A. Yes, sir, because over the year to two years that I
21 had that winch on there it would bounce significantly on
22 the front of the truck and I did have a feeling it was
23 gonna come off eventually one day.

24 Q. When did you notice you had damage to the front of
25 your truck?

1 A. Upon seeing the winch on the front.

2 Q. And when -- was that that night or the next morning?

3 A. That was that night -- or early that morning.

4 Q. Did you have any idea of what you hit, if anything?

5 A. Well, the winch has two significantly large cables
6 that power it and they went through the front of the grill
7 and that's what my belief was; that when the winch was
8 pulled from the front of the truck that the cables took a
9 portion of the grill off.

10 Q. Okay. So the damage you thought was consistent with
11 the -- the -- it broke part of the grill off; is that
12 right?

13 A. Yes, sir. That was right where the large wires were
14 coming through.

15 **MR. HARPOOTLIAN:** Any objection?

16 **MR. SCHMECKPEPER:** No objection.

17 **MR. HARPOOTLIAN:** I apologize, Your Honor. I don't
18 have a separate copy. I'm going to have this marked and
19 show it to you and to him.

20 Would you mark this, please.

21 (Petitioner's/Applicant's Exhibit Number 13, a
22 photograph, was marked for identification.)

23 BY MR. HARPOOTLIAN:

24 Q. Is this a picture of your vehicle?

25 A. It is.

1 Q. And would you point, please, to the area that you
2 think the winch broke off from and where it hit.

3 A. It was mounted under here. The cables went directly
4 where this marking is to the battery which is located
5 behind this light.

6 Q. And so were the cables behind the grill?

7 A. They went through the grill. Right between the grill
8 and the light right here.

9 Q. There's no blood, no -- no nothing on there to
10 indicate you'd hit a person, correct?

11 A. I was told there was no DNA on the truck.

12 Q. So there would be no blood?

13 A. Correct.

14 Q. But you didn't see any blood that night or anything to
15 indicate you hit a person?

16 A. There was no visible markings of hitting anything.
17 That's what led me to believe that it was a malfunction of
18 the installation of the winch.

19 **THE COURT:** And that was 13?

20 **MR. HARPOOTLIAN:** Yes, sir. I move for its admission.
21 Have I done that?

22 **THE COURT:** 13. He said without objection.

23 (Petitioner's/Applicant's Exhibit Number 13, a
24 photograph, was admitted into evidence.)

25 BY MR. HARPOOTLIAN:

1 Q. Okay. Now did you have anything to drink that night?

2 A. No, sir.

3 Q. And -- so you don't know whether you committed the
4 crime or not?

5 A. No, sir, I do not know.

6 Q. And you -- on the day of your guilty plea you were
7 under the influence of drugs?

8 A. Yes, sir, I was.

9 Q. And you told the court the drugs you had taken. You
10 hadn't hidden that from the court, correct?

11 A. Correct.

12 Q. Did Mr. Simmons ever tell you to not take the drugs
13 before the day of court?

14 A. No, sir.

15 Q. Did he ever indicate to you or ask you do you know
16 what you're doing, do yo feel okay? Did he ever ask you
17 that?

18 A. No, sir.

19 Q. Now in terms of making a decision on whether to plead
20 guilty or go to trial, you heard Mr. Simmons' testimony
21 this morning about putting you in a room with the file and
22 you and your mother; is that correct?

23 A. Yes, sir, that's correct.

24 Q. Did you know what you were looking at?

25 A. A lot of photos.

1 Q. Okay. What about the file? Are you trained in the
2 legal process?

3 A. No, sir. I have no idea what I'm doing.

4 Q. Have you ever seen a MAIT report before?

5 A. I do not know what that is.

6 Q. And as a result of looking through that file, did you
7 uncover any evidence you felt was relevant?

8 A. No, sir.

9 Q. Okay. Now when -- and did that help you decide to
10 plea or not plea?

11 A. No, sir. I told him on numerous occasions that I had
12 confidence -- 100 percent confidence in his judgment.

13 Q. And did you rely on his judgment?

14 A. Yes, sir.

15 Q. And because he told you to plead guilty, even though
16 you didn't know if you were guilty, you pled guilty?

17 A. Correct.

18 Q. Now let me back up to an area -- you were indicted on
19 two counts; one, reckless homicide, and the other hit and
20 run, right?

21 A. To my knowledge, yes, sir.

22 Q. Did -- did Mr. Simmons ever sit down and go over the
23 indictments with you?

24 A. Yes, sir.

25 Q. Okay. Did he explain to you what the elements of

1 reckless homicide were?

2 A. Briefly, yes, sir.

3 Q. Did he tell you what in your case would show the
4 recklessness required for reckless homicide?

5 A. Yes, sir.

6 Q. What did he say?

7 A. I don't recall exactly. I just remember we sat there
8 and talked briefly one of the -- one of the times in his
9 office.

10 Q. Okay. And what about -- when did you -- I mean, did
11 you think you were going to trial up to some point?

12 A. Originally, yes, sir, until the Wednesday night
13 before the court date. I don't know the date, but the
14 Wednesday before the court day, which was on a Monday.

15 Q. And at what time -- and how did you decide at that
16 point or who decided at that point you were gonna plead
17 guilty rather than go to trial?

18 A. That was when we first started discussing it may be
19 better. He said the judge changed, it's better for us;
20 that he had a background at the Citadel and my military
21 record -- background would help us, and Thursday we met
22 back up with him again to continue discussing that and
23 actually look at the photos and the evidence.

24 Q. And that was the Thursday before you pled on Monday?

25 A. Correct.

1 Q. Houston, do you know if you're guilty?

2 A. No, sir, I don't. In my head I'm not guilty because
3 I don't recall anything of that nature.

4 Q. Was there -- was there any -- did Mr. Simmons
5 indicate that he had some great deal that you ought to go
6 ahead and take even though you don't know?

7 A. No, sir.

8 Q. Did he indicate to you that the evidence was so
9 overwhelming that you ought to plead guilty anyway?

10 A. No, sir. He -- the only thing he referred to was
11 what he said earlier about a phone -- text message.

12 Q. Okay. And did you and he ever discuss what a
13 blackout was?

14 A. No, sir.

15 Q. Did he ever indicate to you that he didn't think
16 somebody that was blacked out could text?

17 A. No, sir.

18 **MR. HARPOOTLIAN:** Okay. I beg the Court's indulgence.

19 BY MR. HARPOOTLIAN:

20 Q. Okay. If -- if Mr. Simmons had advised you that you
21 couldn't plead guilty unless you knew you were guilty,
22 would you have pled guilty?

23 A. No, sir.

24 Q. Okay. And you would have gone to trial?

25 A. Correct.

1 Q. If Mr. Simmons had talked to you -- did Mr. Simmons
2 talk to you anything about human factors?

3 A. I did not know what that meant until today.

4 Q. Okay. If he had talked to you about that and
5 you'd seen what you saw here today, would you have plead
6 guilty?

7 A. No, sir.

8 Q. And did he ever tell you the State has to show
9 recklessness beyond a reasonable doubt?

10 A. No, sir. I was more scared of the thought.

11 Q. Of what?

12 A. Of the thought of me actually doing it.

13 Q. Okay. But, I mean, did he ever explain what --
14 that they had to show beyond a reasonable doubt that you
15 committed reckless homicide?

16 A. No, sir.

17 Q. Okay. And had he explained what you've heard here
18 today, would you have gone to trial or would you have
19 pled guilty?

20 A. I would have gone to trial for sure.

21 **MR. HARPOOTLIAN:** Thank you. Please answer any
22 questions that the Attorney General has for you.

23 **MR. SCHMECKPEPER:** May it please the Court, Your
24 Honor?

25 **THE COURT:** Yes, sir.

CROSS-EXAMINATION

1 Q. Good afternoon, Mr. Nordan.

2 A. Good afternoon.

3 Q. Now you just testified that your attorney never told
4 you the State would have to prove recklessness beyond a
5 reasonable doubt. Did he advise you of any of your
6 constitutional rights?
7

8 A. I believe so. I can't recall exactly what, but
9 originally, yes, sir.

10 Q. So he didn't -- but he didn't tell you that the State
11 had to prove each element of their case beyond a reasonable
12 doubt to convict you?

13 A. Can you repeat that?

14 Q. You testified that he didn't tell you he had -- that
15 your attorney had to prove recklessness -- that the State
16 had to prove recklessness to convict you; is that correct?

17 A. If that's what I said, yes, sir.

18 Q. And that your attorney told you you weren't gonna --
19 how much time did your attorney say you were gonna get?

20 A. He didn't say anything on how much I was gonna get.
21 He said he believed it would be two to three years.

22 Q. Did the judge explain to you at the guilty plea
23 hearing how much time you could get?

24 A. Yes, sir.

25 Q. And what did he say?

1 A. If I'm not mistaken, on one charge, zero to ten, and
2 the other one, one to twenty-five.

3 Q. And the judge explained to you that the State had to
4 prove its entire case beyond a reasonable doubt, correct?

5 A. He may have. I honestly don't recall a lot about that
6 day.

7 Q. Do you recall -- do you recall how your representation
8 started with Mr. Simmons?

9 A. What do you mean when it started?

10 Q. Do you remember when he started representing you?

11 A. Are you talking about the day I was arrested or the
12 day we were at the police department?

13 Q. I'm talking about the day -- the first time you met
14 with Mr. Simmons.

15 A. Yes, sir, it was in an interrogation room.

16 Q. What did y'all talk about?

17 A. How I was doing. He introduced himself to me, what I
18 was here for, and we discussed for a couple of minutes and
19 then walked out.

20 Q. What did y'all discuss?

21 A. Where I was, what I was doing, what happened, you
22 know, and so forth.

23 Q. What did you tell him?

24 A. Exactly what I -- what I knew what had happened.

25 Q. And what was that?

1 A. That there was a portion that I don't remember and
2 then what I did hear, where I went, the three places I
3 stopped, and where I ended up at.

4 Q. So you didn't tell him that you remembered running
5 over the railroad tracks too fast and busting the winch?

6 A. No, nobody said anything about riding over a railroad
7 track.

8 Q. So that never happened?

9 A. I said it could have been caused by something like a
10 railroad track --

11 Q. You didn't --

12 A. -- or something on concrete.

13 Q. You didn't tell your -- you didn't tell your attorney
14 that's what happened?

15 A. What's that?

16 Q. You -- your attorney got up here -- are you saying
17 your attorney got up here and lied?

18 **MR. HARPOOTLIAN:** Objection, Your Honor. Pitting one
19 witness against the other.

20 **THE COURT:** Do you want to rephrase that question?

21 **BY MR. SCHMECKPEPER:**

22 Q. You're telling me you did not tell that to your
23 attorney?

24 A. I said it could have been caused by a bump like a
25 railroad.

1 Q. Now your attorney testified -- or your plea attorney
2 testified that your story developed or changed several
3 times.

4 A. No, that's not true.

5 Q. That's not true?

6 A. No, sir. My story hasn't changed the whole time.

7 Q. Let's talk about your memory of that night.

8 A. All right.

9 Q. What's the last thing you remember?

10 A. The last thing I remember would be repairing the
11 hydraulic hose on the -- on the truck.

12 Q. About what time was that?

13 A. Early that morning.

14 Q. So you don't remember anything that whole day?

15 A. Which day are you referring to?

16 Q. The day of the actual -- the day the victim was
17 killed. The day you ran over the victim's moped, you don't
18 remember anything from that day?

19 A. No, I do remember portions of it, yes.

20 Q. What do you remember from that day?

21 A. I remember leaving my house. I remember stopping by
22 the Wild Hare. I remember going by her house. I remember
23 -- Brooke's house.

24 Q. Whose house?

25 A. Brooke.

1 Q. And who's that?

2 A. An ex-girlfriend. And I remember finally finding her
3 in Five Points and walking back out to my truck.

4 Q. And that's all continuous?

5 A. Correct.

6 Q. There are no gaps in there?

7 A. No, sir.

8 Q. All right. So you're at Brooke's house and you go to
9 Five Points?

10 A. I was at my house first, yes, sir.

11 Q. Brooke's house, your house, Five Points?

12 A. My house, Wild Hare, Brook's house, Five Points, and
13 that's where the memory loss is.

14 Q. About what time was that?

15 A. I remember leaving my house -- last time I remember
16 seeing the time was roughly 10 -- 10:00.

17 Q. 10:00. So you were at Five Points for how long?

18 A. A matter of minutes.

19 Q. You didn't have any beers?

20 A. No, I'm not a drinker.

21 Q. You never told your attorney you had any beers?

22 A. No, I told him that I purchased a shot to get a better
23 angle to see Brooke and a guy that she was with, split it
24 with the bartender, and on my way out the door sat it down.

25 Q. You split the shot with the bartender?

1 A. One shot two ways.

2 Q. So you bought a shot so you could look at Brooke and
3 her -- some guy that she was with?

4 A. Right. Because the whole point of me being out was to
5 try to find her.

6 Q. And you didn't drink any of that shot?

7 A. No, sir.

8 Q. And you never told your attorney you had a beer and
9 drank it?

10 A. No, sir. I don't drink like that.

11 Q. And then you blacked out?

12 A. Yes, sir.

13 Q. And where were you when you blacked out?

14 A. To my knowledge, somewhere in Five Points.

15 Q. Somewhere in Five Points. And then what happened when
16 you -- what's the next thing you remember?

17 A. Like I said, the winch, the grinding noise of the
18 winch -- or of metal, and I found that to be the winch.

19 Q. And then you called your buddy?

20 A. I don't know if I called my buddy. I don't know if
21 that was before or after, but I -- I don't remember calling
22 anybody.

23 Q. Did you see anybody that night?

24 A. No, sir.

25 Q. Did anybody come out and help you that night?

1 A. No, sir. Not that I know of.

2 Q. Well, what -- you said you remember the winch
3 dragging?

4 A. I said I come to to a grinding noise.

5 Q. And where were you?

6 A. I have no idea.

7 Q. Okay. Do you remember what happened next?

8 A. Upon getting the winch -- I was attempting to get it
9 somehow secured to where the vehicle could drive and get
10 off the road.

11 Q. Okay.

12 A. It took two attempts at that and then went to the shop
13 where I work.

14 Q. You went to the shop?

15 A. What's that?

16 Q. So then you went to the shop?

17 A. Correct.

18 Q. Were there any blackouts between you finding the
19 winch, putting it in your truck and getting to the shop?

20 A. Not that I know.

21 Q. So the only blackout was between Five Points and you
22 finding your winch?

23 A. Apparently, yes, sir.

24 Q. You don't remember calling your buddy?

25 A. No, sir.

1 Q. You don't remember a buddy coming out and helping you
2 out?

3 A. I don't know if somebody helped me out or not.

4 Q. What time did you get to the shop?

5 A. What's that?

6 Q. What time did you get to the shop?

7 A. I'm not sure. I honestly couldn't tell you.

8 Q. Midnight, morning? Was it light outside? Was anybody
9 there?

10 A. No, sir. I'm normally the first one there every day.

11 Q. Did you stay there?

12 A. What do you mean do you stay there?

13 Q. Did you stay at the shop that night?

14 A. I don't understand what the question is. Did I stay
15 there --

16 Q. You get to the shop with your truck. Do you leave or
17 do you stay there?

18 A. No, I stayed there.

19 Q. You stay there. When do people start showing up?

20 A. Roughly a quarter till 7, 7:00 AM.

21 Q. Did you talk to your dad?

22 A. I did talk to my dad. I talk to him every morning.

23 Q. How did that conversation go?

24 A. Honestly I couldn't tell you.

25 Q. Why not?

1 A. It's been four years ago and some change.

2 Q. So you didn't black out?

3 A. Like I said, I don't know.

4 Q. You just don't remember whether or not he made you go
5 home because you smelled like booze?

6 A. No, I went and purchased supplies for the shop for a
7 job we had that day.

8 Q. So he never said go home, you smell like booze?

9 A. No.

10 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

11 BY MR. SCHMECKPEPER:

12 Q. And you said you had other blackouts before that?

13 A. I don't know if I can refer to them as a blackout
14 where there's -- you know, like my attorney said, I don't
15 know if I fell asleep or -- or what, so I would be led to
16 believe no.

17 Q. So right now though -- I mean, you -- thinking back,
18 when you think blackouts, something pops to mind, so tell
19 me what those are. What happened?

20 A. Are you asking me my definition of a blackout?

21 Q. No. What I'm saying is when your attorney asked you
22 had ever had blackouts before, you said maybe, right?

23 A. I don't -- maybe, that's a yes or a no. I don't know.

24 Q. So you don't know if you'd ever had a blackout before,
25 but there are spots in your memory that you just don't know

1 about?

2 A. Correct.

3 Q. Did you tell your attorney about that?

4 A. Which one?

5 Q. Your trial attorney, Mr. Simmons.

6 A. He was aware of the effects on me, yes.

7 Q. I'm asking did you tell him I've had blackouts before?

8 A. I believe so, yes. Like I said, it's been four to
9 five years ago, so.

10 Q. Have you had any blackouts since then?

11 A. Since when?

12 Q. Since the night you killed the victim.

13 A. I don't know if I can refer to it like that, but I
14 don't believe so.

15 **MR. HARPOOTLIAN:** Objection, Your Honor. Allegedly
16 killed the victim.

17 **MR. SCHMECKPEPER:** Well, Your Honor, he pled guilty.
18 It's not allegedly at this point.

19 **MR. HARPOOTLIAN:** Well, that's the whole issue, isn't
20 it?

21 **THE COURT:** Okay. You can answer. I think I
22 understand the -- what you're asking.

23 **BY MR. SCHMECKPEPER:**

24 Q. Have you had any accidents since the victim died --
25 or have you had any blackouts since the victim died?

1 A. Not to my knowledge.

2 Q. So the only real blackout you had was between the
3 time -- between the time you left Five Points, somehow the
4 victim died, and you got back to the shop; is that correct?

5 A. No, sir. That could be correct, but the reason this
6 one stands out is because a significant event could have
7 happened.

8 Q. So the only blackout that you know happened. Any
9 blackout you remember was this blackout?

10 A. You could say that, yes.

11 Q. Let's talk about your trial -- or your guilty plea.
12 And you said, again, your attorney explained your
13 constitutional rights to you?

14 A. Not at the trial, no.

15 Q. At some point your attorney explained your
16 constitutional rights to you?

17 A. I believe so is what I said.

18 Q. And the judge explained your constitutional rights
19 to you; is that correct? I've got the transcript if you'd
20 like to look at it.

21 A. Yeah, I would like to see it.

22 **MR. SCHMECKPEPER:** Your Honor, may I approach?

23 **THE COURT:** Yes, sir.

24 **BY MR. SCHMECKPEPER:**

25 Q. Do you see on page 5 where the judge says, "I'm gonna

1 explain to you your constitutional rights"?

2 A. Yeah, I see that.

3 Q. And then he proceeds to explain them to you; is that
4 correct?

5 A. It appears so, yes.

6 Q. Thanks. Do you mind if I see that? Do you remember
7 the judge asking you how you wish to plead to reckless
8 homicide?

9 A. I do not.

10 Q. You don't remember him asking that? Here, let me show
11 you this again.

12 **MR. SCHMECKPEPER:** I believe it's page 7, Your Honor.

13 No, I'm sorry, it's page 6.

14 BY MR. SCHMECKPEPER:

15 Q. If you'd read page -- lines number 19 through 24.

16 Just read from there right through there.

17 A. Starting on line 19, it says, the court: All right.

18 And indictment number -- indictment listed. You are
19 pleading guilty to reckless homicide resulting in death.

20 Do you recognize that you could receive up to ten years in
21 prison for that and a fine of five thousand, sir -- \$5,000,

22 sir? And it says, defendant: Yes, Your Honor. The court
23 replies: And how to you wish to plead to that offense?

24 And the defendant says guilty, Your Honor.

25 Q. You don't remember any of that?

1 A. No, sir, I don't. It's a haze, like I said.

2 Q. It's just a haze?

3 A. Yes, sir.

4 Q. Do you remember -- what do you remember from your
5 guilty plea?

6 A. Actually being in a courtroom.

7 Q. You just remember being in the courtroom, agreeing to
8 everything?

9 A. I mean, pieces, yeah, but I remember being in a
10 courtroom.

11 Q. What time was it?

12 A. I know it was about 1:00.

13 Q. About 1:00? What time did you take the Ambien the
14 night before?

15 A. Roughly 11:00 PM, 11:30.

16 Q. So you remember that, but you don't remember any of
17 this?

18 A. I wasn't under the same medication and stressful as
19 that time.

20 Q. So you just happened to take the perfect combination
21 of drugs the night before your hearing and you don't
22 remember any of it even though you remember everything
23 before that and everything after that?

24 A. It appears that way, yes.

25 Q. And you just happened to have your only blackout from

1 these medications?

2 A. No, sir, I didn't say the only. I said it was the
3 only one that had a substantial event like this.

4 Q. Forgive me. You just had -- you just happened to have
5 your only substantial blackout the night that the victim
6 was killed?

7 A. Yeah, it appears that way, yes.

8 Q. So why did you plead guilty?

9 A. Honestly because I looked to the person to left and
10 they were shaking their head "yes" and I was told that was
11 the better -- the better option.

12 Q. The person to your left?

13 A. Yes, sir.

14 Q. Who was that?

15 A. That was Mr. Simmons.

16 Q. So Mr. Simmons just shook his head?

17 A. On multiple questions I was asked.

18 Q. All right. So you just answered these questions
19 because Mr. Simmons told you to?

20 A. I was told to follow his lead the day before.

21 Q. So you just followed his lead that whole time?

22 A. Yes, sir. I figured that's what he was there for, to
23 guide me in the right way.

24 Q. So when the judge asked you, he told you -- he pretty
25 much just nodded his head and you went along with him the

1 whole time?

2 A. I believe so, yes.

3 Q. I thought you couldn't remember any of your guilty
4 plea?

5 A. I was told to follow his lead.

6 Q. When did he tell you that?

7 A. The day before like I just said.

8 Q. So you remember that, but not the guilty plea?

9 A. Yeah, that was the day before, yes, sir.

10 Q. So was that the first time you decided to plead
11 guilty, the day before?

12 A. No, we discussed it, like I said, Wednesday and
13 Thursday of the previous week.

14 Q. So how far back was that? I'm sorry.

15 A. Wednesday or Thursday to a Monday.

16 Q. And what happened in that discussion?

17 A. Which discussion?

18 Q. The one where you decided to plead guilty on Wednesday
19 or Thursday of the previous week.

20 A. I wasn't fully decided at that point.

21 Q. Okay. So how did he convince you?

22 A. He said he believed that that would be the best route.

23 Q. And then what happened?

24 A. We, I guess, agreed to take that route.

25 Q. So you agreed with him?

1 A. Not necessarily. I trusted his opinion. I've never
2 been in a situation like this.

3 MR. SCHMECKPEPER: I beg the Court's indulgence.

4 BY MR. SCHMECKPEPER:

5 Q. And you said the only piece of evidence that
6 Mr. Simmons talked about you with -- talked about with
7 you was something about a text message?

8 A. He said that was their biggest -- the biggest thing
9 they had.

10 Q. Is that all he talked about? I mean, what else -- he
11 didn't say the State had anything else?

12 A. From the beginning of the first time we talked until
13 the day we went to court we honestly didn't talk about this
14 court case. Only in the very beginning and only at the
15 very end. The times during -- in between there it was --
16 had more to do with boating, the lake and renting houses
17 and -- and stuff of that nature.

18 Q. So you met with him and you were paying him to talk
19 about boating, laking?

20 A. Like I said, I've never had to deal with this so I
21 thought that was part of it.

22 Q. But he didn't discuss any -- he didn't go over
23 discovery with you?

24 A. Yes, sir. At the end, yes, sir.

25 Q. But he went over it with you?

1 A. Yeah, then we -- he sat a box down in a room and me
2 and my family sat in there for -- until their office closed
3 that night and then the next day come back and looked
4 through it again. The second time we looked through it
5 there was a lady that worked in his office there with us.

6 Q. I mean, what changed your mind though?

7 A. Changed what? I don't understand the question.

8 Q. I mean, you looked in that box. What -- what made you
9 decide to plead guilty?

10 A. Absolutely nothing in that box. It was nothing but
11 photos.

12 **MR. SCHMECKPEPER:** I beg the Court's indulgence. I
13 have no further questions.

14 **THE COURT:** Any redirect on what he went into?

15 **MR. HARPOOTLIAN:** Very briefly, Your Honor.

16 **REDIRECT EXAMINATION**

17 **BY MR. HARPOOTLIAN:**

18 Q. You were asked by the Attorney General about a number
19 of conversations and meetings you had with Mr. Simmons.

20 A. That's correct.

21 Q. Did you ever indicate to him that you had any
22 recollection of what occurred, of running into anybody or
23 leaving the scene of an accident?

24 A. No, that's never happened.

25 Q. You always told him you had no memory of it?

1 A. Yes, sir.

2 Q. You didn't say it didn't happen. You said you had no
3 memory of it.

4 A. No memory. I do not doubt that it happened. I mean,
5 I just have no idea that it did happen.

6 Q. Okay. And you have no idea of whether you did it?

7 A. Correct.

8 Q. And so when he suggested that you plead guilty, did
9 you raise that issue with him, I don't know if I'm guilty?

10 A. Correct.

11 Q. What did he say?

12 A. He said that he believes that that's the best route
13 for us to take at that time.

14 Q. Did he discuss with you a North Carolina versus Alford
15 plea or a no contest plea or anything like that?

16 A. I believe he discussed no --

17 Q. No contest?

18 A. -- contest plea, but I don't know if it went any
19 further than that.

20 Q. Okay. Did he ever give you that option or just
21 mentioned it?

22 A. No, he mentioned the definition of it.

23 Q. Okay. But never offered and never insisted on a
24 no contest plea?

25 A. No, sir.

1 **MR. HARPOOTLIAN:** I think that's all I have. No
2 further questions, Your Honor.

3 **THE COURT:** Thank you, sir. You may step down. Watch
4 your step if you would.

5 (Witness excused.)

6 **MR. HARPOOTLIAN:** Your Honor, this is a copy of the
7 videotape for some reason on a pink -- do you want me to
8 have this marked or give it to you?

9 **THE COURT:** Give it to her to mark and then --

10 **MR. HARPOOTLIAN:** -- and then I'll hand it up to you,
11 yes, sir.

12 (Petitioner's/Applicant's Exhibit Number 14, copy of
13 crash video, was marked and admitted into evidence.)

14 **MR. HARPOOTLIAN:** Do you want this now or just leave
15 it right there?

16 **THE COURT:** Why don't you just leave it right there
17 with her.

18 **MR. HARPOOTLIAN:** I beg the Court's indulgence for
19 just a moment.

20 **THE COURT:** Uh-huh.

21 **MR. HARPOOTLIAN:** Your Honor, the Petitioner rests.

22 **THE COURT:** All right. Is the State ready?

23 **MR. SCHMECKPEPER:** Your Honor, if we could have a five
24 or ten minute recess?

25 **THE COURT:** Okay. We'll come back in a few minutes.

1 (Recess taken.)

2 **BAILIFF:** All rise. Court's now in session.

3 **THE COURT:** Thank you. You may be seated. Yes, sir.

4 **MR. SCHMECKPEPER:** Your Honor, the State calls Rick
5 Hubbard.

6 **THE COURT:** Come around, sir, and let the Clerk of
7 Court swear you in.

8 SAMUEL R. "RICK" HUBBARD, III,
9 having been duly sworn, testified as follows:

10 **THE WITNESS:** My name's Rick Hubbard, H-U-B-B-A-R-D.

11 **MR. SCHMECKPEPER:** May it please the Court?

12 **THE COURT:** Yes.

13 DIRECT EXAMINATION

14 BY MR. SCHMECKPEPER:

15 Q. Good afternoon, Mr. Hubbard.

16 A. Good afternoon.

17 Q. Where do you currently work?

18 A. I work at the attorney general's office. I'm the
19 deputy over the criminal division and I'm -- some time next
20 summer I'll be the chief deputy.

21 Q. And where did you work before coming to the attorney
22 general's office?

23 A. I worked in the Eleventh Circuit Solicitor's Office
24 for over twenty-one years.

25 Q. What kind of cases did you try typically?

1 A. By the time I left, they were usually homicide cases,
2 mostly murders, any kind of complicated cases, and this
3 particular case I had because it was a death case.

4 Q. Now going into this case and leading up to trying it
5 and as far as investigation goes, do you mind walking
6 through with me some of the evidence that you had against
7 Mr. Nordan? Specifically, you know, he's claimed -- first
8 off, was there ever any ever -- I'm sorry. Was there ever
9 any real question that Mr. Nordan was the one driving the
10 vehicle that killed the victim?

11 A. No. I'll tell you what -- what we had. We had --
12 obviously there was this horrible collision and it's at
13 the intersection of 6 and 20, so that's -- that's a big
14 intersection. It happened late at night -- or actually
15 about 2:30 in the morning, so I knew before there was any
16 arrest law enforcement was looking for a truck, probably a
17 two-tone Ram pick-up truck with lights on the top of the
18 truck.

19 When they finally made that arrest, they came and
20 talked to me about it. They had highway patrol do the
21 reconstruction, but then the Town police also had their
22 reconstruction crew out there as well, so I talked with
23 them. I talked with -- went through all their photos, we
24 went and looked through the physical evidence, and what we
25 found was this. Or what they found.

1 At the wreck, at the collision, they had, of course,
2 found the victim. It looked like there was a -- he had
3 been on a red moped, but there was a streak from --
4 basically from that light almost -- almost a hundred feet
5 into the intersection there was a red streak. Initially I
6 thought it might be the red from the moped. It was the
7 victim's head. It was a pretty gory scene, a big puddle of
8 blood. When they picked him up, he was dead. His bike was
9 absolutely demolished. But they noticed there was a bunch
10 of pieces of a vehicle as well and also some pieces they
11 couldn't really figure out, some letters. Those pieces
12 went to Mr. Nordan's truck and those letters went to the
13 winch on the front of that truck. It's a Mossy Oak winch.
14 Mossy Oak makes camo supplies, hunting supplies, but they
15 also had a winch, and so pieces of that were left there at
16 the scene.

17 I asked highway patrol to let me know how fast this
18 person was going. They said well -- they gave me a range.
19 I think it was 36 to 40 something, but low end they said is
20 if there was -- if it was a deflected hit. That's how they
21 calculate it. High end would be if it was a direct hit.
22 So, anyway, before I got with them what they did is they
23 had also gotten a call -- this happened about 2:30 in the
24 morning. Evidence we found later showed that within
25 minutes of this -- this wreck Mr. Nordan placed a phone

1 call and I believe that was a phone call to his buddy. I
 2 can't remember the guy's name. I think my trial partner
 3 can remember the name of the guy, but it was a friend of
 4 his. We pulled that guy in to talk to us. He was
 5 extremely nervous, but would not -- he admitted there was
 6 a phone call, a series of phone calls, and then for about
 7 an hour and a half or so there's no phone calls and then
 8 there's calls again.

9 That was important to us because within less than
 10 an hour or about an hour after this collision in that
 11 intersection Mr. Nordan's truck's seen again. There's
 12 three individuals that say they were awakened by the loud
 13 noise of -- it sounded like metal dragging down the road.
 14 One of the individuals was already up, they were out
 15 smoking a cigarette, but it caused such a ruckus they all
 16 come out and they see a two-tone Dodge truck with the
 17 lights on the top and they see somebody get out of the
 18 driver's seat and was trying lift -- appears to be trying
 19 to lift that winch back up and they think someone else is
 20 in the car because the lights are even blinked on and off.
 21 What we find at that scene are additional parts of the
 22 winch and it appears -- they said that it appears like
 23 there was a fluid of some sort leaking out from under the
 24 truck, sure enough there was fluid everywhere, and then
 25 they said the truck went and parked in a nearby parking

1 lot. We found fluid up there as well.

2 Q. Was there a leak on Mr. Nordan's truck when you found
3 it?

4 A. What's that?

5 Q. Now was Mr. Nordan's truck leaking or did it have a
6 leak when you found it?

7 A. His whole front end was torn to pieces. Basically
8 what they were able to do after that was take that moped
9 and they could place it right in front of that truck. It
10 showed exactly where it hit. It was a frontal hit. So
11 when I went back to my highway patrol speed estimation,
12 they said it's gonna be at the upper end of the speed
13 because it was a frontal hit, head-on collision, square in
14 the middle.

15 And what we found were pieces of the truck. When they
16 finally found -- I can't remember -- well, I remember what
17 happens next. We still don't know who it is and then --
18 and then an individual who lives, I believe, up in Camden
19 called law enforcement and said listen, I was at Nordan's
20 Trim Shop, which is owned by defendant's father in West
21 Columbia, and I'm there and I hear this conversation
22 between Mr. Nordan and one of his employees about how he
23 had to send his son home because he came in drunk and had
24 wrecked his truck. So this is an individual that has
25 nothing to do with his case. He calls law enforcement and

1 says I'm really upset because I'm seeing this wreck on TV,
2 are they connected?

3 That's when law enforcement goes to Mr. Nordan's
4 father, Randy Nordan, and two officers confront him and say
5 we're looking for your son. He goes, "He's not here. He
6 came in drunk and wrecked his truck and I sent him home".
7 Both officers were willing to testify if this had gone to
8 trial that's what he said. There was an employee there
9 that said the exact same thing and said that he told them
10 that he had hit either a deer or a chunk of concrete,
11 something like that. That he was -- it wasn't "I blacked
12 out". There was never a story about "I blacked out". The
13 individual from Camden confirmed that was the story that
14 was relayed to him as well.

15 So all three of those people were potential witnesses.
16 We had to figure -- the employee, there was information
17 obviously that was she was caught later embezzling from
18 Mr. Nordan, she admitted that was true, but the witness
19 out of Camden would have corroborated her testimony.
20 Mr. Nordan, by the time we talked to him, he had changed
21 his story, which we expected. I had two officers ready to
22 impeach him. I was gonna call him as a witness.
23 Q. This is Mr. Nordan, the Applicant's father?
24 A. Yes, Randy Nordan. I was gonna call him as a hostile
25 witness. He was very nice. I expect just about every

1 father by the time the trial runs around -- comes around,
2 his son's looking at twenty-five years, I'm not shocked
3 his story changed, but I was gonna call him as a hostile
4 witness and then impeach him.

5 And, finally, there was also evidence of the video.
6 Now we saw it today. It's a little bit clearer if you see
7 it on a closer screen, but it still wasn't good enough for
8 me. What I did is I contacted -- if we'd gone to trial, I
9 would have presented this, and I presented it at the plea.
10 Law enforcement at the sheriff's department, they have a
11 guy by the name of Mike Phipps. He is not just their CSI
12 guy, but he is a technical guru over there. He did a frame
13 by frame breakdown of the video, and what was interesting,
14 I thought I was seeing brake lights right about the point
15 of collision. When you do a frame by frame, blow those up,
16 you see it appears whoever's driving that truck taps his
17 brakes right about the point of collision, then later into
18 the intersection taps them again. What was significant
19 about all of that for me was somebody's aware of what he's
20 doing. That somebody's just not stopping. And that's why
21 we presented an indictment for hit and run with death.

22 And as the trial -- as prep went on and I could tell
23 that Mr. Nordan's not gonna plea, that was fine, we were
24 gonna have a trial, we discovered or learned that there was
25 gonna be a doctor, Mr. Fuller. That came about because

1 Mr. Simmons asked for a continuance so he could retain an
2 expert and then once he retained Mr. Fuller he asked for a
3 continuance because Dr. Fuller's four-year-old child died.
4 And you could tell Mr. Simmons was very close to Mr. Fuller
5 -- Dr. Fuller, he was very emotional in asking for a
6 continuance, and so that case was put off, but now we knew
7 who our expert was. He just so happened to go -- work in
8 the same practice I used to go to, doctor's office, so I
9 knew exactly who this man was.

10 And we figured as far as defenses we'd be looking at
11 I don't remember because I'm on medication, I had an
12 epileptic blackout, we looked at all of those things, and
13 we were ready to go no matter what he said. If he had
14 testified at trial what he's saying today, we'd still try
15 it because the evidence does not support what he said.
16 Whoever's driving taps those brakes twice and through that
17 violent collision does not swerve off the road, does not
18 wreck, goes on down that dark road for a mile or two, does
19 not run any other car off the road, does not wreck. In
20 fact, he's driving with the winch dragging. You've got to
21 be considering what you're doing pretty carefully to be
22 able not to run off the road. Whoever it was was in
23 control of that vehicle.

24 Then we had the question of well, who's behind the
25 driver's seat? When Mr. Nordan got out of that truck and

1 those three witnesses saw him lifting that winch, he cut
2 his hand. Law enforcement took a picture of his cut hand.
3 We saw blood on the side of the truck, on the door and on
4 the interior where the handle is where you shut the door.
5 It's his blood. He put himself behind the driver's seat.
6 So we were comfortable whichever way he went; hit and run
7 or reckless homicide. We brought the reckless homicide
8 because of Dr. Fuller and any other expert they might have.

9 Q. So going over the evidence, in your experience as a
10 solicitor prosecuting cases, this was a pretty strong case?

11 A. I thought so.

12 **MR. HARPOOTLIAN:** Objection.

13 A. I thought it was strong enough not to --

14 **MR. HARPOOTLIAN:** Objection, Your Honor. That calls
15 for an opinion.

16 **THE COURT:** All right. I'm gonna let him answer.

17 **THE WITNESS:** I have a duty as a prosecutor. If I
18 don't have evidence, I have to have a hard talk with
19 victims, and I've done that many times in my career. In
20 fact, the first murder that had my name on it I sat down
21 with the family and said listen, I don't have enough
22 evidence. That is the toughest part of being a prosecutor
23 and it's my duty to do that. In this case, I was prepared
24 for trial.

25 BY MR. SCHMECKPEPER:

1 Q. Did you get engage in negotiations with Mr. Simmons?

2 A. I did not. And it's not out of any hatred for the
3 defendant. It's just I've got a horrible collision, I've
4 got a guy who does not stop, and even when he appears to
5 realize he hit something, he does nothing to turn around,
6 to come back. Even an hour or so later when he's right
7 down the road, he does nothing to come back. That's a
8 clear violation of the law. I don't have anything to work
9 with. I've got an innocent man in an intersection who's
10 dead.

11 The other evidence I had that we were preparing for
12 reply witness also dealt with alcohol use. Before this
13 incident there's a little bar, it's closed now, it's called
14 the Wild Hare. It's just right down behind the courthouse
15 on Highway 1. We would have presented testimony from one
16 or more witnesses because we talked to the ex-girlfriend,
17 we talked to this other bartender and to the bartender
18 working there that night. We were gonna present testimony
19 that he was drinking that night and not only was he
20 drinking, but he got upset because his girlfriend was in
21 the bar and she was talking to the victim in this case,
22 Mr. Miller. That he bowed up with Mr. Miller and
23 Mr. Miller backed down, said listen, I don't want any
24 problems. Mr. Miller left first and a few minutes later
25 the defendant left, so I had additional testimony of

1 drinking. In fact, one young lady said I work at another
2 bar and I'm a bartender. If he had been in my bar, I would
3 have cut him off. That's how it impressed her that she was
4 impaired -- that he was impaired.

5 Q. Now did Mr. Simmons, Mr. Nordan's attorney, have
6 access to all of this information?

7 A. Sure.

8 Q. Did you give it to -- all of it --

9 A. No.

10 Q. -- to him in discovery?

11 A. Now the rely testimony, I don't know that we gave him
12 everything on that because it only would become relevant if
13 the doctor testified and depending on what the doctor said,
14 so that part I don't know that we gave that over. I've not
15 gone back through that file at all even since I've gotten
16 on the stand.

17 Q. Do you remember the actual guilty plea?

18 A. I do.

19 Q. And do you remember the judge asking the Applicant,
20 or the defendant in that case, whether or not he was, you
21 know, under the influence of any drugs?

22 A. He did. The judge walked through it very carefully.
23 It was Judge Stilwell, who's very conscientious, very
24 bright. He's been in the business a while. He walked
25 through that plea and there was never any hesitation from

1 Mr. Nordan, from the defendant Mr. Nordan. His parents
2 were there. Nobody on that side of the aisle said wait a
3 minute, he looks different today, he looks -- he doesn't
4 appear to be understanding what's going on, and he answered
5 everything promptly and correctly. He didn't give some
6 answer that didn't correspond to the question.

7 Q. Have you ever been in court or prosecuting a case
8 where there's a question as to competency or whether -- or
9 whether or not a defendant's clear-headed prior to the
10 guilty plea?

11 A. Absolutely. I've seen judges sit pleas down all the
12 time. Or if they even have any question about, all right,
13 some type of medication. If there's any equivocation, the
14 judge will sit it down and say listen, I want to know what
15 he's done. I've had judges drug-test people in the
16 courtroom before. They'll take them out and they'll call
17 probation, run a drug screen on this guy, what's going on
18 with them. None of that was present on that day.

19 **MR. SCHMECKPEPER:** I beg the Court's indulgence.

20 BY MR. SCHMECKPEPER:

21 Q. So you never had any reason to suspect during the plea
22 hearing that Mr. Nordan was either not competent or not
23 clear-headed?

24 A. No. And if I did, I had a duty to sit it down, but
25 based on his appearance, his clear responses, I -- I would

1 have made the same conclusion as the judge; that he knew
2 exactly what he was doing. He just didn't like the result.

3 **MR. SCHMECKPEPER:** Thank you, Mr. Hubbard. I have no
4 further questions.

5 CROSS-EXAMINATION

6 BY MR. HARPOOTLIAN:

7 Q. Mr. Hubbard, you apparently interviewed -- did you
8 interview some -- some of these barmaids that knew
9 Mr. Miller?

10 A. Yes.

11 Q. Did you personally interview them?

12 A. Yes. Yes.

13 Q. And did they know Mr. Nordan prior to the incident?

14 A. I think -- well, we talked to the ex-girlfriend. I
15 cannot remember if the other bartender had ever seen him
16 before.

17 Q. The ex-girlfriend where?

18 A. The ex-girlfriend -- I can't remember her name. The
19 one that he ended up calling that night.

20 Q. Right.

21 A. Because what he did is he called somebody within
22 minutes and then texted her within an hour saying he had
23 been in a wreck.

24 Q. Okay. But was that girl in a bar previously that
25 night?

1 A. She had indicated -- based on what she told us, that
2 -- I think she was at the Wild Hare as well. That was my
3 impression going back. Now I have not looked at my notes,
4 I've not looked at that file in --

5 Q. And I can't find her interview anywhere in any of the
6 Lexington County Sheriff's Department file.

7 A. And I don't know if we were gonna put it up, but if we
8 did it would be reply.

9 Q. And it's your position that the State only has to
10 produce information they use directly, even interviews of
11 witnesses?

12 A. Well, again, I don't know exactly what we turned over
13 because I don't have that file. We were trying to check
14 just a few minutes ago.

15 Q. If I told you it's not in the file, there's no notes
16 of an interview with somebody at the Wild Hare; is that
17 correct?

18 A. That may be very well correct.

19 Q. Okay. And even -- you heard Mr. Simmons say earlier
20 when --

21 A. Of course, that wouldn't be Brady nor would it be
22 Rule 5.

23 Q. Well, how do you know it's not Brady?

24 A. It didn't exculpate him. It pointed to him.

25 Q. This waitress who said she saw him that knew

1 Mr. Miller, how does she know him?

2 A. She knew Mr. Miller.

3 Q. No, how did she know Mr. Nordan?

4 A. By appearance. She ended up -- I'll tell you. What
5 I didn't say is that she had seen his face once all this
6 happens, once he's arrested, sometime after this incident,
7 that's when she put two and two together.

8 Q. Saw it in the paper, saw it somewhere?

9 A. Somewhere. And her name's in the discovery because
10 what happened is -- I think it was within minutes of this
11 collision Mr. Miller, the victim, called her or texted her,
12 left a message for her. She had gone home early from the
13 bar.

14 Q. And she -- and she's the one that said she would not
15 have served him had it been her?

16 A. She's -- correct. She's the one that said Mr. Miller
17 called me that night and that's all law enforcement asked
18 her about initially because I asked her why didn't you go
19 into all this other stuff and it's the typical I was
20 scared, I didn't really want to get involved, but the more
21 it went on, the more I realized I did see something, I saw
22 his behavior that night.

23 Q. And you heard Mr. Simmons say had he known that she
24 was going to say that he would have interviewed her and the
25 fact he didn't know that and hadn't interviewed her --

1 A. Well, I didn't know that before I interviewed her
2 either. Her name's in the discovery. I have a policy if
3 there's a name in there, I'm talking to them.

4 Q. Okay. Now -- so that would have led to some alcohol
5 in his system?

6 A. Correct.

7 Q. Okay. But he's not charged with felony DUI?

8 A. No, he was charged with reckless homicide and part of
9 the element I put in there was alcohol and/or drugs because
10 we had daddy saying he came in drunk, we had --

11 Q. No, daddy said he came in smelling of alcohol.

12 A. -- and we had two other people talking -- enough to
13 send him home because he did not want customers seeing him.

14 Q. But did he interview the Sherwin-Williams store where
15 he went to get the paint that morning?

16 A. No. That -- that was never provided to us. And
17 listen, I have no doubt somebody might have gone to
18 Sherwin-Williams. I would strongly doubt that it was the
19 defendant.

20 Q. So what you're saying is -- now this woman that gave
21 you the statement, you had her under indictment at the
22 time, didn't you?

23 A. I don't know if it was our office or who. We might
24 have.

25 Q. Right. And she only pled guilty to stealing money

1 from Mr. Nordan's father?

2 A. Correct.

3 Q. Okay. So her credibility -- I'm an old prosecutor,
4 her credibility is a little questionable, isn't it?

5 A. It is, but it was supported by a man who had no
6 interest in this case, a customer of Randy Nordan's. A
7 man who likes Mr. Nordan.

8 Q. So let's assume he smelled like alcohol the next
9 morning.

10 A. Uh-huh.

11 Q. Does that indicate he smelled like alcohol at the time
12 of the wreck or is that just circumstantial evidence?

13 A. Circumstantial evidence that -- you know, I don't see
14 a man who gets in a big wreck going and getting drunk and
15 coming to work. That's from me as an old prosecutor.

16 Q. Well, you and I both have had many people show up for
17 work that smelled like alcohol the next morning, correct?

18 A. Right.

19 Q. I mean, in our offices.

20 A. Correct.

21 Q. Okay. And they came to work, right?

22 A. They did, but it's more than that. It's the whole
23 circumstance of he doesn't go home, he takes his truck to
24 his daddy's shop that night, he's trying to work on it, and
25 that's when dad finds him and says listen, you reek of

1 alcohol, you've wrecked your truck. He's telling people I
2 hit concrete, I hit a deer. There's nothing about blacking
3 out. Daddy sends him home to momma. Now they're --
4 they're divorced. That's where law enforcement goes, finds
5 the truck, and the winch is in the bed of the truck.

6 Q. Okay. Let me ask you this. You then would agree you
7 have nothing but circumstantial evidence at best, correct?

8 A. At that point.

9 Q. No, no, no. What direct evidence do you have that he
10 was --

11 A. For a reckless homicide?

12 Q. Yes. Direct.

13 A. Well --

14 Q. Direct.

15 A. Here's how --

16 Q. Did anybody see it?

17 **MR. SCHMECKPEPER:** Your Honor, if he could let -- let
18 the witness answer the question.

19 BY MR. HARPOOTLIAN:

20 Q. Well, I'd like him to answer me what direct evidence,
21 not circumstantial. You've got a video, right?

22 A. Yes.

23 Q. What on the video -- you say now after you've enhanced
24 it you see some tapping of brake lights.

25 A. Uh-huh.

1 Q. Does that indicate he knew he hit somebody?

2 A. It appears -- the importance for us was that no
3 blackout at that point. He -- he's aware. So you're going
4 to the other charge in my mind.

5 Q. No, no. Let me -- let me interrupt you for a second.
6 You heard the expert testify about what a blackout is?

7 A. I heard what he had to say, yes.

8 Q. You thought he said something different; that a
9 blackout is unconsciousness?

10 A. No, I -- I will tell you this. What we looked into
11 was a variety of things, including epileptic blackouts,
12 because we were preparing for that because I had understood
13 at this point that he had had those issues in the past,
14 although amazingly it hasn't come up in this hearing.

15 Q. Because he hasn't had them in the past. Go ahead.

16 A. Well, that was the information we were getting.

17 Q. The medical records are right here. You can look at
18 them.

19 A. Yeah, and we never got all of those, so.

20 Q. Did you subpoena them?

21 A. It's a criminal case. There's only -- I can't force
22 people to turn over all their stuff. They don't have to
23 turn over who their witnesses are, what experts they're
24 gonna use, so we're shooting in the dark. So basically
25 I'm in a position where the main charge I cared about was

1 leaving the scene with death. It's only when the doctor
2 got involved about a year later that I brought up the
3 reckless homicide. Now could that have been kicked out?
4 It could have been, but --

5 Q. That's not the answer to my question.

6 **MR. HARPOOTLIAN:** Your Honor, could you direct him to
7 answer?

8 BY MR. HARPOOTLIAN:

9 Q. What if -- if a person -- can a person make a phone
10 call, can they drive an automobile, can they text somebody
11 while they're on -- they're blacked out? Just yes or no.

12 A. I would say no.

13 Q. Okay. And so if you're wrong about that -- and you
14 heard the medical testimony earlier that, yes, that's what
15 a blackout is. Not passed out, blacked out.

16 A. I know the difference.

17 Q. Okay. Well, what's the difference?

18 A. What we had going into this, experts we probably would
19 have put up in reply -- because we were reaching out to --

20 Q. Give me an expert's name.

21 A. I don't have them.

22 Q. Okay. But what --

23 A. My investigator was checking.

24 Q. What was your understanding of what a blackout was?

25 A. A blackout would be I have no memory of what happened.

1 Q. Right.

2 A. And if it was that severe, what we were getting was
3 that person would basically have been out right then and
4 there.

5 Q. That he was passed out?

6 A. It's not simply a memory issue. That he's not
7 functioning.

8 Q. Okay.

9 A. And that if it's like, say, a mild seizure where
10 people can still walk, they're so out of it their motor
11 control, handling a vehicle, a moving vehicle, running over
12 something like a moped would be impossible to maintain
13 control.

14 Q. So if you're wrong about that, if you're wrong about
15 that, then he, in fact, could have had a blackout and his
16 expert that he retained said he based on the medication had
17 a blackout, right?

18 A. If we were at trial, it would have been a battle of
19 the experts, not a battle between me and your expert.

20 Q. But you never gave the name of an expert to -- to
21 Mr. Simmons?

22 A. No.

23 Q. You've never retained an expert?

24 A. No, I wasn't going to.

25 Q. Give me the name of an expert you consulted.

1 A. I just answered that question. My -- here's -- let me
2 -- let me explain. My investigator was reaching out to
3 different people, so basically I wanted to know when is
4 this gonna be a trial, is it a trial, and only then am I
5 gonna shuck out money from a small budget and say I'm ready
6 to go, but then --

7 Q. What I'm getting to is --

8 A. -- but it turned into a plea. I didn't need to.

9 Q. What you had heard was he had blacked out. He had no
10 recollection of what occurred.

11 A. No, I -- what I heard -- we were anticipating that.
12 He never came forward and said he had blacked out.

13 Q. You didn't get the copy of the report from Dr. --

14 A. We saw that the day of the plea. I don't know if it
15 came in before. If it came in before, I never saw it.

16 Q. And actually as Mr. Simmons raises that issue, you
17 enter an objection, right?

18 A. When he went into it, I did so the judge would make
19 sure that this wasn't a man who was pleading to something
20 he wasn't guilty of, that he wasn't saying I don't know
21 what happened, but I'm just saying I'm guilty, and I think
22 the judge made sure for himself, satisfied himself, because
23 we even had a post-trial motion after this where he ruled
24 that he was satisfied the defendant knew what he was doing.

25 Q. So on page 27 of this plea you're standing there,

1 Mr. Simmons says, "And all this comes together for a
2 reason; because he can't tell you what happened as he went
3 through the intersection", right? Did you enter an
4 objection at that point?

5 A. I don't have that in front of me.

6 Q. No. Believe me, no.

7 A. Well, I don't have it in front of me, so I'm gonna
8 have to --

9 Q. Because of his medical condition and the medications
10 he was on, did you ever say judge, no, not true.
11 Mr. Simmons is misrepresenting the facts?

12 A. If you'd show me the transcript so I can kind of
13 catch up with you.

14 Q. Page 27, first paragraph. It's yellowed up for you.

15 A. It doesn't say anything about blacking out. It
16 says --

17 Q. He has no memory.

18 A. No, it doesn't say that either. It says, "All of this
19 comes together for a reason; because he can't tell you what
20 happened as he went through the intersection. It's because
21 of his medical condition and the medications he was on".

22 Q. Okay. Let me have that one back and you can have this
23 one.

24 A. But now earlier in that plea I stopped him and made
25 sure Judge Stilwell was not gonna allow him to plea and do

1 the "he doesn't remember" bit.

2 Q. Let me find it.

3 A. And then this was the basis of the argument in the
4 post-plea motion.

5 Q. Okay. Here's -- let me read -- go to page 28. At the
6 top of page 28 Mr. Simmons says, "Now I'd would like to
7 hand up -- the court up a couple of documents, if I may".
8 One of those documents would have been Dr. Fuller's report,
9 correct?

10 A. Right.

11 Q. The court to you, "Have you seen these?" Mr. Hubbard:
12 I have. Your Honor, my only question is if there's a
13 defense of "I don't know what happened", I think we need to
14 address that. Simmons: That's not where we're going, Your
15 Honor.

16 A. That's exactly right.

17 Q. Okay.

18 A. That's not where we're going.

19 Q. That's not a defense?

20 A. No, that -- that this isn't gonna be -- hang on.

21 Q. It's not a defense.

22 A. That I don't know what happened, and Mr. Simmons says,
23 "That's not where we're going".

24 Q. So Mr. Simmons goes on and says down there, "Here's
25 what Houston did wrong. The medications he took at

1 approximately 11:00", and he goes -- lists them. "This was
2 the reason we hired Dr. Shawn Fuller to give his report.
3 One of the big problems is lisinopril can cause blackouts,
4 and that's what our defense was".

5 A. What it was.

6 Q. What it was, correct. "When we started looking at
7 this case, we said, you know, the problem is the defense
8 could also convict him. Where do you go with that? So the
9 point's now where I want to give you Houston's background".
10 So he -- he says to the court he had a blackout. That was
11 our defense, blackout, right?

12 A. It was his defense.

13 Q. Right. Well, it's not a defense, is it?

14 A. Well, if you're saying -- if it goes to intent, yeah,
15 it can be.

16 Q. Really? The Pittman case? I thought the Pittman case
17 took care of that.

18 A. Well, you have two charges. You have reckless
19 homicide, but you also have leaving the scene --

20 Q. Right.

21 A. -- and he had a duty to come back.

22 Q. Right.

23 A. Now if he -- if he hit something and he's saying I
24 have no idea what I hit so, therefore, I didn't have any
25 reason to come back, you're saying that's not a defense?

1 Q. No, I'm saying if he has no recollection of hitting
2 anything. If he doesn't -- he may have hit him, he just
3 doesn't remember it because he had a blackout.

4 A. But then he goes -- and -- and here's the weird thing
5 for me Mr. Harpootlian, he says he's never had one of
6 these, or nothing significant, but he has it right there
7 at that intersection, which is right down the road.

8 Q. Well, you just heard that today for the first time.
9 I'm talking about back then.

10 **MR. SCHMECKPEPER:** Your Honor, please let the witness
11 answer the question.

12 BY MR. HARPOOTLIAN:

13 Q. I'm talking about back then.

14 A. Back then in prepping for this case we were prepared
15 for him to say I didn't know what happened at that point.
16 Now I thought it would be for another reason, like
17 epilepsy, something like that, so -- but the whole point
18 was he managed that vehicle, he drove that vehicle. You're
19 saying he had a blackout so he couldn't stop, he hits --
20 hits this guy --

21 Q. No.

22 A. -- on a poor moped --

23 Q. No.

24 A. -- but then he goes on the down the road several miles
25 and he's fine.

1 Q. No, that's not what I'm saying. What I'm saying is he
2 has no recollection of it, which is consistent with what
3 Dr. Bartling testified to and what a blackout is. It's not
4 a pass out. So knowing all that on the day he entered the
5 guilty plea his lawyer is still saying he had a blackout,
6 not as a defense he says.

7 A. That's not how I'm reading what he says.

8 Q. Okay. Could he -- do you plead people guilty that say
9 I don't know if I'm guilty? Do you do that?

10 A. No.

11 Q. Okay.

12 A. And judges don't either and that's why I cautioned the
13 judge and Judge Stilwell took his time with this plea.
14 Judge Stilwell also considered this on a post-plea motion.

15 Q. Well, I read the post-plea order and -- and his order
16 ignored the same issue you're ignoring, which is it's not
17 -- there's two issues here. Not whether or not he had a
18 defense because of the blackout, it's could he plead guilty
19 because of the blackout, number one. And, number two, was
20 he impaired on the date of the plea? There's no question
21 he was on drugs. You say he didn't appear stoned to me.

22 A. When you say there's no question he appeared -- he was
23 on drugs, the only evidence I would have of that is what he
24 tells us.

25 Q. On the record.

1 A. On the record. And he only mentions three of the
2 ones. Your doctor up here gave bunch of other ones --

3 Q. Three.

4 A. -- that I didn't hear about --

5 Q. Three.

6 A. -- from his mouth during the plea.

7 Q. Three is what Mr. Bartling -- Dr. Bartling testified
8 to.

9 A. He talked about baclofen, and I take baclofen four
10 times a day.

11 Q. Baclofen's on the record. Baclofen's on the record.

12 A. And I take it four times a day. I mean, so what?

13 Q. Well, maybe -- maybe you're not quite sharp enough
14 here today.

15 A. I think I'm doing alright. I can drive a truck.

16 Q. Do you take tramadol, 200 milligrams of tramadol a
17 day?

18 A. No.

19 Q. Okay. And the other drug, all of which are central
20 nervous system depressants. You would -- you would agree
21 with me that's an issue though. Wouldn't you want to know?
22 Or are you just saying because he didn't get the sentence
23 he wanted he's back here today saying give me another
24 chance?

25 A. That's exactly what I think's going on.

1 Q. Even though the uncontradicted evidence from Mr. Nor
2 -- from Mr. Simmons is Mr. Nordan indicated blackout from
3 the day after he first met him he doesn't have no memory?

4 A. You use the word "blackout". I remember Mr. Simmons
5 saying he couldn't remember, but I also know this. I've
6 known Mr. Simmons a long time, he's practiced as long as I
7 have, and I know he worked his tail off on this case.

8 **MR. HARPOOTLIAN:** Your Honor, I object. He doesn't
9 know anything about what he did on this case because he
10 wasn't there when he worked it. They're advocates and he's
11 simply here trying to protect his conviction. I object to
12 this convoluted testimony.

13 **THE COURT:** All right. Do you want to ask him another
14 question?

15 **MR. HARPOOTLIAN:** Thank you.

16 **THE COURT:** And that would be pitting a witness if I
17 allowed you to answer that question.

18 BY MR. HARPOOTLIAN:

19 Q. So let me ask you about these independent witnesses,
20 okay? Didn't they say there were two people in the car?

21 A. Correct.

22 Q. Okay. Did you ever figure out who the second person
23 was?

24 A. Well, like I said, I can't remember the guy's name,
25 but the guy that we thought it was most likely was the

1 individual that Mr. Nordan called within four minutes of
2 this. I guess he's still in his blackout, but he calls
3 this individual, they exchange phone calls, conversations.
4 We talked to him, this individual. I can't remember his
5 name, Mr. McNair might remember it, but if he had testified
6 he would have said yeah, Mr. Nordan said he hit a deer and
7 that -- then their phone conversations stop for about an
8 hour or so on their phone records and then it picks up
9 again and --

10 Q. So --

11 A. -- and then it picks up again, but this is -- by the
12 time the phone calls pick up again it is after the incident
13 where people suspect that there's a second person in the
14 car. The only reason why they suspect a second person is
15 they see a man who apparently was Mr. Nordan trying to lift
16 the winch, but somebody was inside flashing the lights?

17 Q. Okay. So that would be John Lindsey Goodwin?

18 A. Unh-unh. That doesn't sound right.

19 Q. Well, John Lindsey Goodwin gave a statement in which
20 he said -- let me make sure I get --

21 A. It may be him, but that name doesn't ring a bell with
22 me.

23 Q. How about Pressley?

24 A. No.

25 Q. Harris Dean Pressley?

1 A. No. If you go through the phone records, you have to
2 go by --

3 Q. No, no. I'm talking about the people that saw the
4 truck.

5 A. I'm talking about the phone call. You said the
6 individual who said -- I get you. Yeah, Pressley, the
7 witnesses. I'm talking about the guy that I talked
8 about --

9 Q. No, no. I don't care about that guy.

10 A. Okay.

11 Q. I'm talking about the people that saw the truck --

12 A. Okay. Go over their names again.

13 Q. -- and how do they describe -- for instance, Mr. John
14 Lindsey Goodwin. How did he describe the person get out of
15 -- come around the -- the truck? The truck came along the
16 road, you could hear it dragging something, I thought they
17 were stealing something, I saw someone around the front of
18 the truck, he was wearing shorts, a shorter guy, white.
19 How did he describe him? Weight?

20 A. No, no.

21 Q. No, no, he did. 165 to 170. This guy's never been
22 under 220. He's a short, fat guy. Easy -- easy -- and
23 always has been.

24 A. I'd say he's fatter now than he was. But that -- the
25 point for me was this. This is the middle of the night.

1 These people are standing outside now because of this
2 noise. I'm not -- I have never tried to pin somebody down
3 on that description, but I tell you the description that
4 did stick. The two-tone Dodge pick-up truck with a light
5 rack on top and it appears the winch is folded under, and
6 then we find pieces of your guy's truck there.

7 Q. Where?

8 A. Right out on the street in front of that house.

9 Q. It says now they were -- it says pieces of the truck
10 there, but they say that he got out -- and how far away was
11 this from the wreck?

12 A. I don't know. I'd have to stand your boy --

13 Q. A mile?

14 A. Oh, oh, okay. It might have been a mile or two. I
15 don't know.

16 Q. Okay. So he gets out, fixes the winch, gets back in
17 the truck and drives off, right?

18 A. Kind of fixes it because they said what he does is he
19 pulls on down the road and --

20 Q. Well, that's not -- that's not what Mr. Goodwin says.

21 A. Okay. I'm talking about --

22 Q. He says --

23 A. Well, you've got it. I don't have copy. I don't know
24 what he said --

25 Q. Well, I'm just -- you testified.

1 A. -- since in 2013.

2 Q. Well, you've testified here to certain things. I want
3 to make sure your memory's correct, okay?

4 A. Right, right. Okay.

5 Q. So he said -- then he left. And then the Pressleys,
6 Harris Dean and Karen, say that about 3:15 I could not
7 sleep, got out of bed, went to the restroom, smoked a
8 cigarette, got back in the bed, I heard a loud vehicle
9 dragging something, it sounded like it was turning off
10 South Lake onto New Orangeburg. They parked on the other
11 side of the road right before the curve, the outside dog
12 began barking, the inside dog started barking. My friend
13 John is staying with me. He got up -- and that would be
14 John Lindsey Goodwin --

15 A. Yeah.

16 Q. -- got up. I opened my window, saw the truck. They
17 were trying to -- "they" were trying to fix the front of
18 the truck, something was dragging, they were in a big hurry
19 to fix it. My wife and John saw it. I heard two doors
20 open and close. They were flashing the lights as well.
21 Concerned because I have construction material.. They
22 pulled in the Allstate parking lot at Platt Springs, they
23 seemed to be leaking transmission fluid, they could not
24 have gotten far. Two-tone older Dodge pick-up.

25 So what does this prove? What do these statements

1 prove? That he was in a vehicle, his vehicle, down the
2 road; that the winch was dragging, he got out and attempted
3 to do something with it because it was dragging. Now
4 remember what he tells his lawyer is that he noticed the
5 winch was dragging, he thought he'd hit a bump or
6 something. He gets out. Apparently cut his hand while he
7 was doing that because there was blood on the side of the
8 truck, right?

9 A. Right.

10 Q. Totally consistent with his story, right?

11 A. Right. And then --

12 Q. Wait a second. What's not consistent with his story
13 other than these folks see two people, not one?

14 A. Well, I also interviewed these people.

15 Q. Yeah. And?

16 A. And they said the reason why he moved on down the road
17 is because he realized --

18 Q. Unh-unh. He realized. He realized.

19 A. That's when he turned -- they said that he made eye
20 contact with them, got in his truck and drove on up to
21 where -- away from their -- their house.

22 Q. Maybe where there's better light?

23 A. But the big question --

24 Q. Maybe where there was better light in a parking lot?

25 A. Maybe so, but the big question for me was if he called

1 somebody. Because this is almost an hour later and he
2 hadn't made it too far down the road. So he's on down the
3 road, calls somebody to get help. He has the presence of
4 mind to tell somebody to come help me.

5 Q. And by the way, he is leaking fluid at that point.
6 They say he's not gonna get very far.

7 A. Yeah.

8 Q. Now is this before or after you see him circling the
9 scene?

10 A. I don't see him circling.

11 Q. But somebody said they saw him circ -- returning to
12 the scene.

13 A. No, what he does -- you have that family that --

14 Q. Right.

15 A. -- that some people see him and then he's then seen by
16 an owner of a business near Nordan's Trim Shop that he sees
17 a light on, but it's late at -- it's in the early morning
18 hours, so he goes there.

19 Q. Right. Didn't he say he did that?

20 A. He didn't say exactly when, but it's well before
21 opening time because this guy was concerned about that.

22 Q. So?

23 A. So he sees lights on, so he's gonna let Mr. Nordan
24 know look, I saw your light's on, somebody's in your shop,
25 he wasn't sure what's going on, but he doesn't call the

1 cops. And then Mr. Nordan gets there, his son's there,
2 his truck's all messed up and that's when law enforcement
3 interviews daddy and talks about the alcohol, that he
4 wrecked his truck, he sent him home, he wasn't fit for
5 work.

6 Q. And there's counterevidence to that you found out;
7 that he didn't send him home, but he sent him to
8 Sherwin-Williams.

9 A. I found that out?

10 Q. And the only other corroboration you've got is -- is
11 the woman that's been arrested for stealing money from the
12 Nordans, but that's --

13 A. And the man that corroborates her who has nothing to
14 lose.

15 Q. Okay. Let's go back.

16 A. And as far as the -- the "he sent him on an errand",
17 we found that out the day of the -- well, no, we talked to
18 daddy later. That was his story later.

19 Q. Okay. So the deceased -- you call him the victim, I'm
20 gonna call him the deceased, blood alcohol, how much?

21 A. I don't remember.

22 Q. .18, correct?

23 A. Listen, I don't have any doubt --

24 Q. Well, well, no. Just yes or no. Yes or no?

25 A. I don't remember, but I'm not disputing .18. I'm not

1 disputing that.

2 Q. Okay.

3 A. Or marijuana.

4 Q. Marijuana, a bottle of Southern Comfort found with the
5 body.

6 **MR. SCHMECKPEPER:** Objection. Relevance.

7 **MR. HARPOOTLIAN:** No, we're gonna get to it.

8 **THE COURT:** He's on cross-examination.

9 BY MR. HARPOOTLIAN:

10 Q. Okay. A bottle of Southern Comfort?

11 A. Right.

12 Q. I think you called him an upstanding citizen in the
13 plea. Do you stick by that?

14 A. I don't know that I did that.

15 Q. A good family man.

16 A. Now his family loved him and --

17 Q. Okay. Well, we all have people we love that may not
18 be --

19 A. There are people that have their faults, but it
20 doesn't mean that we care less for them when they get
21 killed.

22 Q. The light changes green. He sits there at the
23 intersection for --

24 A. 20 seconds.

25 Q. -- 22 seconds. Light green.

- 1 A. Yeah.
- 2 Q. On a moped.
- 3 A. Yeah.
- 4 Q. In the middle of the country at night.
- 5 A. Uh-huh.
- 6 Q. Is he at fault?
- 7 A. Listen.
- 8 Q. Is he at fault?
- 9 A. For a civil case, yeah. For a criminal case, no.
- 10 Q. So -- because he contributed to the wreck, correct?
- 11 A. In a criminal case, no. My answer is no, he's not at
- 12 fault.
- 13 Q. Okay. He's not at fault?
- 14 A. No.
- 15 Q. He's not at fault for sitting in the middle of the
- 16 road at 2:30 in the morning, the light green for 22
- 17 seconds. That in no way mitigates the guilt of this
- 18 defendant?
- 19 A. No.
- 20 Q. Okay.
- 21 A. No, and I'll you why. Because you don't know why -- a
- 22 driver coming up on that scene does not know why somebody
- 23 might be sitting there. It could be any number of reasons.
- 24 That's not a factor in it. The whole statute focuses on
- 25 not what is your victim doing, but the mental state and the

1 behavior of the defendant, so the answer is no. Absolutely
2 no.

3 Q. And your mental state of the defendant is drugs and
4 alcohol based on circumstantial evidence. Based on purely
5 -- you have no blood test.

6 A. One charge. On one charge, reckless homicide.

7 Q. Okay. Leaving the scene?

8 A. Leaving the scene was clear. We had video evidence.
9 He left that scene.

10 Q. Okay.

11 A. And we also have evidence he's of sound enough mind to
12 try to fix his truck and never try to come back and see
13 what had happened.

14 Q. Well, again, sound enough mind. Blackout does not
15 mean you're not exercising some decision-making power or
16 texting or typing or phone-calling. What it means is --

17 A. That's your term.

18 Q. No, no. It means you don't remember you did that.
19 That's not my term. The only term in this court testified
20 to by a physician -- a pharmacologist, said that's what it
21 means. Are you -- you will not accept that meaning? Will
22 you accept that meaning?

23 A. I don't know if I will or not because I don't have my
24 pharmacologist. I don't have a person up here. I don't
25 know. I know you got a guy you brought from Atlanta to

1 come testify in this case. I mean, my gosh. Your man's
2 got ten years in prison. I've seen people pay for experts.
3 They'll travel from all over. I don't know. I haven't
4 studied that. I'm a prosecutor. I'm not a pharmacologist.

5 Q. But you don't know what a blackout is. You would
6 concede that?

7 A. I know I've heard different -- different descriptions
8 of it. I know you're sticking to one, but I don't feel
9 compelled to stick to what you're saying.

10 Q. Even though that's the only testimony in the record
11 here?

12 A. Listen. If I knew there was gonna be a
13 pharmacologist, maybe the AG should have paid for a
14 pharmacologist to come up here.

15 Q. Do you have any other direct evidence that the
16 defendant committed, let's talk about reckless homicide,
17 other than the video? Direct. For instance, in many of
18 these reckless homicide cases you have people watching them
19 weave down the road, five witnesses see him go over the --
20 over the median and head-on somebody.

21 A. Right.

22 Q. So what is the direct evidence of reckless homicide?

23 A. I think you mentioned it. The video and then when you
24 couple it with circumstantial evidence.

25 Q. No, no. I said direct.

1 A. You did.

2 Q. Okay.

3 A. And I said the video is direct evidence.

4 Q. Okay. The direct evidence. So if we look at the
5 video we see evidence of reckless homicide?

6 A. When you couple it with the circumstantial evidence.
7 I'm never -- I'm never required to prove a case by just
8 one strand. You know, that -- all right, Mr. Hubbard,
9 you've got some direct evidence, you've got to stop right
10 there. I would have been able in a court of law to show
11 that video for both charges and say here's what actually
12 happened, see him driving, and then couple that with
13 evidence of he had been impaired or was drunk enough or
14 smelled badly enough of alcohol that his dad sent him
15 home.

16 Q. But you know -- I mean, you have no reason to believe
17 -- disbelieve Mr. Simmons when he said he was ineffective.
18 Do you have any reason?

19 A. I absolutely disagree with that.

20 Q. Okay. But he's saying he was ineffective. Were you
21 in the meetings with Mr. Nordan?

22 A. No.

23 Q. Were you there when he prepared the case?

24 A. I know that --

25 Q. No, no. Were you there when he prepared the case?

1 A. Of course not.

2 Q. Did you go with him to interview witnesses?

3 A. Of course not.

4 Q. Did you make decisions about who to interview or not
5 interview?

6 A. No.

7 Q. Pardon me?

8 A. No.

9 Q. So when he says he's ineffective, it's based on what
10 he did, what he feels. You're not in a position to argue
11 with that, you just don't want the conviction overturned,
12 right?

13 A. Actually I am in a position to argue with it because
14 I could tell during our motion hearings that here's a man
15 who's trying to get a physician to come in here to help
16 his client, that he's got all of our discovery, he's
17 responding to that, he's bringing in an expert. That's
18 not -- listen. I've seen some pretty incompetent lawyers
19 before. To me that's a man who's working and whether he
20 made the right choices is beside the point. That
21 doesn't --

22 Q. No, that is the point.

23 A. Actually it's not. If -- if he's going down the
24 road here and -- and making a call on this case that his
25 man's gonna be convicted in a court of law, he might not

1 be buying in it completely that his man said that --
2 buying into the blackout because he says himself on the
3 stand today he gave multiple stories and the "oh, I
4 didn't remember anything", "I don't remember anything"
5 came later.

6 Q. But if he tells his lawyer "I don't remember", can
7 the lawyer plead him guilty?

8 A. If the lawyer believes that that is --

9 Q. No, no.

10 A. -- not true --

11 Q. Yeah.

12 A. -- and the lawyer talks to him and says here's what
13 the judge is gonna ask you because the judge -- if he had
14 said "I don't remember" in court, the judge is gonna stop
15 and say "Where are we going with this". They were not
16 using this as a defense.

17 Q. Can a lawyer plead a client guilty if the client tells
18 him I don't remember committing the offense? Just yes or
19 no and we can probably be done.

20 A. In a generic sense, no.

21 **MR. HARPOOTLIAN:** Thank you. No further questions.

22 **THE COURT:** Any redirect limited to what he went
23 into?

24 **MR. SCHMECKPEPER:** Briefly, Your Honor.

25 **THE COURT:** Uh-huh.

REDIRECT EXAMINATION

BY MR. SCHMECKPEPER:

Q. Mr. Hubbard, whether or not somebody remembers later or not, if somebody has the competency to make a phone call or send a text message to a friend, do you think they also have the competency or capacity to call 9-1-1?

A. Yes.

Q. Do you think that person could pull over even if they forgot it later?

MR. HARPOOTLIAN: Objection. Speculation.

THE COURT: Do you want to rephrase the question for him?

BY MR. SCHMECKPEPER:

Q. Is amnesia a defense to any crime you're aware of?

A. Excuse me?

Q. Is amnesia a defense to any crime you're aware of?

A. Not that -- I tried a guy for the death sentence that said he couldn't remember what he did. It was a question of fact for the jury and if he had pled guilty, I would have been fine with that because that would be him saying "Alright, I know what I've been saying, but how do I know if it's true or not". If he at the point of honesty standing up in front of a judge says, "No, you know what, I am guilty", I'm taking that to the bank if there's no sign that he's just trying to get through it.

1 Q. In evaluating this case and trying to figure out what
 2 kind of offers you -- you might want to make, did it factor
 3 in that the defendant -- or the Applicant said he -- you
 4 know, that the Applicant made phone calls, sent text
 5 messages during his blackout period, but didn't stop or
 6 didn't call 9-1-1?

7 A. All -- all of these facts factored into what I had and
 8 what it left me with was a dead man in the middle of an
 9 intersection who did nothing wrong. He did have alcohol
 10 and drugs in his system, had nothing to do with the
 11 behavior of the defendant, and that I saw no viable
 12 defense -- if I thought that Mr. Nordan, for instance, had
 13 a seizure and hit him, I would have dismissed this case,
 14 but that's not what I believe happened based on what I
 15 was hearing from people when he says "I ran over a
 16 cinderblock", "I hit a deer". I'm hearing multiple stories
 17 which is a telltale sign of somebody who's trying out
 18 different stories to see what flies and then he finally
 19 sticks to the "I'm blacked out". It's a progression and
 20 that happens in every case it seems like when -- when
 21 somebody's looking at big time, they fish for a story,
 22 and that's what I believe he was doing.

23 MR. SCHMECKPEPER: Thank you, Mr. Hubbard. I have no
 24 further questions.

25 MR. HARPOOTLIAN: Just --

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1 what happened. He went to trial, right --

2 A. He did.

3 Q. -- because he couldn't remember what happened?

4 A. Yeah.

5 Q. And -- and he said "I can't remember" and a jury --
6 I think you just said and a jury got to decide, right?

7 A. Yeah, right.

8 Q. Thank you.

9 A. But you know what? The defendant also got to decide
10 whether to stick to that story, he knew the risk, or to
11 come in and say -- if the defendant -- if anybody knows,
12 the defendant knows if it's not true. So if he had told
13 fifty people "I blacked out", on the day he comes into
14 court if he goes "You know what, I am guilty", and the
15 judge asks him pointblank and he says "Yes", then you know
16 what, he has the right to do that too knowing that he
17 might have lied to all those other people.

18 Q. If he were not under the influence of drugs, you
19 would agree with me? If you come in drunk or under the
20 influence of drugs, you can't enter a guilty plea, right?

21 A. We're only hearing that from people that weren't
22 there. Everybody else there thought he looked fine
23 including the judge.

24 Q. Okay. So you're basing your opinion on what you saw,
25 not what he had taken and not what -- I mean, he had said

1 on the record this is what I've taken. Nobody challenged
2 that. If they'd looked at the pharmacological impact at
3 that point rather than saying -- the judge said, "It's
4 just to relax you". Those drugs are not there just to
5 relax you, they're opiates.

6 A. Well, you know, it's -- to me it's a sign the judge
7 didn't see anything, but you know what strikes me is that
8 momma and daddy are right there, too.

9 Q. They don't know.

10 A. Now, come on.

11 Q. How many times have they been in court?

12 A. So just so --

13 Q. How many times have they been in court?

14 **MR. SCHMECKPEPER:** Your Honor, I object.

15 Q. How many times have they been in court?

16 A. I don't know.

17 **THE COURT:** All right, gentlemen. It's argumentative.

18 **MR. HARPOOTLIAN:** Thank you. No further questions.

19 **THE WITNESS:** I've got one response --

20 **MR. HARPOOTLIAN:** Please instruct the witness to be
21 quiet.

22 **THE COURT:** Do you have anything in redirect based on
23 what he asked?

24 **MR. SCHMECKPEPER:** I have nothing, Your Honor.

25 **THE COURT:** All right. Thank you, sir. You can step

1 down.

2 **THE WITNESS:** Thank you, Your Honor.

3 (Witness excused.)

4 **THE COURT:** Does the State intend to call any other
5 witnesses?

6 **MR. SCHMECKPEPER:** No, Your Honor.

7 **THE COURT:** Does the Applicant have anything in reply?

8 **MR. HARPOOTLIAN:** No, Your Honor.

9 **THE COURT:** All right. Let's step down for a couple
10 of minutes. Did you -- y'all do wish to present closing
11 statements or do you not?

12 **MR. HARPOOTLIAN:** I'll go either way, Your Honor.
13 If Your Honor would rather, we would propose to submit
14 proposed orders. Maybe that's the easiest way to do it.
15 I mean, if there were a jury here that might --

16 **THE COURT:** Okay.

17 **MR. HARPOOTLIAN:** No offense to you, but you're
18 somewhat --

19 **THE COURT:** What? Careful.

20 **MR. HARPOOTLIAN:** -- used to this.

21 **THE COURT:** Yes.

22 **MR. HARPOOTLIAN:** And so I don't know if even my
23 persuasive ability is gonna make a difference.

24 **THE COURT:** All right. Then I will look forward to
25 receiving proposed orders. Thank y'all very much.

1 **MR. SCHMECKPEPER:** Judge, when would you like those
2 by?

3 **THE COURT:** What's y'all's schedules? I mean, I've
4 got to do the whole week of PCR's, so I've got plenty to
5 take care of.

6 **MR. HARPOOTLIAN:** There's no chance of having a
7 transcript before -- how long?

8 **THE COURT REPORTER:** Two hundred and something pages?
9 Not -- not --

10 **MR. HARPOOTLIAN:** A month, two months?

11 **THE COURT REPORTER:** Well, no, not that long.

12 **MR. HARPOOTLIAN:** Two weeks?

13 **THE COURT REPORTER:** Not days.

14 **MR. HARPOOTLIAN:** Two weeks?

15 **THE COURT REPORTER:** Probably -- yeah, you're probably
16 looking close to a month.

17 **THE COURT:** 45 days?

18 **MR. HARPOOTLIAN:** That would be great.

19 **MR. SCHMECKPEPER:** Judge, I'm here with you doing
20 PCR's the whole week, too, so.

21 **THE COURT:** Okay. You've got plenty to do this week.

22 **MR. HARPOOTLIAN:** As soon as we get the transcript,
23 if you'll give us -- Your Honor, if you'd give us two weeks
24 after that to submit orders.

25 **THE COURT:** Okay. That sounds fine.

1 **MR. HARPOOTLIAN:** Then we'll all be singing from the
2 same sheet of music and we'll remember it, which has been
3 sort of a problem here.

4 **THE COURT:** That will be very helpful.

5 **MR. HARPOOTLIAN:** Thank you, Your Honor.

6 **THE COURT:** Thank y'all.

7 (Proceedings were concluded at 4:17 PM.)
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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 11th day of January, 2016.

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

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

February 12, 2016

Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Randall Houston Nordan,
S.C.D.C. No. 358103

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2014-CP-32-2893

ORDER OF DISMISSAL
(with prejudice)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 11, 2014. Respondent made its Return on or about March 18, 2015. An evidentiary hearing into the matter was convened on January 11, 2016, at the Lexington County Courthouse. Applicant was present and was represented by Richard A. Harpootlian, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Lawrence Simmons, Esquire, also testified. In addition, Applicant called Mr. James Bartling and Ms. Stephanie Borzendowski. Respondent called Samuel "Rick" Hubbard, III, Esquire. This Court had before it a copy of Applicant's guilty plea transcript, the post-conviction relief transcript, the records of the Lexington County Clerk of Court regarding the subject convictions, appellate records, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections pursuant to orders from the Lexington County Clerk of Court. Applicant was indicted for leaving the scene of the accident involving death (2011-GS-32-1859) at the July 2011 term of the Lexington County and reckless homicide (2012-GS-32-2625) at the October 2012 term of Lexington County Grand Jury. He was represented by Lawrence C. Simmons, III., Esq. On December 9, 2013, Applicant pled guilty as indicted before the Honorable Robin B. Stilwell. Judge Stilwell accepted the pleas and sentenced Applicant to a term of twenty (20) years imprisonment suspended ten (10) years active service and five (5) years of probation for leaving the scene of an accident involving death, and to a term of ten (10) years imprisonment for reckless homicide.

A post-plea motion for the reconsideration of the sentences was filed on Applicant's behalf. In an order dated February 28, 2014, and filed March 3, 2014, Judge Stilwell denied the motion. A notice of appeal was filed on Applicant's behalf by Richard A. Harpootlian, Esq., on March 21, 2014. By order filed on May 29, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR.

Allegations

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

1. Ineffective Assistance of Counsel:
 - a. failure to investigate Applicant's version of the facts: "there was no evidence that I was driving under the influence [sic] alcohol at the time of the alleged incident, yet Government kept arguing this to the Court;"
 - b. failure to investigate Applicant's "conduct and activities immediately prior to alleged incident;"
 - c. failure to consult an independent expert: "my attorney did not timely obtain the requested test and expert opinion in regard to the test and expert opinion in regard to the physical effects caused by the prescribed prescriptions I was taking;"

- d. failure to advise Applicant to plead guilty: State's evidence did not establish the requisite elements of the offenses
- e. failure to object and move to withdraw Applicant's plea: no factual basis to support the convictions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject guilty plea, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Applicant's Credibility

As a general matter, and in light of the plea transcript and evidence presented at the evidentiary hearing, this Court finds Applicant's testimony was not credible.

Counsel's testimony was both credible and compelling on this point – the number of times Applicant shifted and changed stories to his own attorney, whom he hired to represent him, was particularly informative. Counsel testified that even *he* did not believe the story Applicant initially planned to tell law enforcement,¹ which was one of the primary reasons he told Applicant not to give a statement. PCR Tr. p. 8. Applicant's "next story" was that after taking his medication, he left to go find his girlfriend, Brooke Ayers. PCR Tr. p. 83. Applicant said that he went to a bar, had an alcoholic beverage, and apparently saw some people laughing at him and left – after finishing his drink. PCR Tr. p. 83. Counsel said at that point Applicant told him he could not remember anything until he was at his father's shop. *Id.* At another point,

¹ Counsel testified at the evidentiary hearing that Applicant told him he was out driving his truck, and that his winch fell off when he went over a railroad crossing that had a hump in it. PCR Tr. p. 8.

counsel said Applicant told him one of Ms. Ayers' friends put something in his drink, and that Ms. Ayers could possibly corroborate this story. PCR Tr. p. 84. Later, upon learning that Ms. Ayers had already given a statement to police saying she had not seen Applicant the night he killed the victim, counsel said Applicant "changed his story and told me . . . he saw [Ms. Ayers], but she didn't see him." Id. Counsel said Applicant later told him he did not actually have an alcoholic beverage. Id. Counsel testified that nobody brought up Applicant going to pick up supplies for his father the next morning until "probably two weeks or so before the plea." Id.

Applicant's testimony during the evidentiary hearing was also internally inconsistent. When asked, on direct-examination, Applicant remembered quite clearly telling the plea judge that he was not on any drugs, acknowledging to the judge that he committed the charged offenses, pleading guilty, and counsel purportedly nodding "yes" or "no," as a way of signaling how to answer each of the judge's questions. PCR Tr. p. 157-58. Shortly thereafter, on cross-examination, Applicant could no longer remember pleading guilty, and could not remember being informed of the potential penalties he was facing. PCR Tr. p. 179. In fact, within the space of less than an hour, Applicant's memory apparently deteriorated to the point where he could no longer remember anything from his guilty plea other than "[a]ctually being in the courtroom." PCR Tr. p. 180. In all fairness, Applicant then clarified that he was able to remember "pieces," specifically that he only pled guilty because he saw counsel "shaking [his] head 'yes.'" PCR Tr. p. 180-81.

In light of the above referenced testimony, this Court finds Applicant's testimony was not credible. Indeed, the issue of credibility permeates practically every aspect of this case.

Standard of Review

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights, and must be treated as final in the vast majority of cases. Jamison v. State, 410 S.C. 456, 468, 765 S.E.2d 123, 129 (2014). A PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty pleas. Id.

Involuntary Guilty Plea

Applicant alleges his guilty plea was not knowingly and intelligently entered into due to the side effects from his prescription medications. This Court finds Applicant has failed to meet his burden to prove this allegation.

Applicable Law

A plea of guilty is an admission or a confession of guilt, and is as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury. State v. Fuller, 254 S.C. 260, 266, 174 S.E.2d 774, 777 (1970); see North Carolina v. Alford, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (noting guilty pleas constitute a waiver of trial and an express admission of guilt upon which a sentence may be imposed). Thus, when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. Jamison v.

State, 410 S.C. 456, 468, 765 S.E.2d 123, 129 (2014). The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. Jamison v. State, 410 S.C. 456, 471, 765 S.E.2d 123, 130 (2014).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 422 (2000); Boykin v. Alabama, 395 U.S. 238 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, an Applicant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977).

In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a defendant must be advised of the constitutional rights he is waiving. Id. Specifically, a defendant must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. In addition, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999).

Guilty Plea Hearing

Applicant's PCR testimony and sworn statements during the plea colloquy indicate that he understood the consequences of his guilty plea. Specifically, he stated that counsel went over both indictments with him, and explained the elements of reckless homicide. PCR Tr. p. 164-65.

Applicant said that while he could not remember the specifics, he believed counsel advised him of his constitutional rights. PCR Tr. p. 168. Further, while Applicant testified that his attorney told him he thought he would only get “two to three years,” he acknowledged that the plea judge went over the mandatory minimum and maximum sentences with him during his plea. PCR Tr. p. 168.

Regardless of Applicant’s present sense “fuzziness” or “haziness” at the plea hearing,² the actual plea transcript reflects that Judge Stillwell went through a thorough and exhaustive colloquy with him. Judge Stillwell asked Applicant whether he understood, his right to a jury trial, his right to remain silent, and his right to confront his accusers, and whether he wished to waive those rights in order to enter a guilty plea, to which Applicant responded: “[y]es, Your Honor.” Plea Tr. p. 5-6. Judge Stillwell informed Applicant that reckless homicide resulting in death carries a potential sentence of up to ten years in prison and a fine of up to \$5,000. Plea Tr. p. 6. He further informed Applicant that hit and run involving death carries a potential sentence of up to twenty-five years in prison and a fine of up to \$25,000. PCR Tr. p. 7. Judge Stillwell told Applicant that those sentences could be set to run consecutively to one another. Id.

Judge Stillwell then asked Applicant how he wished to plead to each offense. Id. Applicant responded “guilty.” Id. Applicant told Judge Stillwell that no one had forced or threatened him to make him plead guilty, and that he was pleading of his own free will because he was, in fact, guilty. Id. Applicant then heard the solicitor state the facts for the record. Plea Tr. p. 9-21. Applicant agreed to the general recitation, and agreed unequivocally that he hit and killed the victim and then left the scene of the accident. PCR Tr. p. 21. Finally, following

² As discussed above, Applicant’s testimony with respect to what he was and was not able to remember was internally inconsistent throughout the course of the PCR hearing. Credibility, supra.

statements from the victims, Applicant then delivered what appears to have been a sincere and heartfelt apology, saying:

"I just want to let everybody know that I am truly sorry, and listening to y'all today does make it that much worse. I am very sorry for what I've caused whether or not y'all can forgive me or – I want to let you know I'm truly sorry for everybody."

Plea Tr. p. 33. In light of this thorough colloquy, as well as Judge Stillwell's findings and the evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his burden to prove he did not enter his plea knowingly, intelligently, and voluntarily.

Medication Testimony

This Court is also not persuaded by Applicant's allegation that the side effects of the various prescription medications he was taking rendered his otherwise valid guilty plea involuntary. While Mr. Bartling was certainly qualified to testify to what the side effects of Applicant's medications would were or could be under normal circumstances, those qualifications did not extend to philosophical concepts as abstract and theoretical as "free will." See PCR Tr. p. 113. Nor is his conclusory opinion on the legal issue of whether Applicant's plea was entered knowingly, intelligently, and voluntarily controlling in this matter. Id.

Ultimately, what this Court can take from Mr. Bartling's testimony is that the side effects of Applicant's medication may have caused some level of impairment, *assuming he was actually taking them as prescribed*. PCR Tr. p. 118. Mr. Bartling also opined that "in terms of making a prudent decision in terms of the future, he should not have been on those drugs." Id. Beyond that, Mr. Bartling's testimony was, at best, fuzzy as to what the specific nature of Applicant's cognitive impairment could have been as a result of his medication.

Mr. Bartling also had no baseline with which to compare Applicant's cognitive skills on or off of the medication. He admitted that he did not directly observe Applicant while on any of the medications in question, and did not speak with any of the healthcare providers who actually prescribed the medications to him. PCR Tr. p. 120. Mr. Bartling was not even aware of what medications Applicant was taking when he interviewed him. PCR Tr. p. 121. What this Court is left with is a general statement of how these medications could have impacted an average patient. There is no credible evidence in the record, however, to suggest that these medications actually impaired *Applicant* to the extent that his plea was not voluntarily or intelligently entered into.

In addition, assuming the medication actually affected Applicant as described by Mr. Bartling, this Court finds that the expressed level of impairment does not rise to the level of rendering his guilty plea involuntary. The record reflects that during Applicant's long term use of the prescribed medications he was able to function adequately in his day to day life, as well as participate in the planning and preparation of his defense. Even Mr. Bartling acknowledged that Applicant was apparently able to work quite effectively while on his medication. PCR Tr. p. 122. Applicant was able to review discovery and discuss his case with counsel. See, e.g., PCR Tr. p. 93-94. Further, he was able to stand up in open court and engage in a thorough colloquy with Judge Stillwell without anyone, including his defense attorney, who had spent a substantial amount of time with him, or his family members, many of whom addressed the court without raising any impairment issue. In fact, counsel specifically testified at the evidentiary hearing that he did not have any questions about Applicant's ability to answer the questions of the judge. PCR Tr. p. 26. Mr. Barlow's testimony that it might not "necessarily follow" that Applicant would have appeared impaired is also unpersuasive, in light of the fact that counsel spent a substantial amount of time with him and never had any question as to his competence or ability

to answer the questions presented by the Court. PCR Tr. p. 26. Applicant's remorseful apology to the victims – his longest statement during the plea hearing – does not appear to have been hampered by any sort of impairments.

Concerning Ambien, Mr. Bartling testified that the drug typically lasts eight hours. PCR Tr. p. 120. Accordingly, the effects would have worn off by roughly the time Applicant woke up the next morning. Id. In any event, they would have worn off by the time Applicant attended his 1:00 pm plea hearing, roughly *thirteen to thirteen and a half hours* after he claimed he ingested it. While Mr. Bartling did, in fact, testify that the impact of the Ambien would have continued past the initial eight hours due to its half-life, he did not testify as to what those continued effects would be or how much longer they would have lasted. This Court will not fill in the gaps of Mr. Bartling's indefinite testimony with speculation. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court also finds that the problems with Applicant's credibility, discussed supra, go so far as to infect the very issue of whether he actually took his prescribed medications and in what quantities. The convenient "memory gap" Applicant testified to at the evidentiary hearing resembles, in more than one respect, the "blackout" he purportedly suffered when he ran over and killed the victim. Both rely on the rare side-effects of the medication he was taking to support his claim.³ Each also requires this Court to entirely disregard his contrary statements at the plea hearing.⁴

Similarly, Applicant's claim that he answered Judge Stillwell's questions based on counsel's "nods" one way or another is entirely not credible, and is insufficient to warrant relief.

³ Oddly, barring another blackout, Mr. Bartling did not include memory loss as an additional potential side effect of Applicant's medication regime.

⁴ Surprisingly, Applicant's paid expert testified that "[Applicant] apparently didn't know he was impaired, but I believe he was." Id.

See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (A statement by counsel that questions by presiding judge are "routine" is not an invitation to answer them untruthfully, nor does it constitute a reason to believe the questions and statements of the judge during a guilty plea proceeding mean nothing). Regardless, there has not been any evidence presented that Applicant's medications prevented him from answering questions truthfully.

For the foregoing reasons, this Court finds Applicant has failed to meet his burden with respect to this allegation. It is therefore denied and dismissed.

Ineffective Assistance of Counsel

Where ineffective assistance of counsel is alleged as a ground for relief, an Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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

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

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to a guilty plea, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Ineffective in Advising to Plead Guilty

Applicant alleges counsel was ineffective for allowing him to plead guilty when Applicant purportedly did not know whether or not he was guilty.

Applicant's Testimony was not Credible

As discussed above, Applicant's testimony on this subject is not credible. Taking into account counsel's credible testimony that Applicant shifted stories a number of times, as well as the State's utterly overwhelming evidence of Applicant's guilt, this Court finds Applicant has failed to meet his burden.

Moreover, while this Court does not dispute the fact that blackouts may, indeed, be a *rare* and possible side effect of Lisinopril, none of the expert witnesses were actually in Applicant's truck with him when he ran over and killed the victim. The only direct evidence that Applicant actually was blacked out during the incident, then is his own testimony.⁵ This testimony was not credible. According to counsel, the first story Applicant planned on telling police did not have anything to do with a blackout. Instead, it involved him being in another place and wrecking his truck differently than he ultimately said he did at the evidentiary hearing. Also probative is the

⁵ Applicant alternatively argued that he should not have been able to plead guilty because he was "blacked out" and did not remember committing the offense, and that under State v. Pittman a "blackout" would not have been an appropriate offense. 373 S.C. 527 (2000). With respect to Pittman, its application to the present circumstances is tenuous, at best. There, the Supreme Court of South Carolina found a criminal defendant's defense that Zolofit qualified as a lawful act in the context of an involuntary guilty plea argument to be "unconvincing," but only in light of the strong evidence that he was acting deliberately. Id. at 572, 647 S.E.2d at 167. Moreover, they were affirming the trial court's findings of fact. Id. Accordingly, Pittman does not stand for the blanket proposition that involuntary intoxication is never a valid defense, but rather that the success of such a defense depends on the individual circumstances of each case.

fact that the first people to interact with Applicant following the incident – including his father – did not say anything to law enforcement about Applicant having “blacked out” the night before. Further, while testimony was presented that Applicant’s actions in texting and calling third parties may not have been inconsistent with a blackout, they provide strong circumstantial evidence that he was aware of what was going on and functioning normally at the time that he killed the victim.

Pleas Based on Contract Principles

In any event, Applicant’s allegation that he should not have been allowed to plead guilty because he did not know that he was guilty – even if true – does not warrant relief. Plea agreements are governed by contract principles. Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001) (citing State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)). All that is required before a plea can be accepted is that the defendant understand the nature and crucial elements of the charges, the consequences of the plea, and the constitutional rights he is waiving, and that the record reflect a factual basis for the plea. *Id.* A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted but of which he is not guilty. *Id.* at 510, 552 S.E.2d at 292; see also Anderson v. State, 342 S.C. 54, 535 S.E.2d 649 (2000) (finding an individual could plead guilty to voluntary manslaughter under an indictment for murder, even though the facts would not support such a lesser charge); North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) (holding it constitutional to allow an accused to consent to imposition of sentence, although unwilling to admit culpability, where he intelligently concluded that a guilty plea was in his best interest and the evidence strongly supported his guilt).

In this case, there is no dispute that there was a factual basis for the guilty plea, as Applicant agreed to the solicitor's statement of facts during the plea hearing. Plea Tr. p. 21. Mr. Hubbard – the prosecuting solicitor – also testified that in addition to the victim's body and moped, police recovered pieces of Applicant's vehicle and letters off of the "Mossy Oak" winch from his vehicle at the scene of the incident. PCR Tr. p. 189. Further, it is undisputed Applicant was driving while on his prescription drugs, and there was strong circumstantial evidence that he had been drinking. The morning after Applicant ran over and killed the victim, an individual called law enforcement following the accident, and said that he heard Applicant's father say he had to send his son home because he came in drunk and had wrecked his truck. PCR Tr. p. 191. Police then went to Applicant's father and ask about his whereabouts. PCR Tr. p. 192. Applicant's father said to police "[h]e's not here. He came in drunk and wrecked his truck and I sent him home." Id. There has also never been any serious dispute that after killing the victim Applicant left the scene afterwards. Mr. Hubbard noted that the frame-by-frame of the video of the accident showed the driver tapping their breaks twice and not swerve off of the road after the incident, indicating that he was aware of what was going on. PCR Tr. p. 194.

Clearly a factual basis existed on which Judge Stillwell could accept Applicant's guilty plea. The allegation that Applicant may have had some available defenses to one or more elements of the offenses he was charged with is not relevant to the analysis here. Because his plea was voluntary and there was a factual basis for the plea, he was capable of entering into this agreement. In fact, the reasoning as explained *by Applicant* made sense – his attorney told him that a plea would be better because he thought Judge Stillwell, who attended the Citadel, would be sympathetic to Applicant's military background. This was all the more compelling in light of the fact that the State had a very strong case.

Failure to Investigate

This Court also finds Applicant has failed to meet his burden to prove Applicant was ineffective for failing to investigate. Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). Accordingly, the controlling standard for counsel’s duty to investigate is *reasonableness*. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011). So long as a defendant’s attorney conducts a reasonable investigation, including interviewing potential witnesses *when it is reasonable to do so*, his performance will not be deficient. Id. at 457, 710 S.E.2d at 65 (emphasis added). Moreover, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Counsel’s investigation in this case was reasonable. Counsel said that he staffed his entire office on Applicant’s case. PCR Tr. p. 27. He testified that he spent between fifty and seventy-five hours working on Applicant’s case. PCR Tr. p. 97. However, he said that he would also conduct research after hours with his wife – another attorney. PCR Tr. p. 96-97. Counsel said that he retained an expert to explore a possible blackout defense. PCR Tr. p. 98. He said that he also talked to a number of other healthcare professionals,⁶ all of whom told him roughly the same thing: that Lisinopril could, in rare instances, cause blackouts, but they were more likely to occur when the drug was combined with alcohol. PCR Tr. p. 98. Counsel said he investigated multiple defenses and “looked at a lot of different things.” PCR Tr. p. 88. He said

⁶ In fact, counsel testified that in addition to speaking with Dr. Fuller, the expert he hired, he spoke with Amy Epps, a cardiologist; Alana Williams, a family doctor; as well as several nurses. PCR Tr. p. 16.

he looked at the lack of DNA evidence on the truck and how it affected the statements of several witnesses who gave statements. PCR Tr. p. 88-89.

Counsel investigated April Hughes – another potential state witness, who told police Applicant had been drinking – by confirming with Applicant and his father that Applicant's relationship with Ms. Hughes was "not very good to say the least." PCR Tr. p. 88. Counsel said that had the case proceeded to trial, he would have put Applicant's father on the stand to say Applicant had not been drinking, and that he would not have sent him off for supplies if he were drunk. PCR Tr. p. 87-88. Counsel said that he discussed with Applicant any possible theories he could present at trial, as well as "what every witness said" and "what every law enforcement officer said and everything that happens." PCR Tr. p. 94.

This Court would note that Counsel's recollection of this case was not perfect. PCR Tr. p. 94. Counsel acknowledge as much, and said that his recollection and understanding of the relevant case law and statutes would probably have been better in 2012 when the plea happened than at the PCR evidentiary hearing. PCR Tr. p. 94-95. However, the record is sufficiently clear to establish that counsel's investigation in this case was reasonable under the circumstances.

Brandi Crocker

Counsel's position at the evidentiary hearing seemed to be that Ms. Crocker's testimony was material in that "if [Applicant] was on a blackout, then other people would have seen him, but they didn't say anything, really, where Brandy Crocker saw him consuming alcohol." PCR Tr. p. 90. Taking counsel's testimony into context, this Court finds his current opinion that he would have changed his advice on whether to plead had he known of Ms. Crocker's statement be a product of hindsight. First, it does not appear to this Court that anything Ms. Crocker may have said would have seriously called into question or changed the balance of the evidence

against Applicant. In fact, counsel conceded that there “still would have been problems . . . with the phone call coming shortly after the incident,” and that he “[did not] know how to get around those text messages with [Ms. Ayers]” shortly after the incident. PCR Tr. p. 90-91.

In any event, Applicant has failed to show prejudice. As noted previously, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. Moorehead, supra. Applicant did not produce Ms. Crocker as a witness at the evidentiary hearing or otherwise introduce her testimony in a manner consistent with the rules of evidence. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). This Court will not follow counsel’s lead and speculate as to what her testimony might have been.

As Applicant has failed to meet his burden with respect to the above allegation, it is denied and dismissed.

Failure to Call Human Factors Witness

Applicant also alleges counsel was ineffective in failing to consult with a human factors witness. This Court finds neither deficiency nor prejudice. First, Applicant has failed to show that counsel had a duty to consult with a “human factors” witness. The proper standard for attorney performance is that of reasonably effective assistance. Strickland at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not “a reasonably competent attorney” and the advice was not “within the range of competence demanded of attorneys in criminal cases.” Id. at 687-88.

This Court finds that counsel did not hire a human factors witness because he did not believe he needed one. Although counsel had trouble remembering every specific detail of the

case, he did explicitly state that he did not think he even wanted to hire a human factors witness. PCR Tr. p. 57.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland at 689. Because of the difficulties inherent in evaluating counsel's conduct without the distorting effects of hindsight, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Applicant has failed to overcome this strong presumption of reasonableness.

Additionally, this Court finds Applicant has not established that the *constitutional floor* of reasonably adequate representation would require counsel to have hired and consulted with a "human factors" witness. After a thorough review of this State's jurisprudence, this Court has not located a single opinion – published or otherwise – referencing the use of a human factors expert in the context of a criminal case. This Court declines Applicant's invitation to impose a new duty on criminal defense attorneys across the State of South Carolina. In any event, in this case counsel articulated a sound defensive theory and strategy. "There are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland, supra.

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.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this _____ day of _____, 2016.

J. MARK HAYES, II
Presiding Judge
Eleventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

) IN THE COURT OF GENERAL SESSIONS
) ELEVENTH JUDICIAL CIRCUIT
) FILED

Randall Houston Nordan, No. 358103

JUL 22 A 11: 15/A No.: 2014-CP-3202893

Applicant,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

vs.

OPINION AND ORDER

The State of South Carolina,

Respondent.

ORIGINAL

This is a Post-Conviction Relief matter. On December 9, 2013, Applicant Randall Houston Nordan entered guilty pleas to the criminal offenses of leaving the scene of an accident involving death (2011-GS-32-1859) and reckless homicide (2011-GS-32-2625). The pleas were presented to the court without negotiations or recommendation, and were not pleas of nolo contendere or Alford pleas. Applicant was represented by retained counsel at the plea hearing. Applicant received sentences of twenty (20) years of imprisonment suspended to ten (10) years active followed by five (5) years of probation for leaving the scene of an accident involving death and a concurrent sentence of ten (10) years for the reckless homicide.¹

On August 11, 2014, Applicant filed this action seeking post-conviction relief. Applicant claims he is entitled to post-conviction relief on account of ineffective assistance by Plea Counsel in violation of his rights protected by the Sixth Amendment to the United States Constitution. Applicant asserts, among other things, that his plea counsel was ineffective in conducting a proper investigation into his not being under the influence of alcohol when the

¹ Subsequent to plea hearing, Applicant retained new counsel and, on December 12, 2013, moved the plea judge to vacate the plea or reconsider the sentence. The request was denied. Applicant filed a timely appeal, and his appeal was dismissed pursuant to Rule 203(b)(1)(B)(iv) of the South Carolina Appellate Court Rules on May 29, 2014.

government asserted the same at the plea hearing, failure to properly consult expert opinion as to the physical effects of the prescribed medications he was taking, improperly advising him to enter a plea when the state's evidence did not establish the requisite elements of the offenses, and failure to object and move to withdraw the plea when no factual basis exists to support the plea.

On January 11, 2016, the Court held an evidentiary hearing. At that hearing, Applicant challenged Plea Counsel's investigation of the facts and circumstances, his deficient review of the applicable law, and his decision to allow Applicant to enter a guilty plea.

Having had an opportunity to carefully consider the evidence² and applicable law, Applicant's petition is **GRANTED** because (1) Plea Counsel was ineffective in allowing Applicant to plead guilty when Plea Counsel knew Applicant was impaired during the plea hearing, (2) Plea Counsel's decision to allow Applicant to plead guilty was flawed because there was an insufficient factual basis for the plea, and (3) Plea Counsel's investigation fell below the standard owed to a criminal defendant to advise the client using professional judgment that is informed by the law and to investigate the facts.

STANDARD OF REVIEW

To establish a claim for ineffective assistance of counsel, a post-conviction relief applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). "An applicant may attack the voluntary and intelligent

² In addition to the evidence and testimony presented during the January 11, 2016 hearing, the record before this Court consisted of a copy of Applicant's December 9, 2011, guilty plea transcript, the post-conviction relief transcript of the January 11, 2016 hearing, the records of the Lexington County Clerk regarding the convictions, appellate records consisting of the remittitur Order and cover letter from the South Carolina Court of Appeals Clerk, Applicant's records from the South Carolina Department of Corrections, and the pleadings related to the present application.

character of a guilty plea entered on the advice of counsel only by demonstrating that counsel's representation was below an objective standard of reasonableness." Id. (citing Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)). "Further, the applicant must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." See Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998).

A post-conviction relief applicant bears the burden of proving ineffective assistance and prejudice. Porter, 368 S.C. at 383, 629 S.E.2d at 356 (citing Bannister, 333 S.C. at 302, 509 S.E.2d at 809). In discerning whether these elements are met, the post-conviction relief court's decision must be supported by probative evidence. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

FINDINGS OF FACT

A circuit court hearing an application for post-conviction relief must resolve any factual dispute necessary to decide the application. See S.C. Code Ann. § 17-27-70 (2015); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). As factfinder, a circuit court must weigh the credibility of witnesses and determine what weight, if any, to give the evidence presented. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). This Court has carefully reviewed the evidence and records presented to it and considering the testimony presented during the hearing, the Court makes the following findings of fact.

In June 2011, Applicant was indicted for leaving the scene of an accident involving a death, a violation of South Carolina Code § 56-5-1210. In October 2012, the State indicted Applicant for reckless homicide, a violation of South Carolina Code § 56-5-2910. Both of the



indictments arise from a tragic truck/moped accident that occurred during the nighttime hours of May 9, 2011. Applicant was the driver of the truck that struck a moped which resulted in the death of the Victim, Hiram Juarez Miller. During the original plea hearing and during the present PCR hearing, it was not contested that the vehicle being driven by Applicant struck the moped. In fact, a surveillance camera from a nearby gas station recorded the actual collision.³

The central issues contested in the present PCR focus on Applicant's mental condition at the time of collision and at the time of the plea, his lawyer's knowledge of Applicant's mental condition, and the decisions his lawyer made with that knowledge. Central also is his lawyer's misunderstanding of legal principles and the resulting advice given to Applicant. Also at issue are the deficiencies in the factual investigation performed by Applicant's lawyer.

MISAPPLICATION OF LAW

The State's indictment cited the following predicate acts as the basis for Applicant's reckless conduct:

(a) Drove a motor vehicle while his license to drive was suspended; (b) drove a motor vehicle while under the influence of alcohol or drugs, or a combination of both; (c) failed to reduce his speed when approaching and crossing an intersection; (d) failed to reduce his speed and/or drive in a reasonable and prudent manner; (e) drove without regard to actual and potential hazards then existing; (f) failed to keep and maintain a proper lookout; (g) failed to keep and maintain proper control of his vehicle; and (h) failed to drive with due care to others on the road.

(Hr. Tr. Ex. 4)

³ On May 9, 2011, at approximately 2:35 a.m. Victim was riding a moped on Highway 6 and stopped at an intersection for a red light. (Pl. Tr. 11:5-14) After the traffic light turned green, Victim's moped remained stationary in the road. The collision took place approximately 21-22 seconds after the light had turned green. Applicant was driving a truck that struck Victim from behind and proceeded through the intersection. Victim died as a result of the collision and Applicant did not stop the truck at the scene of the collision. Even though the video was reviewed several times by the court, it is not clear whether Victim was seated on or had gotten off of the moped. (See Hr. Tr. Ex. No.14)

During the evidentiary hearing in this matter, Plea Counsel testified it was his belief that any one of these predicate acts, if proven, was sufficient to convict Applicant of reckless homicide. (Hr. Tr. 34:24-35:18) However, after having an opportunity to review the reckless homicide statute, Plea Counsel testified that he advised Applicant about his *criminal* charge by applying *civil* negligence principles:

Mr. Harpootlian: Okay. So is driving under suspension something that would give rise to recklessness under that statute?

Mr. Simmons: I don't think so.

Mr. Harpootlian: Okay. So that's one of the things they relied on. Did you tell Mr. Nordan that that was something that they could not rely on?

Mr. Simmons: I believe I did. I don't believe it was the basic thing because I -- I explained recklessness to him as compared to just ordinary negligence.

Mr. Harpootlian: And what -- and what did you tell him?

Mr. Simmons: That negligence was failure to use due care, that gross negligence meant that you are neglect to the extreme to where it was almost intentional.

Mr. Harpootlian: Okay.

Mr. Simmons: And gross negligence equals criminal negligence.

(Hr. Tr. 37:5-20) As will be discussed herein, the Supreme Court has strongly disavowed the connection of civil concepts of negligence to recklessness in criminal cases. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). As to the remaining predicate acts on which the State relied in its indictment, Plea Counsel testified that each *could* be an element of reckless homicide, depending on the particular circumstances of the case. (Hr. Tr. 39:19-41:7; 41:25-42:8; 43:3-5)

For example, when asked about the predicate act of failing to keep proper control of the vehicle,

Plea Counsel testified:

Mr. Harpootlian: Okay. Failed to keep a proper control of his vehicle.

Mr. Simmons: It depends on the circumstances.

Mr. Harpootlian: Now the video of this collision shows that he's in his lane, he's not weaving.

Mr. Simmons: Right.

Mr. Harpootlian: It shows, according to the highway patrol, he was in the range, but maybe being a mile an hour over the speed limit, right?

Mr. Simmons: Correct.

(Hr. Tr. 41:25-42:8)

APPLICANT'S MEDICAL CONDITION

Applicant is a former Marine who injured his back and knees in a training accident, received an honorable medical discharge, and was placed on disability under the treatment of the Veterans Administration at the time of the collision. (Hr. Tr. 9:19-10:9 & 149:19-150:16; Pl. Tr. 29:16-30:21) Applicant was prescribed medication for severe pain (Hr. Tr. 150:22-24 ("A. Sometimes more than others, but extreme would be a good word, yes, sir."))

At the hearing, Plea Counsel repeatedly testified that Applicant told him he blacked out and could not recall anything about the collision. (See, e.g., Hr. Tr. 8:12-17, 22:12-14 & 67:17-68:1) When he took the stand, Applicant testified that while he recalls "certain parts" of the evening in question, he has never had any memory of the collision itself. (Hr. Tr. 152:11-153:4 ("Q. What about the part where Mr. Miller gets hit and killed? A. No, sir.") Applicant also testified that while he had suffered blackouts before, he had never suffered one to the extent as the night in question. (Hr. Tr. 154:4-8) Plea Counsel agreed that everything Applicant told him

about that evening was consistent with Applicant having suffered a blackout at the time of the collision. (Hr. Tr. 22:24-23:3)

NO RECOLLECTION AT TIME OF COLLISION

Plea Counsel hired a physician, Sean Fuller, M.D., to meet with Applicant and examine Applicant's VA medical records and the medications he was taking at the time of the collision. (Hr. Tr. 9:12-18, 10:15-20 & 153:20-23) Dr. Fuller issued a report indicating he was of the medical opinion that Applicant suffered "some type of cognitive impairment from the medication, particularly with antidepressants, muscle relaxers, [and] insomnia medications" that caused Applicant to blackout and collide with Victim's moped. (Hr. Tr. Ex 1) In other words, Plea Counsel's expert physician was prepared to give a medical opinion at trial that Applicant suffered a medication-induced blackout (Hr. Tr. 15:11-23), which was consistent with what Applicant told Plea Counsel.

At the plea, Plea Counsel represented to the Plea Judge that Applicant had no memory of the night in question. Plea Counsel testified:

Mr. Harpootlian: Okay. Now, as a matter of fact, you tell the judge during the guilty plea he's got no recollection of hitting anybody that night, correct?

Mr. Simmons: That's right.

Mr. Harpootlian: And you represented that to the court as an officer of the court?

Mr. Simmons: That's right.

Mr. Harpootlian: And that he had no recollection of committing a reckless homicide or leaving the scene of an accident; isn't that correct?

Mr. Simmons: Correct. That's correct.

(Hr. Tr. 8:22-9:7)⁴ Plea Counsel explained Applicant's culpable acts to the Plea Judge as follows:

Mr. Simmons: Here's what Houston did wrong: The medications that he took at approximately 11 o'clock that evening included Lisinopril, which was for blood pressure; Tramadol, which is a very mild pain killer; cyclobenzaprine, which is a muscle relaxer and an anti-inflammatory medication. That was the reason that we hired Dr. Shawn [sic] Fuller to give his report.

One of the big problems was the Lisinopril itself can cause blackouts and that's what our defense was. And we started looking at this case and said, you know what, the problem is the defense could also convict you. Where do you go with this?

(Pl. Tr. 28:17-29:5) Dr. Fuller's report, which this Court has had the opportunity to examine, was presented by Plea Counsel to the Plea Judge as evidence that Applicant's medication caused him to blackout at the time of the collision. (Hr. Tr. 14:16-15:2 & 23:3-8)

APPLICANT WAS MEDICATED DURING THE PLEA HEARING

Moreover, during Applicant's plea colloquy, the following exchange occurred:

The Court: Are you under the influence of any drugs or alcohol today?

Defendant: No, Your Honor.

Mr. Simmons: He is under medications.

The Court: Okay. And what type of medication is that, sir?

Defendant: Tramadol, sir, psycho -- Baclofen and meloxicam, Your Honor.

⁴ Plea Counsel also told the Plea Judge that Applicant had not been drinking, a fact Plea Counsel corroborated by interviewing Applicant's employer and father, Randy Nordan, who saw his son the morning after the collision and sent him on an errand to pick up supplies from a paint store without noticing any impairment or evidence of alcohol use. (Pl. Tr. 28:10-16; Hr. Tr. 87:18-23; see also Hr. Tr. 163:1-2 (Applicant testifying to the same))

(Pl. Tr. 8:6-13) During the hearing of this application, Applicant testified he had taken 10 milligrams of Ambien the night before to help him sleep, followed by 100 milligrams of tramadol, 20 milligrams of baclofen, and one meloxicam tablet at 8:00 a.m. the morning of the plea. (Hr. Tr. 154:13-155:25) After Applicant's plea was postponed to the afternoon, he returned home and took another 100 milligrams of tramadol around noon. (Hr. Tr. 156:1-19) Plea Counsel testified that he knew to interrupt Applicant's plea colloquy with the Court because Applicant had told him he had taken his medication prior to the plea, although Plea Counsel was unaware of the dose. (Hr. Tr. 73:11-74:13) When asked whether Applicant's use of his medication—medication he described as "very powerful" (Hr. Tr. 78:20-22)—was cause for concern when Applicant took his plea, Plea Counsel answered, "Yes. Yes." (Hr. Tr. 74:14-16)

Plea Counsel's testimony concerning the potency of Applicant's medication was supported by the testimony of Dr. James W. Bartling, a pharmacist with professional training in pharmacology and a professor at Mercer University's College of Pharmacy.⁵ (Hr. Tr. 104:14-105:7) Dr. Bartling helped explain a major point of disagreement that repeatedly surfaced during Plea Counsel's testimony:

Mr. Harpootlian:	Okay. Now how about tell the Court, please -- now if I am blacked out, am I laying on the floor?
Dr. Bartling:	Not necessarily, no. You could be walking around just like you are now.
Mr. Harpootlian:	Okay. And what would -- when I say somebody's had a blackout, what does that mean?

⁵ Applicant moved, without objection, that Dr. Bartling be qualified as an expert in the area of pharmacology. Having had an opportunity to review Dr. Bartling's *curriculum vita*, consider his background, and observe his testimony, the Court finds him qualified and his testimony helpful to aid the Court in understanding what role Applicant's medication may have played in this matter. The state presented no expert witnesses during the present hearing to counter any expert opinions offered on behalf of Applicant.



Dr. Bartling: That means that you do not recall that period of time while you're in the blackout.

Mr. Harpootlian: Okay. So could you make phone calls?

Dr. Bartling: Yes.

Mr. Harpootlian: Could you text people?

Dr. Bartling: Yes.

Mr. Harpootlian: Could you drive a vehicle?

Dr. Bartling: Yes.

Mr. Harpootlian: Could you do -- perform ordinary functions yet not have any recollection of it sometime after these occurrences?

Dr. Bartling: Yes, that's the definition of a blackout.

Mr. Harpootlian: Okay. And that is your opinion to a degree of medical certainty, more probably than not?

Dr. Bartling: Yes, it is.

(Hr. Tr. 107:18-108:13) Based on his examination of Applicant's medical records, Dr. Bartling agreed with Dr. Fuller's conclusion that Applicant could have suffered a blackout on the morning of the collision. (Hr. Tr. 106:25-107:17)

Dr. Bartling also testified about tramadol, baclofen, and meloxicam—the medications Applicant was taking the afternoon of his plea. (Hr. Tr. 109:10-16) He explained tramadol is a strong central nervous system depressant commonly used to treat pain (Hr. Tr. 111:17-22), baclofen is a muscle relaxer and central nervous system depressant (Hr. Tr. 112:4-13), and meloxicam is an anti-inflammatory medication and central nervous system depressant. (Hr. Tr. 112:19-24). Applicant had also taken Ambien, a common sleep aid and central nervous system depressant the night before the plea. (Hr. Tr. 111:8-16; 113:3-6) In Dr. Bartling's opinion, after taking these medications in the doses prescribed to Applicant, Applicant was medically unable to

knowingly and freely exercise the judgment necessary to plead guilty.⁶ (Hr. Tr. 113:7-114:8; see also Hr. Tr. 115:9-15 ("...he apparently didn't know he was impaired, but I believe he was.")) Dr. Bartling testified that in his medical judgment, even though Applicant may not have appeared impaired, Applicant was impaired to a cognitive degree that should have precluded him from making an important, life-altering decision such as pleading guilty. (Hr. Tr. 116:23-117:20 ("A. He was not in a position to make that kind of a decision that day."); see also Hr. Tr. 125:22-126:1)

The Court finds Dr. Bartling's testimony persuasive in two respects. First, based on Dr. Bartling's description of the doses and effects of the medication Applicant was taking during his plea, it appears Applicant was medically impaired when he appeared before the Plea Judge. Plea Counsel was concerned enough to interject during the colloquy and correct Applicant's misstatement that he was not under the influence of any drugs. The only medical opinion before the Court is that of Dr. Bartling, which indicates Plea Counsel was correct to be concerned. Second, the Court also credits Dr. Bartling's view that Applicant could have suffered a blackout as a result of the medication he was taking. As explained further below, this testimony is probative because it corroborates the medical opinion of Dr. Fuller who reached the same conclusion and which Plea Counsel had available to him prior to the plea.

The Court also considered testimony from Stephanie Borzendowski, Ph.D., a consultant and an expert in the psychology of human factors, which she explained is the manner in which human beings understand and interact with technology, the environment, and other human beings. (Hr. Tr. 127:4-129:24) Dr. Borzendowski offered the opinion that the fact that Victim's

⁶ Dr. Bartling also took issue with the Plea Judge's statement, and Applicant's agreement, that these drugs helped Applicant understand and remain calm, explaining, "That's not what they're designed for, no, sir." (Hr. Tr. 114:19-115:3)

moped was not in motion would not be appreciable to Applicant until a distance that was likely to result in a collision. (Hr. Tr. 132:13-133:1) Dr. Borzendowski opined that a number of factors would contribute to this misperception by a driver in Applicant's position, such as, an unlit roadway, the expectation that traffic would be moving in response to a green traffic light, and the expectation that the moped's single red taillight was actually a distant vehicle with two taillights rather than a much closer vehicle with a single taillight. (Hr. Tr. 133:2-134:10, 135:2-16) In Dr. Borzendowski's view, it would have been difficult for "any driver" in Applicant's position to appreciate the hazard posed by the stationary moped until it was too late and this collision presented "a perfect storm of conditions" caused by the lack of a visual cue on which drivers customarily rely to make decisions. (Hr. Tr. 134:14-135:25; see also Hr. Tr. 142:22-143:16 & 146:20-147:3 (explaining a driver must not only perceive the hazard but also have time to react)) After the gas station surveillance video of the collision was played, Dr. Borzendowski observed, and the Court agrees, that the truck "definitely does not appear to swerve," and that any reduction in speed was "not really detectable in the video." (Hr. Tr. 139:4-10) Based on these observations, Dr. Borzendowski testified it did not appear Applicant ever appreciated the fact that Victim and his moped were stationary in the road. (Hr. Tr. 147:4-7)

INVESTIGATION AND ADVICE OF PLEA COUNSEL

Plea Counsel testified that he assisted Applicant in deciding whether to plead guilty by reviewing different theories over the course of the representation, but that the ultimate decision was made after placing Applicant and Applicant's mother in his conference room with the file and telling him he would plead him guilty or go to trial, "whichever one he wanted." (Hr. Tr. 32:14-33:23) When asked about his review of the file, Applicant told this Court, he had "no idea" what he was doing. (Hr. Tr. 164:1-3; see also Hr. Tr. 164:4-5 ("Q. Have you ever seen a



MATT report before? A. I do not know what that is.”)) Additionally, Applicant told this Court that he told Plea Counsel “on numerous occasions that [he] had confidence -- 100 percent confidence in his judgment,” and that Applicant relied on Plea Counsel’s advice that he should plead guilty. (Hr. Tr. 164:9-17)

As for Plea Counsel’s investigation of the facts, he did not hire an accident reconstruction expert or a human factors expert. (Hr. Tr. 47:5-19) Nor did Plea Counsel review the scene of the collision at the same time of day to determine what the lighting conditions would have been like around the time of the accident. (Hr. Tr. 48:25-49:8) The only weight Plea Counsel gave to the fact Victim was stationary on the moped for approximately twenty-two seconds after the light turned green, was a limited investigation into the possibility Victim died from other causes—a theory bolstered by the fact Victim tested positive for marijuana and a .18 blood alcohol level—however, Plea Counsel abandoned this argument based on the mistaken belief that Victim’s cause of death was a head injury. (Compare Hr. Tr. 47:20-48:16, with Hr. Tr. 54:12-14 (“Q. So he -- the primary, what killed him was cardiac arrest? A. Right”); see also Hr. Tr. 49:12-22) Conversely, Victim’s cause of death as reported on his death certificate was cardiac arrest. (Hr. Tr. Ex. 7) Plea Counsel did not retain an expert to determine whether Victim suffered cardiac arrest before or after the collision (Hr. Tr. 54:8-11), and conceded he “ha[d] no idea,” whether Victim suffered cardiac arrest as a result of the collision. (Hr. Tr. 54:15:17)

Additionally, Plea Counsel made several assumptions of fact that a reasonable attorney would have investigated. Plea Counsel testified that the “one witness [he] wish[ed] [he] would have talked to[,]” was a bartender who had given a statement that she received a phone call from the Victim the night of the collision and that the State claimed she had seen Mr. Nordan that evening. (Hr. Tr. 63:23-64:64:21) Plea Counsel explained that he “didn’t see the need to

[interview her] because all she had was a phone call [with the Victim]. There was nothing in there about her seeing [Applicant] in there drinking and, in fact, when you compared that with the bartender from the Wild Hare, the bartender from the Wild Hare didn't see him drinking." (Hr. Tr. 64:22-65:7) When pressed, Plea Counsel conceded that this un-interviewed witness, the last person to speak to the Victim, could have had information probative to Applicant's defense and should have been interviewed, if for no other reason than for possible impeachment purposes at trial. (Hr. Tr. 65:23-66:25 ("A. In hindsight I probably should have, yes.")) Plea Counsel also agreed that his failure to speak to this witness left him unable to challenge the Solicitor's assertion that this witness would swear she saw Applicant drinking:

Mr. Harpootlian: Okay. You think that affected -- I mean, you heard what the Solicitor said at the plea.

Mr. Simmons: Yeah.

Mr. Harpootlian: You don't think it would be important for you to be able to impeach that even at the plea?

Mr. Simmons: Yeah.

Mr. Harpootlian: Okay.

Mr. Simmons: And at that point in time I think that what I should have done was withdraw the plea and then get that straightened out with the solicitor's office and actually contact her.

Mr. Harpootlian: Okay.

Mr. Simmons: But you're right. I didn't do that.

Mr. Harpootlian: And you would have -- you should have withdrawn the plea in your judgment?

Mr. Simmons: Yeah, I should have.

(Hr. Tr. 67:1-16; see also Hr. Tr. 88:8-13) Nevertheless, Plea Counsel went forward with the plea.

At the hearing of this matter, Plea Counsel made several key concessions that weigh in support of this Court's decision. First, Plea Counsel conceded he was ineffective for pleading Applicant guilty when Applicant did not know whether or not he was guilty. (Hr. Tr. 73:5-10; see also Hr. Tr. 78:2-5 & 79:23-81:2) When confronted with Applicant's inability to remember and Dr. Fuller's medical opinion concerning a likely blackout, Plea Counsel agreed Applicant's inability to know whether he was, in fact, guilty resulted in a failure to make a knowing and intelligent waiver of his rights. (Hr. Tr. 68:2-8). When asked about his plea colloquy, Applicant testified convincingly:

Mr. Harpootlian: Do you know whether you're guilty or not?

Mr. Nordan: The whole time I've said I don't like using the word "guilty" because I don't know if I did it or not.

Mr. Harpootlian: And that's because you have no memory of it?

Mr. Nordan: Correct.

Mr. Harpootlian: Did you tell Mr. Simmons that?

Mr. Nordan: Correct.

(Hr. Tr. 158:3-159:1) When pressed by his current counsel to explain his responses to the Plea Judge, Applicant's testimony strongly suggested a lack of comprehension at the plea:

Mr. Nordan: Beforehand I was told to kind of -- I forget the exact words, but something along the lines of "follow my lead", and a lot of times I looked to my left for -- I was getting a nodding of "yes" or a nodding of "no" and that was the answer that I was taking.

(Hr. Tr. 159:4-159:8) Even before the Court had occasion to hear Applicant's account, Plea Counsel had already conceded he should not have pled Applicant guilty. (Hr. Tr. 68:21-69:8; 80:11-81:2)

Second, Applicant's plea was not a plea of no contest, nor one taken pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), as Plea Counsel testified he never explained those doctrines to Applicant (Hr. Tr. 71:17-72:18), and neither option was offered by the State or requested by Applicant. (Hr. Tr. 72:25-73:4)

Third, Plea Counsel testified he knew Applicant was taking very powerful drugs, specifically tramadol, during his plea, that he had taken twice the maximum dose, and that he should not have allowed Applicant to take the plea in that condition. (Hr. Tr. 78:23-79:24 ("Q. -- and you did not interrupt the judge. Was that -- were you ineffective for not interrupting the judge? A. Probably so."); 81:3-6)

CORRECT LAW APPLIED

Finally, Plea Counsel also admitted that if had he been aware of the legal precedent he discussed with Applicant's counsel during the hearing at the time he was representing Applicant, it would have caused him "to hesitate and investigate further," and could have made a difference in the outcome of the case. (Hr. Tr. 79:25-80:10) Specifically, when asked whether his advice to Applicant was based on legal research concerning the elements of reckless homicide, Plea Counsel testified he had researched the matter but did not recall any precedent concerning a defendant unable to remember what happened at the scene (Hr. Tr. 43:20-44:2) and conceded it would have been "important" if he had found such a case. (Hr. Tr. 44:3-5) Applicant's counsel then presented Plea Counsel with a copy of In Interest of Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141 (1991), a case concerning a motorist charged with reckless homicide having no memory of what occurred because of injuries suffered during the collision and the only evidence being the physical evidence from the collision itself. (Hr. Tr. 44:7-45:4) Plea Counsel conceded he never reviewed Stacy Ray A. prior to Applicant's plea and eventually conceded that the facts in

Applicant's case were more favorable than those cited by the Supreme Court's decision reversing the conviction in the Stacy Ray A. case. (Hr. Tr. 50:11-21) In Plea Counsel's view, his ineffectiveness was prejudicial to Applicant such that he believes Applicant deserves a new trial. (Hr. Tr. 102:8-14)

These concessions carry some additional weight because, after having an opportunity to observe Plea Counsel's testimony, the Court is of the opinion that Plea Counsel's admissions he was ineffective were candid and reluctant, but nonetheless truthful. Indeed, taken as a whole, Plea Counsel's testimony was largely adversarial to Applicant as he frequently disagreed with Applicant's counsel during cross-examination. In the Court's view, this lends additional weight to Plea Counsel's concession he was ineffective on allowing Applicant to plead guilty under the circumstances in this case.

CONCLUSIONS OF LAW

The Sixth Amendment's right to counsel exists to protect the fundamental right to a fair trial. Strickland, 466 U.S. at 684 (citing Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963)). The constitutional guarantee of a fair trial "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. The right to counsel is "crucial" to the adversarial system because it is counsel's skill and knowledge that equips a defendant with the tools to meet and defend the government's claims. Id. Because of the importance counsel plays in a fair trial, the Sixth Amendment guarantees, not simply the presence of a lawyer, but "effective assistance" by a lawyer loyal to the client's cause, who keeps the client informed, and who brings to bear "such skill and knowledge as will render

the trial a reliable adversarial testing process." Id. at 688. This Application implicates the fundamental right to the effective assistance of counsel in three distinct ways.

First, the Court holds Plea Counsel was ineffective in allowing Applicant to plead guilty when Plea Counsel knew his client was impaired as a result of taking the same drugs that Applicant claimed caused him to blackout the morning of the collision. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Because of the gravity of such an act, a trial judge cannot accept a plea without an affirmative showing it was knowing and voluntary. Id. A knowing and voluntary plea is one in which the defendant has a "full understanding of the consequences of his plea and the charges against him." Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Id. (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

Having conducted such a review, the Court is persuaded that the records before it supports the conclusion that Applicant lacked sufficient capacity to enter a knowing and voluntary plea. Applicant testified he was impaired to such a degree that he had to look to Plea Counsel for assistance in answering the Plea Judge's questions. Applicant's testimony is significantly bolstered by that of Dr. Bartling who offered a credible medical opinion that a person having taken Applicant's medications would be in no position to make a consequential decision such as taking a plea. Finally, Plea Counsel also agrees he was deficient in allowing Applicant to plead guilty given his impaired condition.

Second, and more importantly, Plea Counsel's decision to allow Applicant to plead guilty was flawed because there was an insufficient factual basis for the plea. Two ingredients are



essential to a valid plea: (1) comprehension by the defendant of the charge and consequence, and (2) "that the record indicates a factual basis for the plea." State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975); Rollison v. State, 346 S.C. 506, 511, 552 S.E.2d 290, 292 (2001); State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006). See generally Van Sellner v. State, No. 27644, 2016 WL 3595804 (S.C. June 29, 2016) (holding that a defendant may challenge a guilty plea when the State does not have the evidence to demonstrate each element of the charged offense). This means a factual basis for each element of the charged offense. Here, there is no evidence in the record to support the *mens rea* component of the charged crimes, which meant, absent Applicant's personal knowledge of facts contemporaneous with the collision, there was an insufficient factual basis to support Applicant's culpable mental state.

Applicant was charged with leaving the scene of an accident involving a death and reckless homicide. The former requires knowledge of an accident before a defendant has a legal duty to stop. See S.C. Code Ann. § 56-5-1210; State v. Horton, 271 S.C. 413, 414-15, 248 S.E.2d 263, 263-64 (1978) (describing the offense as one involving "moral turpitude" because "[o]ne who leaves the scene of an accident is fraudulently attempting to relieve himself of any liability."). The latter requires the State to prove "the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others...." S.C. Code Ann. § 56-5-2910(A).

Reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a *conscious failure* to exercise due care or ordinary care or a *conscious indifference* to the rights and safety of others or a reckless disregard thereof.

State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (emphasis added) (citing Tucker, *infra*). The defendant's culpable mental state is a crucial ingredient because "[t]he gist of the

charge of recklessness was that the collision could have been avoided." State v. Tucker, 273 S.C. 736, 739, 259 S.E.2d 414, 415-16 (1979). "This necessarily implies that the State must prove beyond a reasonable doubt that the actions of the defendant were culpable, which excludes the theories of an unavoidable accident or one brought about by an intervening cause." Id.

For example, it was the absence of any evidence of reckless conduct in In Interest of Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141 (1991)—no evidence of speeding, no witnesses, and a defendant with no memory—that caused the Supreme Court to vacate the defendant's reckless homicide conviction and explain:

Too many unanswered questions exist in this case, none of which the State has answered. Stacy A. could have blacked out; could have swerved to miss a pedestrian in his traffic lane; or could have had a blown left tire which caused his car to swerve. Instead of presuming any of these scenarios and requiring the State to present evidence making them less probable; the trial judge here has presumed Stacy A. drove recklessly and required him to disprove it. This is a presumption of guilt rather than of innocence, and may not be allowed to stand.

Id. at 294, 400 S.E.2d at 143. Conversely, where eyewitness testimony supports an inference of reckless disregard for the safety of others, the jury decides. See, e.g., Rowell, 326 S.C. at 316-17, 487 S.E.2d at 186-87.

The United States Court of Appeals for the Fourth Circuit's decision in United States v. Mastrapa, 509 F.3d 652 (2007), is nearly indistinguishable on this point. In Mastrapa, the defendant agreed to transport several bags of groceries to a hotel room and was stopped by undercover agents who found drugs in the bags. Id. at 654. The defendant pled guilty to conspiracy to distribute. Id. During the plea colloquy, and again during his sentencing hearing, the defendant admitted that he drove the van and helped carry the bags at the request of his alleged co-conspirators, but that he did not know there was anything other than groceries in the bags. Id. at 655-56. "Before proceeding with the sentencing, the court observed, 'I guess this is

an Alford plea,' and Mastrapa's attorney responded that 'that would be one way of presenting this, yes, sir.'" Id. at 656. Even though the defendant had no grounds for a meritorious appeal, the Fourth Circuit was "[c]oncerned about the adequacy of the factual basis for the guilty plea[,]" and invited the parties to submit briefs. Id. at 656.

The Fourth Circuit vacated the conviction because the defendant lacked any knowledge of the conspiracy or the drug crime and the only evidence in the record was the affidavit of the DEA agent "which likewise failed to provide evidence of *mens rea*." Id. 658.

The facts that Mastrapa protested the *mens rea* element of the conspiracy offense and that the affidavit failed to fill the gap should have alerted the magistrate judge to explore further the discrepancy between Mastrapa's acknowledgment of his guilt and his understanding of what the crime entailed. As revealed during sentencing, Mastrapa apparently thought that driving the vehicle and carrying the groceries were sufficient to convict him even without knowledge of the persons for whom he was performing those tasks, what they were doing, or the fact that drugs were involved.

Id. The court found it particularly telling that, "Mastrapa never changed his position." Id.

Nor did the sentencing judge's reference to Alford salvage the plea. An Alford plea can be accepted "only if the defendant (1) 'intelligently concludes that his interests require entry of a guilty plea' and (2) '*the record before the judge contains strong evidence of actual guilt.*'" Id. at 659 (emphasis original) (quoting Alford, 400 U.S. at 37). "[A]n Alford plea was never discussed, tendered, or agreed to by Mastrapa." Id. at 659. Even if it had, "the outcome could be no different," because "the court must find a factual basis even for an Alford plea." Id. (citing United States v. Morrow, 914 F.2d 608, 611-12 (4th Cir. 1990)) The defendant's plea was defective because it was predicated on the erroneous belief that the DEA affidavit evidenced the defendant's guilty mind and that the defendant accepted that basis. Id.

The Court finds Mastrapa highly instructive here. As a result of a blackout, Applicant has never known he was "guilty." Like Mastrapa, Applicant consistently told Plea Counsel he had no memory of the collision. Likewise, Plea Counsel never discussed Alford with Applicant.

This is not to say that a blacked-out defendant could not plead guilty to reckless homicide when confronted with other evidence that establishes his recklessness. See Alford, 400 U.S. at 37; Mastrapa, 509 F.3d at 659. Likewise, even in the absence of such evidence, a guilt-ridden defendant with a recollection of his misdeeds could certainly choose to plead guilty. But the absence of either is the circumstance contemplated by Stacy Ray A. Plea Counsel's decision to plead Applicant guilty to leaving the scene and reckless homicide denied Applicant effective representation. To his credit, Plea Counsel admitted as much and shared his view that Applicant should receive a new trial. The Court agrees this defect warrants correction.

At Applicant's plea, all of the participants—Plea Counsel, the State, and the Plea Judge—were aware of the fact that Applicant had no memory of what occurred. Based on this Court's review of the plea transcript, the Solicitor was properly concerned about this as reflected in the following exchange:

Mr. Hubbard: I have. Your Honor, my only question is if there's a defense of I don't know what happened, I think we need to address that.

Mr. Simmons: That's not where we're going, Your Honor.

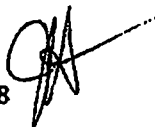
The Court: Okay. I'll hear you out.

(Pl. Tr. 28:4-9) Plea Counsel should have shared the Solicitor's concern. Instead of assuaging the State and Plea Judge that the plea could go forward, Plea Counsel should have considered the legal consequences of his client's consistent inability to know what had occurred. Faced with such a dilemma, Plea Counsel should not have gone forward with the plea.

Third, the Court holds Plea Counsel's investigation of Applicant's case fell below the standard owed to a criminal defendant to investigate the facts and to advise the client using professional judgment that is informed by the law. A criminal defense attorney is obliged to conduct a reasonable investigation, the scope of which is case specific but at a minimum includes interviewing witnesses and making an independent investigation of the facts. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). In the Court's view, Plea Counsel's investigation was, at best, incomplete as it failed to pursue defense theories that Applicant has demonstrated here would have undermined the State's theory of liability.

Plea Counsel's investigation appears focused on identifying witnesses that might testify they saw Applicant drinking or believed him to have been drinking prior to the collision. One witness, with known biases against Applicant, was never interviewed by Plea Counsel. Nor did Plea Counsel take the statement of a witness who said she saw Applicant at a bar and he was not drinking. This left Plea Counsel unequipped to challenge representations by the State that this witness had changed her story. "[D]efense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses," such that the failure to do so could give rise to constitutional prejudice. Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986). Plea Counsel left other avenues of inquiry entirely unexplored. For example, he failed to speak to the last person who spoke to the Victim the evening before the collision. Based on the evidence presented, the Court cannot say Plea Counsel's assistance was "reasonable considering all the circumstances." See Strickland, 466 U.S. at 688.

The consequence of these lapses in professional judgment was exacerbated by a misunderstanding of the relevant criminal law in two ways. First, Plea Counsel relied on civil negligence concepts to explain criminal recklessness to Applicant and analyze the risk he faced



by the reckless homicide indictment. This was incorrect. In State v. Rowell, 326 S.C. 313, 487

S.E.2d 185 (1997), the Supreme Court explained:

We clarify today that in a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind. The import of the terms negligence and recklessness as used in the civil law and in the criminal law are neither equivalent nor interchangeable. To the extent the confusion about the impact of civil concepts of negligence and recklessness on criminal law stem from dicta in our decision in In the Interest of Stacy Ray A., 303 S.C. 291, 400 S.E.2d 141 (1991), we disavow that discussion.

Id. at 317, 487 S.E.2d at 187 (footnote and citations omitted). Here, Plea Counsel testified that he explained recklessness to Applicant along the spectrum of civil negligence and equated it to "gross negligence." He also testified that, in his view, the indictment's predicate acts, if proven true, were sufficient to convict Applicant of the charge of reckless homicide. Plea Counsel was mistaken. South Carolina Code § 56-5-2910 requires the State to prove the driver acted "in reckless disregard of the safety of others" in order to convict, meaning a "conscious failure" or "conscious indifference" to the safety of others. Rowell, 326 S.C. at 315, 487 S.E.2d at 186; see also S.C. Code Ann. § 56-5-2920 (defining reckless driving as driving a vehicle "in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property.") This has long been held to be a case-specific inquiry that a mere statutory violation, like driving with a suspended license or speeding, does not satisfy. State v. Rachels, 218 S.C. 1, 9, 61 S.E.2d 249, 252-53 (1950) (construing the old reckless homicide statute and explaining recklessness "does not lie in speed alone, but in that and all other attendant circumstances which together show a reckless disregard of consequences."). Plea Counsel's failure to appreciate this standard caused him to advise Applicant of a litigation risk far greater than under a proper reading of the law.

Second, even assuming Applicant was drinking (a fact Applicant disputes), that evidence, without more, does not establish the offense. For example, in State v. Dobson, 281 S.C. 36, 314 S.E.2d 310 (1984), a defendant argued a mechanical malfunction unrelated to his drinking was responsible for the accident. Id. at 38, 314 S.E.2d at 311. The Supreme Court agreed, explaining "when the case rests entirely on circumstantial evidence, a directed verdict is proper when the evidence fails to positively prove the guilt of the accused to the exclusion of any other reasonable hypothesis." Id. (citing State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 (1982)). Since the only evidence of "recklessness" was that the defendant drank beer prior to the accident, and there was no evidence of excessive speed or failure to maintain a proper lookout, "the State failed to meet the circumstantial evidence test in showing that this recklessness was the proximate cause of the accident." Id. According to the surveillance video, Applicant's truck was not swerving. The State's MAIT report suggests a rate of speed between one and nine miles over the speed limit. Road lighting was poor and the Victim was arguably illegally stationary on a small vehicle underneath a green traffic light. See S.C. Code Ann. § 56-5-2510(A) ("No person shall stop, park, or leave standing a vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park, or leave the vehicle off the roadway."). Applicant's position is that he suffered a medication-induced blackout. Even assuming Applicant had been drinking, Plea Counsel failed to appreciate that the circumstantial evidence rule in Dobson would entitle Applicant to a directed verdict in the absence of some evidence he operated the vehicle in a reckless manner. Cf. State v. Tucker, 273 S.C. 736, 737-38, 259 S.E.2d 414, 414-15 (1979) (upholding conviction based on eyewitness testimony defendant was driving fast and weaving in and out of traffic nine-tenths of a mile from the scene).

The Court does not view its role as one to second-guess counsel's strategic choices and has therefore reviewed Plea Counsel's decisions with the utmost deference. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Even affording Plea Counsel due deference, his judgment was guided by an incomplete investigation of the facts applied to a misapprehension of the law. Applicant's consistent assertions he blacked out warranted additional factual and legal inquiry. See id. at 691 (the reasonableness of counsel's actions may be determined or influenced by defendant's own statements or actions). So too did the presence of alternative, exculpatory explanations and the State's misplaced reliance on certain predicate acts in the indictment, which should have prompted Plea Counsel to investigate whether the State could prove proximate cause and a culpable state of mind, or whether this case was akin to Stacy Ray A. and Dobson. The Court cannot say that these errors fall within the realm of sound trial strategy or the exercise of informed professional judgment, and, therefore, holds Applicant received ineffective assistance from Plea Counsel.

* * *

Since the constitution's guarantee of counsel is designed to protect the outcome of the proceeding, deficiencies in counsel's performance must be prejudicial in order to entitle an applicant to relief. Strickland, 466 U.S. at 691-92. The Court holds that the deficiencies outlined above prejudiced Applicant in three ways.

First, had Plea Counsel appreciated Applicant's impaired state at the plea hearing, he would have withdrawn the plea or, at a minimum, sought a continuance until such time as he could be assured either by a medical professional or Applicant's abstention from medication that

he had sufficient capacity to appreciate the decision he was making. Significantly, Applicant testified that, if given the opportunity to do so again, he would not plead guilty. Cf. Harres, 282 S.C. at 133, 318 S.E.2d at 361 (circuit court erred in granting post-conviction relief to applicant who would have pled guilty anyway); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981) (denying relief to applicant who would plead guilty again if granted a new trial). The Court has already agreed with Plea Counsel's testimony that it was error to plead Applicant guilty given his impaired state, the Court holds this error was prejudicial to the outcome of this matter.

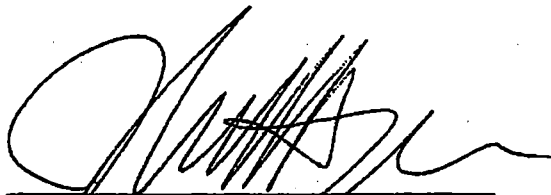
Second, aside from his impairment, Applicant was legally unable to take a plea in the absence of either personal knowledge or independent facts that established he knowingly left the scene of the collision or acted with conscious disregard for the safety of others. Since this defect should have prevented Applicant from taking the plea, it is prejudicial. Again, the plea was not an Alford or no contest plea.

Third, the Court holds Plea Counsel's ineffective factual and legal investigation of Applicant's case was prejudicial. A fuller factual inquiry, like the record considered by the Court here, suggests the State may have had difficulty satisfying its burden. Likewise, Applicant may have had viable factual and legal defenses based on legal precedent that Plea Counsel either overlooked or misunderstood. Plea Counsel conceded that had he been aware of the precedent raised by Applicant in this proceeding, at a minimum, he would have investigated Applicant's options further. While the Court takes no position on the merits going forward, Applicant's inability to consider these options was clearly prejudicial.



For these reasons, Applicant's request for post-conviction relief is **GRANTED** and his request for a new trial is granted. Furthermore, Applicant's criminal case is **REMANDED** to the general sessions court for further prosecution.

IT IS SO ORDERED.


The Honorable J. Mark Hayes, II
Circuit Court Judge

July 19, 2016.
Columbia, South Carolina.

FILED
2016 JUL 22 A 11:16
JENNIFER A. GARRIG
CLERK OF COURT
LEXINGTON, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3202893Randall Houston Nordan
#358103

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

Submitted by:

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

7/27/2016

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on July 27, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian PO Box 1090 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Patrick Lowell Schmeckpeper PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/kpk

Beth A. Carrigg - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

357

1-25 yrs & \$10,000 + \$25,000

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE VS.Randall Houston Nordan

AKA:

Race: Sex: M Age: 26DOB: [REDACTED] SS#: [REDACTED]Address: 426 Walter Rawl RoadCity, State, Zip: Lexington, SC 29072DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Traffic / Hit and run, duties of driver involved in accident with deathin violation of § 56-05-1210(A)(3) of the S.C. Code of Laws, bearing CDR Code # 2463☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTORNEY

[Signature]
Solicitor015294
SC Bar#[Signature]
Defendant[Signature]
Attorney for Defendant12023
SC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed 10 yearsand/or to pay a fine of \$ [REDACTED]; provided that upon the service of 10 days/months/years and/or paymentof \$ [REDACTED]; plus costs and assessments as applicable*; the balance is suspended with probation for 5months/years and subject to South Carolina Department of Probation, Parole and Pardon Service's standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. Lex. Co. C.C.C.P., G.S. & P.D.☐ 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 ☐ OrderedTotal: \$ [REDACTED] plus 20% fee: \$ [REDACTED]Payment Terms: [REDACTED]☐ Set by SCDPPPS [REDACTED]Recipient: [REDACTED]*Fine: \$ [REDACTED]

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ [REDACTED]§ 56-5-2995 (DUI Assessment) \$12 \$ [REDACTED]§ 56-1-286 (DUI Breath Test) \$25 \$ [REDACTED]Proviso 47.9 (Public Def/Prob) \$500 \$ [REDACTED]§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00§ 14-1-213 (Drug Court Surcharge) \$150 \$ [REDACTED]§ 50-21-114 (DUI Breath Test Fee) \$50 \$ [REDACTED]§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ [REDACTED]Proviso 90.5 (SCCA Surcharge) \$5 \$ 5.003% to County (if paid in installments) \$ [REDACTED]TOTAL \$ [REDACTED]Clerk of Court/ Deputy Clerk [Signature]Court Reporter: [Signature]

SCCA/217 (03/2011)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS3201858A/W#: 1628010Date of Offense: 5/9/2011S.C. Code § : 56-05-1210(A)(3)CDR Code #: 2463

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & P.D.

[REDACTED] days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. [REDACTED]May serve W/E beginning [REDACTED]Substance Abuse Counseling ☒Random Drug/Alcohol testing ☒Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ [REDACTED] beginning [REDACTED]\$ [REDACTED] paid to Public Defender FundOther: [REDACTED]☐ Appointed PD or appointed other counsel,§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge [Signature]Judge Code: 2158Sentence Date: 9-11-11

358

ARREST WARRANT

1-628010

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
LEXINGTONTHE STATE
against

RANDALL HOUSTON NORDAN

Address: 426 WALTER RAWL RD
LEXINGTON SC 29072

Phone: _____ SSN: _____

Sex: M Race: W Height: 5-11 Weight: 193

DL State: SC PL#: _____

DOB: _____ Agency ORI#: SC0320400

Prosecuting Agency: TOWN OF LEXINGTON POLICE

Prosecuting Officer: DET. M. MIRAMONTES

Offense: TRAFFIC / HIT AND RUN

Offense Code: 2463

Code/Ordinance Sec. 56-05-1210 (A) (3)

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

Date: 05/16/2011

RETURN

A copy of this arrest warrant was delivered to
defendant: RANDALL HOUSTON NORDAN
on 5/19/2011

Signature of Constable/Law Enforcement Officer



STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
LEXINGTON

AFFIDAVIT

Form Approved by
S.C. Attorney General
July 28, 1990
SCCA 518Personally appeared before me the affiant MARC MIRAMONTES who
being duly sworn deposes and says that defendant RANDALL HOUSTON NORDAN
did within this county and state on 05/09/2011 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of LEXINGTON)
in the following particulars:

DESCRIPTION OF OFFENSE: 56-05-1210 (A) (3) / TRAFFIC / HIT AND RUN (DANNA)

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

THAT ON MAY 9TH, 2011, THE DEFENDANT, RANDALL HOUSTON NORDAN, DID WITHIN THE TOWN OF LEXINGTON, SOUTH CAROLINA, COMMIT THE OFFENSE OF HIT AND RUN RESULTING IN A DEATH. THE DEFENDANT WHILE DRIVING HIS 2001 DODGE 1500 HEAVY DUTY RAM PICKUP TRUCK (SC -EFS-614) ON SOUTH LAKE DRIVE AT INDUSTRIAL DRIVE, STRUCK THE REAR OF THE VICTIM'S (HIRAM JUAREZ MILLER) KYMCO MOPED AS IT SAT STATIONARY AT THE INTERSECTION. THE DEFENDANT THEN LEFT THE SCENE WITHOUT STOPPING AND RENDERING AID OR REPORTING THE ACCIDENT TO AUTHORITIES AS REQUIRED BY LAW. THE VICTIM WAS PRONOUNCED DEAD A SHORT TIME LATER AT THE LEXINGTON MEDICAL CENTER DUE TO THE INJURIES SUSTAINED DURING THE COLLISION. PHYSICAL EVIDENCE LOCATED AT THE SCENE MATCHED EVIDENCE TAKEN FROM THE DEFENDANT'S VEHICLE DURING THE EXECUTION OF A SEARCH WARRANT. SAID ACTIONS BY THE DEFENDANT WERE WITHOUT LEGAL JUSTIFICATION OR EXCUSE.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
LEXINGTON

Affiant's Address 111 MAIDEN LANE

LEXINGTON SC 29072

Affiant's Telephone (803) 359-6260

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe that
on 05/09/2011 defendant RANDALL HOUSTON NORDAN

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

☐ County/ ☒ Municipality of LEXINGTON) as set forth below:DESCRIPTION OF OFFENSE: TRAFFIC / HIT AND RUN, DUTIES OF DRIVER INVOLVED IN ACCIDENT
WITH DEATHHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 05/16/2011

BRIAN JEFFCOAT (L.S.)

Judge Code: JEFFCOAT

Judge's Address 111 MAIDEN LANE

LEXINGTON SC 29072

Judge's Telephone 803-951-4634

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

Case: 11004712

ORIGINAL

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & E.C.

RETURN WARRANT TO:

JOHN RAKOWSKY, MUNICIPAL JUDGE

111 MAIDEN LANE

LEXINGTON, SC 29072

(803) 951-4634

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
LEAVING THE SCENE OF AN ACCIDENT
INVOLVING DEATH

§ 56-05-1210(a)(3)

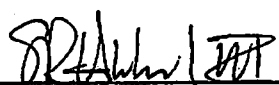
At a Court of General Sessions, convened on JULY 2011, the Grand Jurors of Lexington County present upon their oath:

That **Randall Houston Nordan**, being the driver of a vehicle involved in an accident which resulted in the death of **Hiram Juarez Miller**, did in Lexington County, South Carolina on or about May 9, 2011, willfully and unlawfully fail to immediately stop his vehicle at the scene of the accident or as close to it as possible, and did fail to return to and remain at the scene of the accident until he had fulfilled the requirements of Section 56-5-1230, in violation of Section 56-5-1210 (a)(3) of the South Carolina Code of Laws (1976), as amended.

A TRUE COPY


Lex. Co. C.C.C.P., G.S. & F.O.

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


ASSISTANT SOLICITOR

360

WITNESSES

Lexington Police Department

Marc Antonio Miramontes

Law Enforcement Case #:

SRH

ARREST WARRANT NUMBER

1628010

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: 7/11/11

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2011GS3201858

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JULY TERM 2011

**THE STATE
vs.**

Randall Houston Nordan

CDR #: 2463

Indictment for

**LEAVING THE SCENE OF AN
ACCIDENT INVOLVING DEATH**

§ 56-05-1210(a)(3)

DONALD V. MYERS, SOLICITOR

361

10-115 9/02 \$1000 - 5000
IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE VS.

Randall Houston Nordan

AKA:

Race: Sex: M Age: 26

DOB: SS#:

Address: 426 Walter Rawl Road

City, State, Zip: Lexington, SC 29072

DL#: SID#:

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

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

TO: Reckless Homicide, death results within 3 yrs, caused by injury from vehicle

INDICTMENT/CASE#: 2012GS3202625

A/W#: 12-STR-00515

Date of Offense: 5/9/2011

S.C. Code §: 56-05-2910

CDR Code #: 3097

SENTENCE SHEET

in violation of § 56-05-2910

of the S.C. Code of Laws, bearing CDR Code # 3097

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

w/minor 1st or Lewd Act)

☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTES:

Solicitor

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

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

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

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

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

SPECIAL CONDITIONS:

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

PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fines:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	
§ 56-5-2995 (DUI Assessment)	\$12	
§ 56-1-286 (DUI Breath Test)	\$25	
Proviso 47.9 (Public Def/Prob)	\$500	
§ 14-1-212 (Law Enforce. Funding)	\$25	\$25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	
§ 50-21-114(BLI Breath Test Fee)	\$50	
§ 56-5-2942(I) (Vehicle Assessment)	\$40/ea	
Proviso 90.5 (SCCJA Surcharge)	\$5	\$5.00
3% to County (if paid in installments)	\$	
TOTAL	\$	

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

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:

A TRUE COPY

Lex. Co. C.C.O.P., G.S. & T.O.

☐ Appointed PD or appointed other counsel,

§ 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

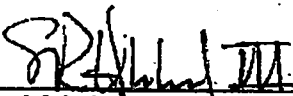
INDICTMENT FOR
 RECKLESS HOMICIDE

§ 56-05-2910

At a Court of General Sessions, convened on OCTOBER 2012, the Grand Jurors of Lexington County present upon their oath:

That **Randall Houston Nordan** did in Lexington County, South Carolina, on or about May 9, 2011, drive a motor vehicle in reckless disregard for the safety of others in that he did an act or acts forbidden by law and/or recklessly disregarded a duty or duties imposed by law, to wit: (a) drove a motor vehicle while his license to drive was suspended; (b) drove a motor vehicle while under the influence of alcohol or drugs, or a combination of both; (c) failed to reduce his speed when approaching and crossing an intersection; (d) failed to reduce his speed and/or drive in a reasonable and prudent manner; (e) drove without regard to actual and potential hazards then existing; (f) failed to keep and maintain a proper lookout; (g) failed to keep and maintain proper control of his vehicle; and (h) failed to drive with due care to others on the road, and the defendant did collide with the victim, **Hiram Juarez Miller**, and the victim did die within one year of sustaining his injury, as a result of the defendant's reckless act or acts, in violation of Section 56-5-2910 (A) of the South Carolina Code of Laws, (1976), as amended.

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


 ASSISTANT SOLICITOR

A TRUE COPY


 Lex. Co. C.C.C.P., G.S. & F.C.

363

Lawrence D. Myers
WITNESSES

Lexington Police Department

Marc Antonio Miramontes

Law Enforcement Case #:

SRH

ARREST WARRANT NUMBER

12-STR-00515

ACTION OF GRAND JURY

TRUE BILL

Susan Suf

Foreperson of Grand Jury

Date: 10/1/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202625

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Randall Houston Nordan

As Charged

CDR #: 3097

Indictment for

RECKLESS HOMICIDE

§ 56-05-2910

DONALD V. MYERS, SOLICITOR

10-1-12

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
 RECORD SUMMARY REPORT DATED 10/30/14

C0511

NORDAN, RANDALL HOUSTON FBI # 710528LD4 SID# SC02000179 SCDC # 358103

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ... ALLENDALE CORR INST

SECURITY/CUST.: 2 MINIMUM IN

CURR INCARC SENT...: 10 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #....:

DORM.....: COA0047A

RACE....:W SEX...:M

PROJ MAXOUT DATE: 06/07/2022

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: HORTICULTURIST (GNHS

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 2F5 EEC LEVEL:

ASSIGNMENT...: HORTICULTURE DETAIL

CURRENT PROGRAM...: COURT-ORD ATU

AGE...: 27 DATE OF BIRTH...:

 PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE		
	YRS	MOS	DYS		START	V/NV	CATEGORY
HIT & RUN-DEATH RESULTS	10	0	0	LEXINGTON	12/ 9/2013	V	4
RECKLESS HOMICIDE	10	0	0	LEXINGTON	12/ 9/2013	N	3

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINEES (HOLD, WANTED, NOTIFY):

NO DETAINEES

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES WHILE IN CUSTODY

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

1/25/14 POSSESSION OF CONTRABAND CONVICTED ADMIN

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
3/10/14	ALLENDALE	INCARCERATED	ADMINISTRATIVE
12/11/13	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
HORTICULTURIST (GNHS	06/13/14	0/ 0/ 0		2F5
HORTICULTURIST (GNHS	03/13/14	6/12/14	MI ELIGIBLE FOR LEVEL 2	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS

***** END OF REPORT *****

10: Thursday, October 7 2014

365

CMTI330D

SCDC OFFENDER MANAGEMENT SYSTEM

10/30/14

OMCOMITA

RELEASE DATE SCREEN

C051132

SCDC# > 358103

LOC: ALLENDALE

NORDAN, RANDALL HOUSTON

SCDC CLASSIFICATION... VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE

SEXUAL REGISTRY...: N

SEXUAL PREDATOR...: NOT APP

DNA STATUS...: COMPLETED

GPS REQUIREMENT...: N

PREA DECISION...:

CURRENT SENTENCE: 010-00-000

CONSECUTIVE SENTENCE ...: N

010-00-000

CURRENT SENT START DATE: 12/09/2013

PROJECTED COMPLETION DATES

MAXOUT DATE: 06/07/2022

CURRENT EWC ..: 2 F 5

YOA SIX YEAR DATE: / /

CURRENT EEC ..: NOT CURRENTLY EARNING EEC

INITIAL PAROLE DATE: 00/00/0000

NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000

LABOR CREW/WORK PROG DATE: 99/99/9999

TOTAL EARNED WORK CREDITS ...: 000114

LABOR CREW DISQ REASON:

TOTAL EDUCATION CREDITS: 000000

CATEGORY 4 OR 5 OFFENSE

TOTAL EXTRA EARNED CREDITS ..: 000

SUPERVISED REENTRY DATE...: 00/00/00

TOTAL SERVICE TIME EARNED ...: 000321

ISS.....:

PFKEYS:

5: HISTORY OF DATE CHANGES

LCWC

1-04rs 3. P101000 366 12/10/11

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington
STATE VS.
Randall Houston Nordan
AKA: _____
Race: _____ Sex: M Age: 26
DOB: _____ SS#: _____
Address: 426 Walter Rawl Road
City, State, Zip: Lexington, SC 29072
DL#: _____ SID#: _____
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Traffic / Hit and run, duties of driver involved in accident with death

INDICTMENT/CASE#: 2011GS3201858
A/W#: 1628010
Date of Offense: 5/9/2011
S.C. Code § : 56-05-1210(A)(3)
CDR Code #: 2463

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

in violation of § 56-05-1210(A)(3) of the S.C. Code of Laws, bearing CDR Code # 2463
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: _____

[Signature] Solicitor 015294 SC Bar# [Signature] Defendant [Signature] Attorney for Defendant 12023 SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 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 10 days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
☐ 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 _____

PTUP _____ days/hours Public Service Employment

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 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	\$ <u>5.00</u>
3% to County (if paid in installments)		\$
TOTAL		\$

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: _____

Clerk of Court/ Deputy Clerk [Signature]
Court Reporter: [Signature]
SCCA/217 (03/2011)

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.
Presiding Judge [Signature]
Judge Code: 2158
Sentence Date: 9 DEC 2013

367

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE VS.Randall Houston Nordan

AKA:

Race: Sex: M Age: 26DOB: SS#: Address: 426 Walter Rawl RoadCity, State, Zip: Lexington, SC 29072DL#: SID#: *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Reckless Homicide, death results within 3 yrs, caused by injury from vehicleINDICTMENT/CASE#: 2012GS3202625A/W#: 12-STR-00515Date of Offense: 5/9/2011S.C. Code § : 56-05-2910CDR Code #: 3097

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSin violation of § 56-05-2910 of the S.C. Code of Laws, bearing CDR Code # 3097☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar# 015294

Defendant

Attorney for Defendant

SC Bar# 13023WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

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

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ 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 ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
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§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$
TOTAL	\$	\$

Clerk of Court/ Deputy Clerk Beth GarrigCourt Reporter: S. Sheppard

SCCA/217 (03/2011)

PTUP days/hours Public Service EmploymentObtain 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 FundOther: ☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.Presiding Judge Judge Code: 258Sentence Date: 9 DEC 2013