

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Florence County

Honorable Jocelyn J. Newman, Circuit Court Judge

RECEIVED

MAY 03 2017

S.C. SUPREME COURT

SHAQUILLE BURGESS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001611

APPENDIX

WANDA H. CARTER  
Deputy Chief Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

LINDSEY MCCALLISTER  
Assistant Attorney General  
Attorney General Office  
P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX ..... i

TRIAL TRANSCRIPT DATED .....1

APPLICATION FOR POST-CONVICTION RELIEF .....16

RETURN.....23

POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JUNE 1, 2016 .....30

ORDER OF DISMISSAL.....70

INDICTMENT.....78

SENTENCE SHEET.....80

STATE OF SOUTH CAROLINA	)	
COUNTY OF FLORENCE	)	COURT OF GENERAL SESSIONS
	)	2012-GS-21-1654
	)	
	)	
State of South Carolina	)	)
vs.	)	TRANSCRIPT OF RECORD
	)	
Shaquille Tyster Burgess	)	)
DEFENDANT	)	March 4, 2013
		Florence, South Carolina

B E F O R E:

THE HONORABLE D. CRAIG BROWN, JUDGE.

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

JOHN JEPERTINGER, DEPUTY SOLICITOR  
Attorney for the State

JOSHUA BAILEY, ESQ.  
Attorney for the Defendant

KESHIA REED  
Official Court Reporter

I N D E X

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

(WHEREUPON, no witnesses were called.)

1 MR. JEPERTINGER: Please the Court, Your Honor,  
2 standing in front of you is Shaquille Burgess on  
3 2012-21-1654. He's pleading to armed robbery, Your Honor.  
4 Represented by Mister -- Lord, I forgot your name.

5 MR. BAILEY: Joshua Bailey.

6 MR. JEPERTINGER: Joshua Bailey, Lord how mercy.

7 THE COURT: How can you forget a name like that,  
8 Mr. Jepertinger?

9 MR. JEPERTINGER: Don't call him Joshua Bailey,  
10 that's my problem. It is a negotiated sentence for ten  
11 years, Your Honor, that I've entered into with the defense  
12 attorney. Your Honor, we talked to you in chambers about  
13 this case a little bit. Your Honor, I did talk to the  
14 victims in the case, which would be the Bureau of Alcohol  
15 and Tobacco and Firearms was the confidential informant  
16 that was robbed at gun point in this matter, Your Honor.  
17 And they do not need to be here, Judge.

18 THE COURT: Mr. Bailey, you represent Shaquille  
19 Tyster Burgess?

20 MR. BAILEY: I do, Your Honor.

21 THE COURT: You explain to him the charges  
22 contained in the indictment, the possible punishment and  
23 his Constitutional Rights?

24 MR. BAILEY: I have, Your Honor.

25 THE COURT: In your opinion, does he understand

1 the charges against him, the possible punishment and his  
2 Constitutional Rights?

3 MR. BAILEY: I believe he does, Judge.

4 THE COURT: Has he indicated to you a desire to  
5 plead guilty or not guilty?

6 MR. BAILEY: Guilty.

7 THE COURT: Do you agree with that decision?

8 MR. BAILEY: I do.

9 THE COURT: From your investigation of the facts  
10 and circumstances of this case, do you believe the State  
11 could produce sufficient evidence to convince a jury of  
12 his guilt beyond a reasonable doubt and that if he were to  
13 stand trial, his conviction would be probable?

14 MR. BAILEY: I believe it would be probable,  
15 Your Honor.

16 THE COURT: Has he been ordered to submit to a  
17 psychological or mental evaluation?

18 MR. BAILEY: He has, Your Honor, on a number of  
19 occasions.

20 THE COURT: As a result of those evaluations, is  
21 there any question in your mind about his competency?

22 MR. BAILEY: Your Honor, in the conversations  
23 that I've had with him, I think there has been a little  
24 bit of learning deficiency. Just briefly, Judge, and  
25 according to the most recent report I have which was from

1 November of 2009. Shaquille had an IQ that was tested and  
2 it was scaled at 49. I have obtained other records where  
3 Shaquille has been tested dating back to 2008 where some  
4 of those tests has reflected in the 50's and some even up  
5 into the 70's, so there has been some discrepancy over the  
6 past handful of years as to where his IQ actually lies.  
7 But I think Mr. Burgess does have an understanding as to  
8 what we're doing here today despite his low IQ.

9 THE COURT: All right.

10 MR. JEPERTINGER: I like to point out too,  
11 Judge, that in my office's dealings with Shaquille Burgess  
12 in another courtroom pleas have always been accepted by  
13 trial judges, Your Honor.

14 THE COURT: Okay. Well, in light of that, is  
15 any question in your mind about his competency, Mr.  
16 Bailey?

17 MR. BAILEY: I don't think so, Your Honor. I  
18 think he's competent to enter a guilty plea at this time.

19 THE COURT: All right. Has he been sworn?

20 THE CLERK: Please raise your right hand. Do  
21 you swear to tell the truth, the whole truth, and nothing  
22 but the truth so help you God?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Sir, you are Shaquille Tyster  
25 Burgess?

1 THE DEFENDANT: Tyster.

2 THE COURT: Can you spell it for me?

3 THE DEFENDANT: T-Y-S-T-E-R.

4 THE COURT: Certain things -- certain questions  
5 I must ask you to ensure that you are entering into this  
6 plea freely, voluntarily, knowingly and intelligently and  
7 that you have a full understanding of the offenses you are  
8 pleading guilty to and the consequences of your plea. If  
9 at any point in time you need to speak your attorney,  
10 Mr. Bailey, you let me know and I'll be happy to let you  
11 talk to him, okay?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Have you ever been treated for  
14 alcohol abuse, drug abuse or mental illness?

15 THE DEFENDANT: No, sir.

16 THE COURT: Within the last 24 hours have you  
17 taken any medications, drugs or alcohol?

18 THE DEFENDANT: No, sir.

19 THE COURT: Are you aware of any physical,  
20 emotional or nervous problem that would keep you from  
21 understanding what you doing here today?

22 THE DEFENDANT: No, sir.

23 THE COURT: The State indicates you are pleading  
24 guilty to armed robbery; is that correct?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: You understand that carries a  
2 minimum penalty of ten years up to 30 years. You  
3 understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And you understand I got to give you  
6 ten years?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And the State's indicated that  
9 they've negotiated a sentence with your lawyer and that  
10 negotiated sentence is that I in fact give you ten years.  
11 You understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Now, under a negotiated plea, do you  
14 understand that I can if either accept it -- accept your  
15 plea of guilt or set it aside and let you plead on a  
16 different day in front of another judge. Do you  
17 understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you want me to accept your plea  
20 here today and sentence you at this minimum sentence of  
21 ten years?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Now, you understand that this charge  
24 of armed robbery is considered to be a violent offense.  
25 You understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: In other words, a no parole offense.  
3 You understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And do you understand that whatever  
6 sentence -- if I impose this ten year sentence on you, you  
7 can count on doing day for day?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Now, you also understand that this  
10 is considered to be what's classified as a most serious  
11 offense?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: And you understand that upon your  
14 release from the department of corrections that if you're  
15 convicted of another most serious offense and the State  
16 has noticed you or put you on notice of their intent to  
17 seek life, the Court would have no alternative but to give  
18 you life in prison. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Understanding all of  
21 that, do you still want to go forward here today and plead  
22 guilty to this offense?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now, were you in here this morning  
25 when I went through everybody's Constitutional Rights with

1 them?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Your lawyer's indicated he's gone  
4 over those rights with you as well; is that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand your  
7 Constitutional Rights?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you understand that when you  
10 plead guilty you give up those rights?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right. Understanding your  
13 rights and understanding what when you plead guilty you  
14 give them up, how do you plead here today guilty or not  
15 guilty?

16 THE DEFENDANT: Guilty.

17 THE COURT: All right. You're represented by  
18 Mr. Bailey. You satisfied with how he's advised you and  
19 represented you in this case?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Have you talk with him enough?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you need any more time to talk to  
24 him?

25 THE DEFENDANT: No, sir.

1 THE COURT: Have you understood my your talks  
2 with him?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Has he done everything that you  
5 believe he could have or should have done for you?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Has he done anything that you think  
8 he shouldn't have done?

9 THE DEFENDANT: No, sir.

10 THE COURT: You completely satisfied?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Any complaints?

13 THE DEFENDANT: No, sir.

14 THE COURT: Has anybody promised you anything or  
15 held out any hope of reward to get you to plead guilty?

16 THE DEFENDANT: No, sir.

17 THE COURT: Has anybody used any threats, force,  
18 pressure or intimidation to get you to plead?

19 THE DEFENDANT: No, sir.

20 THE COURT: Anybody mistreated you in any way  
21 whether it be law enforcement or the Solicitor's office?

22 THE DEFENDANT: No, sir.

23 THE COURT: Have you had enough time to make up  
24 your mind as to whether or not you want to plead guilty or  
25 go to trial?

1 THE DEFENDANT: Plead guilty.

2 THE COURT: You want to plead guilty?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Have you understood my questions?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right, Mr. Jepertinger.

7 MR. JEPERTINGER: Your Honor, this happened back  
8 on July 16th 2012, over at Suburban hotel on West Lucas  
9 Street here in Florence County. This individual along  
10 with a co-defendant committed armed robbery by pointing a  
11 high point .380 caliber semiautomatic handgun at a  
12 confidential informant of the Bureau of Alcohol Tobacco  
13 Firearms. The situation was under surveillance. We  
14 showed the video, the armed robbery to the defense  
15 attorney in this case, \$260 was stolen. He was caught  
16 shortly thereafter, Your Honor.

17 The gun was given, I believe, to the  
18 co-defendant, who gave it to a gentleman by the name of  
19 Leon Gregg, who stuck it in a Mariah Wilson's purse. Leon  
20 Gregg has already excuse me -- Leon Gregg has not pled  
21 guilty, but Leon Gregg gave the gun to Toris Burgess who  
22 got three years for accessory after the fact to an armed  
23 robbery, Your Honor. Gregg's case is still pending. In  
24 terms of record, he only has a trespassing after notice  
25 and malicious injury and whatever came out of that other

1 court, Your Honor.

2 THE COURT: All right. Mr. Burgess, you heard  
3 what the prosecutor said about the facts in this case.  
4 You agree with those facts?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And are you in fact guilty of arm  
7 robbery?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And how do you plead guilty or not  
10 guilty?

11 THE DEFENDANT: Guilty.

12 THE COURT: All right. I find that there is a  
13 substantial factual basis for this plea. I also find the  
14 defendant's decision to plead guilty has been entered into  
15 freely, voluntarily, knowingly and intelligently, that  
16 he's had the advice and counsel of an attorney with whom  
17 he's indicated he's completely satisfied. I'll accept his  
18 plea. Be happy to hear from you, Mr. Bailey.

19 MR. BAILEY: Thank you, Your Honor. In light of  
20 the Court's acceptance of this negotiated sentence,  
21 Mr. Burgess has been incarcerated in Effingham since  
22 July 16, 2012, which according to my calculations is 232  
23 days.

24 THE COURT: Anything else you want to tell me,  
25 Mr. Bailey?

1 MR. BAILEY: That will be it, Your Honor.

2 THE COURT: The family members wish to say  
3 anything?

4 Sir, you wish to tell me anything, if so please  
5 state your name fore the record?

6 MR. HARDY: My name is Scott Hardy I wish not to  
7 say anything.

8 THE COURT: And what is your relation to him,  
9 sir?

10 MR. HARDY: This is my son.

11 THE COURT: Okay.

12 NICOLE: My name is Nicole I don't want to say  
13 anything.

14 MR. BAILEY: That's his mother, Your Honor.

15 ~~THE COURT: Anything else from the State?~~

16 MR. JEPERTINGER: I'm dismissing the possession  
17 of a weapon during the commission of a violent crime that  
18 arose out of this.

19 THE COURT: Well, I want to say on the record  
20 also I understand that the concerns that Mr. Bailey has  
21 brought to light to the Court here in court today and  
22 prior in chambers with Mr. Jepertinger. And this court's  
23 observation of Mr. Burgess and his ability to promptly  
24 answer any and all questions that I've asked him, there's  
25 no question in my mind that he understands, knows and

1 understands what's going on here today. Certainly  
2 recognizing the fact that he may have a low IQ, but again  
3 there's no question in my mind that he knows and  
4 understands what's going on here today.

5 As I previously said, I accepted his plea based  
6 upon what I've heard here today and based upon the  
7 negotiated -- negotiations between the State and defense  
8 counsel. I'm going to go along with the negotiation.  
9 Hereby sentencing the defendant under indictment  
10 2012-GS-21-1654 to the department of corrections for a  
11 period of ten years, giving him credit for 232 days that  
12 he's done. Good luck to you, Mr. Burgess.

13 END OF REQUESTED TRANSCRIPT  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



FORM 5

JUN 20 2013

STATE OF SOUTH CAROLINA )  
County of Florence )

IN THE COURT OF COMMON PLEAS  
2013-CP-21-1639

# Shawille Burgess 854654 )  
Full name and prison number (if any) of Applicant )

v. )

State of South Carolina )

APPLICATION FOR  
POST-CONVICTION REVIEW

FILED  
2013 JUN 20 PM 1:51  
CORINNE NEEL, CLERK  
CLERK OF COURT, S.C.  
FLORENCE COUNTY, S.C.

INSTRUCTIONS TO 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 Trenton Correctional Institution
2. Name and location of Court which imposed sentence Florence County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Not available at this time
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) 2012-GS-21-01654 / Armed robbery

CERTIFIED: A TRUE COPY  
Corinne Neel, Clerk  
CLERK OF COURT, S.C.  
FLORENCE COUNTY, S.C.

(b) \_\_\_\_\_

(c) \_\_\_\_\_

5. The date upon which sentence was imposed and the terms of the sentence:

(a) MARCH 4, 2013 / sentenced to 10 yrs. for armed robbery

(b) \_\_\_\_\_

(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ✓

(b) after a plea of not guilty \_\_\_\_\_

(c) after a plea of nolo contendere \_\_\_\_\_

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

NO

8. If you answered Ayes@ to (7), list:

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) the date of each such result:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) Counsel failed to file an appeal

- (b) Fail to file motion for resentencing
- (c) \_\_\_\_\_

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

- (a) Ineffective assistant counsel
- (b) Involuntarily guilty plea
- (c) Lack of subject matter jurisdiction

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

- (a) Hill vs. Lockhart 447 U.S. 52
- (b) Hill vs. Lockhart 447 U.S. 52
- (c) Brown vs. State 343 S.C. 342

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (3)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

iv. \_\_\_\_\_

(c) the disposition thereof:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

NO  
\_\_\_\_\_  
\_\_\_\_\_

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

(a) which grounds have been presented:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

- (a) Could not raise issues for an appeal
- (b) PCR is the proper remedy
- (c) \_\_\_\_\_

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

- (a) your arraignment and plea? YES
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

18. If you answered Ayes@ to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
  - i. Josh Bailey - 814 W. Evans St. Florence, S.C 29501
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. At plea and sentencing
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

FILED  
2013 JUN 20 PM 1:51  
CONNIE REEL, CLERK  
FLORENCE COUNTY, SC

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

To reverse conviction and sentencing  
grant applicant a new trial.

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA )

County of: FLORENCE )

VERIFICATION

I, Shaville Burgess 384554, 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.

Shaville Burgess  
Shaville Burgess 384554

SWORN to and subscribed before me this 4th  
day of June, 2013, 2013

Elaine M. Freeman (L.S.)  
Notary Public

My Commission Expires: June 22, 2021

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

I, \_\_\_\_\_, 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.

Shaquille Baracos  
Applicant

SWORN or affirmed to and subscribed before me this  
13th day of June, 2013.

Elaine M. Freeman  
Notary Public

My Commission Expires: June 22nd, 2021

2013 JUN 20 PM 1:51  
CORNIE REE-HEARIN  
CCCP & GS  
FLORENCE COUNTY, SC

FILED

*Next*

STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS

Shaquille Burgess, #354554, )

C.A. No. 2013-CP-21-1639

Applicant, )

**RETURN**

v. )

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

In response to the Application Post-Conviction Relief filed June 20, 2013, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. Applicant was indicted at the November 2012 term of the Florence County Grand Jury for armed robbery and possession of a weapon during the commission of a violent crime (2012-GS-21-1654). Joshua A. Bailey, Esquire, represented Applicant. On March 4, 2013, Applicant entered a negotiated plea of guilty to armed robbery. The Honorable D. Craig Brown accepted the negotiation and sentenced Applicant to ten (10) years imprisonment. Applicant did not appeal his plea or sentence.

Attached herewith and incorporated herein by reference are the records of the Florence County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. Ineffective assistance of counsel.
2. Involuntary guilty plea.
3. Lack of subject matter jurisdiction.

Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRPC.

## III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir.

1977)). The court strongly presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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

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

#### IV.

Respondent further submits Applicant's allegation his guilty plea was involuntary is without merit. In post-conviction relief cases, an applicant asserting a constitutional violation

must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. "A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

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

## V.

Applicant's allegation regarding subject matter is without merit. Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an applicant challenging subject matter jurisdiction must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's armed robbery plea involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction and this allegation should be dismissed.

## VI.

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

## VII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

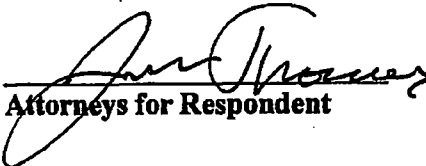
ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

JOSHUA L. THOMAS  
Assistant Attorney General  
Bar No. 100777

P.O. Box 11549  
Columbia, S.C. 29211

By:   
Attorneys for Respondent

12/10, 2013

STATE OF SOUTH CAROLINA )

COUNTY OF FLORENCE )

SHAQUILLE BURGESS, #354554 )

Applicant, )

vs )

STATE OF SOUTH CAROLINA, )

Respondent. )

IN THE COURT OF COMMON PLEAS

2013-CP-21-1639

AFFIDAVIT OF SERVICE BY MAIL

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

**Jonathan Waller, Esquire**  
**1720 Main St., Suite 104**  
**Columbia, SC 29201**

DATED this 10<sup>TH</sup> day of December, 2013.

  
 Norma Bigbee, Legal Assistant

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	2013-CP-21-1639
	)	
	)	
	)	
Shaquille Burgess	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State Of South Carolina	)	)
DEFENDANT	)	June 1, 2016
		Florence, South Carolina

B E F O R E:

THE HONORABLE JOCELYN J. NEWMAN, JUDGE.

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

JOHNATHAN D. WALLER, ESQ.  
Attorney for the Applicant

CROOM HUNTER, ASSISTANT ATTORNEY GENERAL  
Attorney for the State

KESHIA REED  
Official Court Reporter

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

WITNESS                      DIRECT      CROSS      REDIRECT      RECROSS

Shaquille Burgess

    Mr. Waller                      4                                      20

    Mr. Hunter                                      16

Joshua Bailey

    Mr. Hunter                      23

    Mr. Waller                                      32

Certificate Of Reporter 39

1 THE COURT: What do we have next?

2 MR. HUNTER: We have -- may it please the Court,  
3 this is Shaquille Burgess SCDC number 354554 vs. The State  
4 of South Carolina case number 2013-CP-21-1639. Mr.  
5 Burgess is incarcerated with SCDC pursuant to the Florence  
6 County Clerk of Court's orders. He was indicted November  
7 of 2012 term of the Florence County grand jury for armed  
8 robbery and possession of a weapon during the commission  
9 of a violence crime, that was 2012-GS-21-1654. He was  
10 represented by Joshua Bailey on March 4th 2014. Mr.  
11 Burgess entered a negotiated guilty plea to armed robbery.  
12 Judge Brown sentenced applicant to ten years in prison.  
13 He did not appeal his plea or his sentence. He filed this  
14 post-conviction relief application on June 20th 2013. Mr.  
15 Waller was appointed to represent him, present today and  
16 the State is ready to go forward.

17 THE COURT: All right, Mr. Waller.

18 MR. WALLER: Thank you, Your Honor. I would --  
19 before I would call my first witness, I would tell the  
20 Court that I made a motion back in 2014 to have  
21 Mr. Burgess evaluated, that was on December 29th 2014,  
22 that was granted. Mr. Burgess was evaluated by the  
23 department of disability and special needs and he was  
24 found competent to stand trial. So I would call Shaquille  
25 Burgess to the stand.

1 THE COURT: Yes, sir, Mr. Burgess, come on up,  
2 come around here. That's going to be your chair right  
3 there. Before you sit down, I need you to raise your  
4 right hand as best as you can, so she can put you under  
5 oath.

6 THE CLERK: Do you swear to tell the truth, the  
7 whole truth, and nothing but the truth so help you God?

8 MR. BURGESS: Yes, ma'am.

9 THE CLERK: Thank you.

10 THE COURT: Have a seat.

11 WHEREUPON,

12 Shaquille Burgess,

13 after first having been duly sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WALLER:

16 Q Good morning, Mr. Burgess, how are you today?

17 A Fine.

18 Q Mr. Burgess, how old are you?

19 A Twenty-two.

20 Q Okay. And where you from?

21 A Florence, South Carolina.

22 Q You lived here all your life?

23 A Yes, sir.

24 Q Okay. Mr. Burgess, how far did you go in school?

25 A To seventh grade.

1 Q Okay. Why did you leave school?

2 A I was just -- I couldn't really focus in school  
3 right, so I kept getting sent home at like 12 o'clock. I  
4 couldn't do a whole day in school, so at 12 o'clock they  
5 let me go home.

6 Q Okay. So in seventh grade, you just had enough of  
7 that and just didn't go back?

8 A Well, I was on home school -- on home bound, so the  
9 lady use to come and get me and we just use to do it like  
10 that.

11 Q Okay. When you were in school, what kind of classes  
12 were you in?

13 A Special need classes.

14 Q Okay. Do you remember what they were for?

15 A No, sir.

16 Q Okay. When you left school, what were you doing  
17 then? Did you go to work or -- seventh grade that's  
18 pretty young, what were you doing?

19 A Well, I use to work with my granddad, but I was doing  
20 home school, so I really...

21 Q How long were you on the -- is it home bound?

22 A Yeah.

23 Q Home bound.

24 A Home bound.

25 Q How long were you on the home bound?

1 A Probably like two years.

2 Q Okay. And that was after seventh grade?

3 A Yes, sir, that was after seventh grade.

4 Q So you made it to about ninth grade?

5 A Yes, sir.

6 Q Okay. When you were younger or coming up or even  
7 until now, were you treated for any mental health issues  
8 or anything like that?

9 A Well, I use to take Adderall, Concerta (sic),  
10 Ritalin, Trajado (sic) and all that because I was  
11 transferred for like ADHD like -- I use to be always  
12 hyper.

13 Q Okay. Have you ever been -- other than this case,  
14 have you ever been evaluated before to see if you were  
15 competent to stand trial?

16 A Well, when I went to juvenile, yes, sir.

17 Q Okay. Do you recall when that was?

18 A No, sir.

19 Q Five years ago?

20 A I don't even know.

21 Q Okay. Ten years ago?

22 A Probably like 2007 or 2008 something like that.

23 Q Okay. Was it before or after you dropped out of  
24 school?

25 A After.

1 Q But you were still a juvenile?

2 A Yes, sir.

3 Q Okay. And you were -- you remember getting evaluated  
4 in this case back in 2015?

5 A Yes, sir.

6 Q Okay. When did you get in the trouble that brought  
7 us here today that you were represented by Mr. Bailey?

8 A 2012 or July, but I don't know exactly what date, but  
9 I know it was in July.

10 Q Okay. July of 2012. After you were arrested, you  
11 got a lawyer obviously; is that right?

12 A Yes, sir.

13 Q Okay. How did Mr. Bailey, Joshua Bailey, come to be  
14 your attorney?

15 A Well, my mom then paid for him and that he came to  
16 see me in the county after she paid him, I guess, he came  
17 to see me in the county.

18 Q Okay. Was he your first lawyer?

19 A Yes, sir, he was like -- she paid for him, but then I  
20 had a public defender before him.

21 Q Okay. How long were you represented by the public  
22 defender's office?

23 A Probably like a couple months.

24 Q Okay. How long were you represented after the first  
25 time you met Mr. Bailey until you pled guilty?

1 A Probably like a month or three weeks, I didn't really  
2 know him.

3 Q Okay. Had you met with the lawyer for the public  
4 defender before?

5 A Yes, sir.

6 Q Were you able to make bond or were you locked up all  
7 the time?

8 A I was locked up the whole time.

9 Q Okay. How many times you think you met with the  
10 public defender?

11 A A couple times.

12 Q Okay. How many times do you think you met with  
13 Mr. Bailey?

14 A Well, probably like two, three times.

15 Q Okay. When you met with Mr. Bailey, what did y'all  
16 talk about?

17 A Well, whenever he first came to see me in the county,  
18 he said he looked at the camera and that he said that he  
19 did not see me rob this man. He said, well, he gone try  
20 to get it down to a strong arm robbery, but as soon as I  
21 come to court, then all sudden it's armed robbery. But on  
22 the camera, he said that he did not see me harm this man.  
23 I didn't use no force or none of that, so I don't get it.

24 Q Okay. When you say he saw you on the camera, was  
25 there a surveillance video in this case?

1 A Yes, sir.

2 Q Okay. Did you ever see the surveillance video?

3 A No, I had ask him to see it, but they wouldn't let me  
4 see it though.

5 Q Okay. Did you ever see any pictures?

6 A Yes, sir.

7 Q Okay. What did you and Mr. Bailey talk about the  
8 pictures?

9 A Well, on the pictures, the only thing on the camera  
10 it show was when he was trying to grab me and then that  
11 when I pull out a gun on him, but I did not actually rob  
12 this man. I didn't threaten this man in no type of way  
13 and on the camera it shows everything. And if that was  
14 the case, I would have went to trial and I feel like I  
15 would have beat trial.

16 Q Okay. Do you remember and you might not remember  
17 what pictures that you saw what they show?

18 A Me holding a gun, that's all it shows.

19 Q Okay. But was that all of what happened?

20 A No.

21 Q Okay.

22 A No.

23 Q To your knowledge was the entire incident recorded on  
24 the video?

25 A Yes, sir.

1 Q Okay. And were you able to actually see that video?

2 A No, sir.

3 Q Okay. Did Mr. Bailey see the video?

4 A Yes, sir.

5 Q Okay. Did y'all talk about any potential defenses  
6 that you might have?

7 A Well, he said that he was gone try to get it down to  
8 strong arm because on the camera, it shows us talking on  
9 the camera and all. And he said that it showed us on the  
10 camera talking. And on the camera I never said give me  
11 your money or none of that. He gave me -- I gave him some  
12 soap, he gave me his money. I started backing back. He  
13 transgress against me and then that when I pull out a gun  
14 on him. And then that when I back -- then that's when I  
15 ran off.

16 Q Okay. When you met with Mr. Bailey and could have  
17 been the first time or any time you met with Mr. Bailey,  
18 did y'all talk about your special needs?

19 A Not like that.

20 Q Okay. Was he aware that you were in special needs  
21 classes?

22 A No, sir.

23 Q Okay. At the plea, Mr. Bailey told the Court that  
24 you had been evaluated before, but you weren't evaluated  
25 in his case?

1 A Yes, sir.

2 Q How would he have known or how did he know that you  
3 been evaluated?

4 A My mom.

5 Q Okay. What -- you testified that y'all didn't talk  
6 about your special needs at all?

7 A No, sir. Not that I know of, sir.

8 Q Do you know when he and your mom would have spoke --  
9 do you know when he would have found out about your  
10 special needs?

11 A No, sir.

12 Q Okay. Did y'all ever talk about -- did you ever tell  
13 him you didn't understand something? You need to answer  
14 me.

15 A Yes, sir.

16 Q Okay. What did you tell him you didn't understand?

17 A Well, I don't really understand a whole lot of stuff,  
18 sir. You have to actually break it down to me for me to  
19 actually understand you.

20 Q Okay. Did you tell him why you didn't understand  
21 stuff?

22 A Yes, sir.

23 Q Okay. So you told him you had trouble understanding  
24 things?

25 A Yes, sir.

1 Q Okay. After that, did y'all change the way you  
2 talked to each other?

3 A No, sir, he was like if I don't take that plea, then  
4 I catch 30 years. So this my first time ever so, I mean,  
5 I was scared so I took ten. But if I would have know that  
6 I had to come home to house arrest and all of this, then I  
7 would have went to trial.

8 Q Okay. We're going to get back to that in just a  
9 minute. When you and Mr. Bailey talked and he would  
10 explain something to you, would he ask you if you  
11 understood it?

12 A No, sir.

13 Q Okay. Did he ask if you understood things before  
14 moving on to a different topic?

15 A No, sir.

16 Q Okay. Did you understand everything that y'all  
17 talked about?

18 A Not really, sir.

19 Q Okay. Did y'all discuss the evidence the State would  
20 have against you outside the video? I know y'all talked  
21 about the video. Did y'all talk about any of the other  
22 evidence?

23 A Not that I know of, sir.

24 Q Okay. There were -- you had at least one  
25 co-defendant; is that right?

1 A Yes, sir.

2 Q Did y'all talk about any of the co-defendants in this  
3 case?

4 A No, sir.

5 Q Okay. Your guilty plea was a negotiated guilty plea?

6 A Yes, sir.

7 Q Did you understand what that meant?

8 A Well, he told me -- well, that what came out his  
9 mouth to say, yes, everything was gone be all right. So I  
10 said, yes, to everything, but that at the same time he  
11 didn't told me every element that -- only thing it say was  
12 ten years. I ain't know if it was ten years 85, 65  
13 because like this my first time ever being in trouble like  
14 this right here. So I didn't really know what was going  
15 on.

16 Q Okay. This is your first serious charge?

17 A Yes -- no, this is my first time ever in prison or  
18 ---

19 Q You -- when Judge Brown was asking you questions and  
20 you answered, yes, to a lot of his questions is that  
21 because you thought you had to answer, yes?

22 A Yes, sir, and that he was telling me too to answer  
23 yeah and that my mom be standing right there and that she  
24 heard everything too.

25 Q Okay. The plea was for a negotiated ten years, okay.

1 Did you understand the exact amount of time or close to  
2 the exact amount of time you actually have to serve?

3 A No, sir.

4 Q Okay. Did you understand that when you are released  
5 from the department corrections that you'll have to go on  
6 a community supervision program?

7 A No, sir, and if he did told me that, I want him to  
8 actually show the judge that on paper saying that he told  
9 me that I had to do supervision and all of that when I get  
10 out. I never knew none of that. I'm just thinking that  
11 I'm just going to do my ten years and just get out  
12 scot-free.

13 Q Did you ever meet with Mr. Bailey with any of your  
14 family members present?

15 A One time with my mom and that when we was in court  
16 and that we had to go in the back room.

17 Q Okay. Did you ever -- and that was the day you pled?

18 A Yes, sir.

19 Q Okay. Did you have any questions for Mr. Bailey then  
20 that you didn't understand?

21 A Well, yeah, that I didn't know the difference between  
22 ten 85 and ten 65, only thing it said was ten years. So  
23 I'm thinking that I'm just gone do this time and just go  
24 home, not knowing that I got to go home to this  
25 supervision and that I got to pee in a cup every other

1 month. I didn't know none of this stuff because if I  
2 would have know this, I would have went to trial.

3 Q Okay. What about the charges though? I'm not so  
4 worried about the sentence right now. I want to know  
5 about that armed robbery charge?

6 A I didn't know the difference armed robbery and strong  
7 arm robbery. I didn't know the difference.

8 Q Okay. Did you and Mr. Bailey talk about that?

9 A Well, no, sir, because even if he tell me that I know  
10 the difference between strong armed robbery and armed  
11 robbery, then I want to see it on paper.

12 Q Okay. You did not give a statement to law  
13 enforcement in this case; is that right?

14 A (Shake head in the negative.)

15 Q Did you and Mr. Bailey have any discussions about a  
16 different sentence for you?

17 A Well, whenever he first came to see me he said that  
18 he was gone try and get me a YOA, but when I come to  
19 court, they say -- first they try to say 12 years, then I  
20 say naw. Then he say he'll try to get me ten, but only  
21 thing he can say was ten, so whenever Jepertinger came to  
22 me and say, well, if you don't take this, then, well, I'm  
23 going to push for 30 years. So this is the first time  
24 ever, so I'm scared. So I just took the ten.

25 Q Okay. Did you and Mr. Bailey discuss any defenses

1 that you thought you might have had to this charge?

2 A No, sir.

3 Q Okay. Did you give him any information or any  
4 witnesses that might help you -- help your case out?

5 A Well, I told him what happened and when he seen the  
6 camera, he told me he was gone try to get it down to  
7 strong armed because it wasn't armed robbery. It ain't  
8 like I force this man to give me his money. I sold him  
9 some fake drugs and he gave me his money. And he try to  
10 grab me and I pull out a gun and then I ran.

11 Q Okay. So it was your understanding Mr. Bailey told  
12 you that it wasn't armed robbery?

13 A Yes, sir.

14 Q Okay. After you were convicted and sentenced, did  
15 you ask Mr. Bailey to file an appeal for you?

16 A Well, I didn't want to talk to him any more, so I did  
17 it on my own because I feel like my mom paid him for no  
18 reason.

19 Q Okay. So you didn't personally ask him?

20 A No.

21 Q Okay.

22 MR. WALLER: No further question. Thank you.

23 THE COURT: All right, Mr. Hunter.

24 MR. HUNTER: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. HUNTER:

2 Q Good morning, Mr. Burgess.

3 A Good morning, sir.

4 Q And I believe your testimony a few minutes ago was  
5 that you did not give a statement, correct?

6 A Yes, sir.

7 Q Okay. But didn't you confess to the police?

8 A Confess to what ---

9 Q To armed robbery, to robbing the victim in this case?

10 A I didn't confess to the armed robbery. I told the  
11 officer them that I didn't really rob this man. I told  
12 them exactly what happened and that you can see this on  
13 camera what happened.

14 Q And you had a gun on camera, right?

15 A Yeah, but I pulled the gun out after the fact when he  
16 try to grab me that was after the fact.

17 Q Okay. And there was some talk earlier about your  
18 inability to understand things and some troubles you had  
19 in school and things like that?

20 A Yes, sir.

21 Q But you were evaluated, correct?

22 A Yes, sir.

23 Q And they found you competent, right?

24 A Yes, sir.

25 Q Okay. At your plea the judge told you that if you

1 wanted to have a trial, you could have a trial, right, and  
2 that you could fight that evidence?

3 A Well, listening to him when we were standing right  
4 there, he was mumbling just take the ten, just take the  
5 ten. So, I mean, this is my first time ever getting in  
6 trouble, so I don't really know what's going on here, sir.

7 Q Well, it wasn't your first time ever getting in  
8 trouble, right?

9 A No, but this is my first time ever in SCDC. I done  
10 been to DJJ before, but DJJ don't got nothing to do with  
11 this right here, sir.

12 Q Okay. Do you remember at your plea when the judge  
13 asked you if you were happy or satisfied with Mr. Bailey's  
14 work?

15 A Sir, just like I told you, sir, the man was telling  
16 me to take -- keep saying yeah, sir, but I feel like you  
17 trying to go too hard on me, sir. And that I'm not here  
18 to argue with you or fight with you. I'm here just to  
19 tell her what's going on here, sir.

20 Q Well, Mr. Burgess right now you're here to answer my  
21 questions, okay. You told the judge that you were  
22 satisfied with Mr. Bailey, didn't you?

23 A Yes, sir.

24 Q Okay. And so you're saying that everything that you  
25 told the judge was just because that's what Mr. Bailey

1 told you to tell him?

2 A Yes, sir.

3 Q Okay. So what you told the judge was not the truth?

4 A No, sir.

5 Q Okay. So when you told the judge you wanted to plead  
6 guilty, you didn't really want to plead guilty?

7 A If I would have know that that I had to do house  
8 arrest and all that, sir, I would have went to trial and  
9 that I would have just let the 12 jurors decide right then  
10 and there, sir.

11 Q Okay. So you would have rather potentially face 30  
12 years in prison ---

13 A Yes, sir.

14 Q --- rather than do ---

15 A Yes, sir.

16 Q --- ten and then have to come pee in a cup every once  
17 in a while?

18 A Yes, sir, because I feel like I could have beat  
19 trial, that's what I felt like, sir.

20 Q So one more time everything you told the judge at  
21 your plea, you told him just because Mr. Bailey told you?

22 A Yes, sir.

23 Q So none of it was true?

24 A No, sir.

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

1 THE COURT: Yes, sir.

2 (WHEREUPON, a pause in the proceedings.)

3 MR. HUNTER: That's all I have. Thank you.

4 THE COURT: Any redirect?

5 MR. WALLER: Just briefly.

6 REDIRECT EXAMINATION

7 BY MR. WALLER:

8 Q Mr. Burgess, you were asked by Mr. Hunter about a  
9 confession. You didn't give a written statement; is that  
10 right?

11 A No, sir.

12 Q You did talk to some officers at some point?

13 A Yes, sir.

14 Q Did you and Mr. Bailey talk about how the State would  
15 try to use that against you?

16 A No, sir.

17 Q And one last thing you were not evaluated for the  
18 armed robbery case; is that right?

19 A No, sir.

20 Q You had been evaluated couple years prior?

21 A Yes, sir.

22 Q So not until from your DJJ case until this case that  
23 I represent you on, you didn't have an evaluation at any  
24 time involved in the armed robbery?

25 A No, sir.

1 MR. WALLER: No further questions.

2 THE COURT: All right. Mr. Burgess, you can  
3 step down and go sit back next to your lawyer.

4 MR. BURGESS: Yes, ma'am.

5 THE COURT: Actually, Mr. Burgess, before you  
6 leave, is there anything else you want to tell me?

7 MR. BURGESS: Well, I feel like I didn't really  
8 rob this man, ma'am, in that I wish you could have seen  
9 this camera and actually seen what really happened. Like  
10 I sold the man some soap, he gave me his money. He tried  
11 to transgress towards me, so I pull out a gun just to get  
12 him off me and then I ran off. And that they got the soap  
13 from off him and then they got the 260 from off me, but on  
14 the camera, the camera got us talking and all, ma'am, in  
15 that it never shows me ---

16 THE COURT: Let me interrupt you, I'm not here  
17 to decide whether you're guilty of that or not, but tell  
18 me anything you want to tell me about how you feel like  
19 your lawyer messed up?

20 MR. BURGESS: Well, he told me this ten years,  
21 ma'am. He didn't tell me that I had come home to  
22 supervision, that I got to pee in a cup and that I have to  
23 pay these people, ma'am, and he can't even show you this  
24 on paperwork now. And that if he can just show you this  
25 on paperwork now, ma'am, I'll just walk out your

1 courtroom, ma'am. But, I mean, I didn't know that I had  
2 to come home to house arrest and all of this. I didn't  
3 know that.

4 THE COURT: I understand. Thank you. Go sit  
5 back next to your lawyer.

6 (WHEREUPON, the witness leaves the witness  
7 stand.)

8 THE COURT: Mr. Waller, you have any other  
9 witnesses?

10 MR. WALLER: No further witnesses, Your Honor.

11 THE COURT: All right. Mr. Hunter.

12 MR. HUNTER: State will call Mr. Bailey.

13 THE CLERK: Do you swear or affirm that the  
14 testimony you give will be the truth, the whole truth, and  
15 nothing but the truth so help you God?

16 MR. BAILEY: I do.

17 THE CLERK: Thank you. Please have a seat and  
18 state your name.

19 MR. BAILEY: My name is Joshua Bailey. I'm an  
20 attorney with an office here in Florence and also a  
21 satellite office in Marion County.

22 THE COURT: All right. Thank you, Mr. Bailey.

23 Yes, sir.

24 WHEREUPON,

25 Joshua Bailey,

1 after first having been duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. HUNTER:

4 Q Good morning, Mr. Bailey.

5 A Good morning.

6 Q How long have you been practicing law?

7 A This makes my ninth year.

8 Q And how much of your practice is devoted to criminal  
9 defense work?

10 A At least half of my practice if not more, that's a  
11 fair amount of my practice especially at the time this  
12 case was going on. It was before the contract system, I  
13 received a lot of appointments in criminal cases.

14 Q So you were appointed on this case or retained?

15 A I was retained on this specific case.

16 Q Do you recall how long after Mr. Burgess' arrest you  
17 were retained in this matter?

18 A Do you know what day his arrest was?

19 Q I do not. Do you recall not specifically, but a  
20 month, two months any idea?

21 A I don't recall -- well, hang on a second. Looks like  
22 his Florence County booking sheet indicates he was booked  
23 in on July 16th of 2012, on armed robbery and a possession  
24 of a weapon during violent crime. Looks like I met with  
25 his parents on around January the 14th 2013, six, seven

1 months maybe in that ballpark.

2 Q Okay. And how long did you represent Mr. Burgess  
3 before he decided to plead guilty or prior to his plea, do  
4 you recall?

5 A I was retained in January and I represented him  
6 through his guilty plea. I think was in March roughly two  
7 ---

8 Q Two or three months?

9 A Yes, somewhere in that ballpark.

10 Q Okay. Do you recall how often you met with  
11 Mr. Burgess?

12 A The notes in my file show that I -- of course, I met  
13 with his parents they retained me on January the 14th  
14 2013. My first meeting with Mr. Burgess was on January  
15 the 15th. We met at the Florence County detention center  
16 in Effingham. I met with the assign solicitor on January  
17 the 17th and received a copy of the discoverable material  
18 from his file. We then made the necessary arrangements  
19 for me to watch the video from the CI, which was done on  
20 January the 28th 2013.

21 Q Could you explain why the -- why Mr. Burgess was not  
22 permitted to watch the video?

23 A Because the victim in the case was a confidential  
24 informant and he was actually a CI for the feds. He was  
25 doing work for the federal government at the time this

1 case arose. After I viewed the video with the Solicitor's  
2 office on January the 28th, I left the complex where we  
3 are today. I watched it on the 11th floor of this  
4 building. I went out and I met with Mr. Burgess that  
5 afternoon on January the 28th. I then again met with  
6 Mr. Burgess on February the 11th 2013. And while I don't  
7 have the specific date that I met with him, I did write  
8 him a letter on February the 22nd confirming a  
9 conversation we had regarding the negotiations for his  
10 guilty plea.

11 Q Let me ask you the question another way. Do you feel  
12 like you met with Mr. Burgess enough?

13 A Certainly, certainly. I met with him four or five  
14 times in a two month period.

15 Q Did he have any real defenses to this charge that you  
16 could figure out?

17 A The first time I met with Mr. Burgess we went over  
18 his version of the facts and I still had not received any  
19 discoverable material at that time. And he did explain  
20 the same version of facts that he explained when he  
21 testified today. He was selling soap as fake drugs making  
22 money and he explain to me that that is what happened with  
23 the CI. That the CI attempted to grab the money back from  
24 him, accost him in some way. As he backed up, he pulled  
25 the gun, some threats were made. And then Mr. Burgess

1 left the hotel that they were at off 52.

2 Q Did ---

3 A And I know you ask me if he had any real defenses to  
4 the case. I received -- when I met with the Solicitor on  
5 the 17th, two days after my first meeting with Mr.  
6 Burgess, they provided me a copy of the reports from law  
7 enforcement. It included some reports from the Florence  
8 County Sheriff's Department, some stuff from Florence  
9 Police Department. But the bulk of the discoverable  
10 material that I received came from the federal government,  
11 the ATF. As they were, I guess, the lead investigators on  
12 the case and I received that material. In the course of  
13 my meetings with Mr. Burgess, we obviously reviewed these  
14 items. And the greatest thing that hurt us in that set of  
15 facts were the statements that they included in their  
16 report. I was not provided any written statements, none  
17 of the statements to my knowledge were recorded or  
18 videoed. They just noted in their reports the statements  
19 that Mr. Burgess made. It hurt our case because certainly  
20 we could have taken a defense that Mr. Burgess wanted to.  
21 However, the ATF report specifically indicates Shaquille  
22 Burgess said he planned to rob Will, which was the name of  
23 the CI, since he had spoken to Will around 12 p.m.  
24 Earlier that same day, Burgess mention that his  
25 co-defendants -- that mention that his co-defendant,

1 Joseph Gregg, knew Burgess was going to do the robbery.  
2 Burgess confess that it was his idea to rob Will, the CI.  
3 So we were confronted with Mr. Burgess' set of facts and  
4 the idea that we were going to have law enforcement come  
5 in, particularly the federal government who interviewed  
6 him. They were going to come in and testify as to the  
7 confession. And that really took our aspect on how we  
8 were going to address the case from 100 percent trial to  
9 trying to negotiate a guilty plea.

10 I think it's worth noting that Mr. Grove, who was  
11 here earlier this morning, was Mr. Burgess' first attorney  
12 through the public defender's office. When I was  
13 contacted and asked to become involved in it and get  
14 retained on this case, I spoke to Mr. Grove and I  
15 immediately spoke to the assistant solicitor or deputy  
16 solicitor, who was prosecuting the case, John Jepertinger.  
17 Both of them had informed me that an offer of 12 years was  
18 made to Mr. Burgess, that he had rejected that. At the  
19 time I was retained in January of 2013. Mr. Jepertinger  
20 was ready to proceed with trial. He informed me that all  
21 offers were removed from the case, that Mr. Burgess was  
22 left with the option of pleading guilty straight up to an  
23 armed robbery or we could have a trial.

24 Q Then you were successful in getting that offer which  
25 he ultimately pled?

1 A Ultimately, I convinced John Jepertinger to put the  
2 12 years back on the table. I conveyed that to  
3 Mr. Burgess, that did not satisfy him. So we were still  
4 talking about how we were going to litigate and present a  
5 defense to the case. I went and met with Mr. Burgess one  
6 of the visits in February. I sent him a letter after my  
7 visit in February. I explained to him about law  
8 enforcement testifying at trial about his confession to  
9 the armed robbery. I told him that we may have an  
10 opportunity to challenge his confession based upon the IQ  
11 level that Mr. Burgess had from the documents that I had  
12 received. I explained that the decision with regards to  
13 his confession wrestled with the judge in term of his  
14 voluntariness. I explain to him that his charge carries a  
15 mandatory minimum of ten years maximum of 30 years. I  
16 told him that I attempted to get ten years on the table  
17 for a guilty plea. John Jepertinger rejected that. Your  
18 prosecuting attorney or your prosecuting solicitor has  
19 agreed to place the original 12 years back on the table  
20 should you desire to plead guilty. When we last spoke, it  
21 was my understanding that you willing to accept this offer  
22 and plead guilty in exchange for a negotiated sentence of  
23 12 years. And informed him that he would be transported  
24 to the Florence County Complex on March the 3rd for a  
25 guilty plea. When we arrived that morning as we normally

1 do here in Florence, we have a lot of time. John  
2 Jepertinger and I negotiated some. Mr. Burgess' parents  
3 were here. I met with them. At one point, Mr. Burgess'  
4 parents met with Mr. Jepertinger in the hallway and Mr.  
5 Jepertinger decided to put ten years back on the table.  
6 And that was from my observation of the conversation  
7 between Mr. Jepertinger and Mr. Burgess' parents. They  
8 were basically begging him to put ten years on the table  
9 for Mr. Burgess to plead guilty to. And Mr. Jepertinger  
10 ultimately agreed and allowed him to plead to ten years.

11 Q Did you go over the elements of the charges with Mr.  
12 Burgess and explain what the State would have to prove?

13 A On a couple of different occasions. And we  
14 intertwined that with his version of the facts if the jury  
15 was to believe it in terms of -- it was originally a drug  
16 deal involving fake soap, to turning into more of a  
17 self-defense argument and, of course, how the confession  
18 was going to play into that. And it would be ultimately  
19 up to the jurors if they believed the confession if it was  
20 admitted into court.

21 Q Prior to his plea, did you go over Mr. Burgess'  
22 Constitutional Rights with him?

23 A Yes, sir.

24 Q Did you ever have any indication that he didn't  
25 understand you?

1 A I did not. It was made aware to me very early on by  
2 Mr. Burgess' parents that he had some learning  
3 difficulties as he was younger and some trouble in school.  
4 According to the documents in my file, I went back and I  
5 obtained a lot of the materials that information that was  
6 given to me. I obtained records from the Department of  
7 Juvenile Justice, Carolina Boys' Home, a copy of the prior  
8 evaluations that were done. If I remember correctly, I  
9 think they were for his DJJ charges that he had. So I  
10 went and obtained those records to review. I guess, for  
11 the record, I think my file notes that I had sent out the  
12 request for those records to the different providers on  
13 January the 18th. So that was done approximately three  
14 days after I was retained.

15 Q Did you explain to Mr. Burgess what a negotiated plea  
16 was as to oppose to an open plea?

17 A Yes. He understand that by us coming into court  
18 under a negotiated plea scenario that if the judge  
19 accepted the plea, the only option was that Judge Brown  
20 was going to sentence him to ten years in the department  
21 of corrections. If he did not accept the guilty plea as  
22 Judge Brown does on occasion base on the facts, the plea  
23 would be set aside. We would make arrangements to have  
24 another judge hear the case.

25 Q Did you coach Mr. Burgess on how to answer all the

1 judge's questions?

2 A I didn't need to. He understood the questions. And  
3 I will say this for the record, standing as close as we  
4 are up on the 11th floor in front of Judge Brown, had I  
5 done any coaching of him to answer those questions, Judge  
6 Brown would have made it on the record, that's just the  
7 type of judge he is.

8 Q At the end of Mr. Burgess' plea, did Judge Brown go  
9 over his observations of Mr. Burgess' mental state?

10 A From my recollection of reading the transcript from  
11 the guilty plea. And the reason he did that was  
12 Mr. Jupertinger and I approached Judge Brown in chambers  
13 that morning to make him aware of the situation.  
14 Obviously, I told him that the family had raised concerns  
15 with me regarding Mr. Burgess's IQ level. I had obtained  
16 records. And Judge Brown had asked me just to place on  
17 the record some of the information that I had received and  
18 that he would make specific findings regarding his  
19 observations of Mr. Burgess on the record. But both  
20 Mr. Jupertinger and I did not believe that he was  
21 incompetent to proceed with a guilty plea and that's why  
22 we moved forward.

23 Q And whose decision was it to plead guilty?

24 A Mr. Burgess one hundred percent.

25 MR. HUNTER: That's all I have. Thank you,

1 judge's questions?

2 A I didn't need to. He understood the questions. And  
3 I will say this for the record, standing as close as we  
4 are up on the 11th floor in front of Judge Brown, had I  
5 done any coaching of him to answer those questions, Judge  
6 Brown would have made it on the record, that's just the  
7 type of judge he is.

8 Q At the end of Mr. Burgess' plea, did Judge Brown go  
9 over his observations of Mr. Burgess' mental state?

10 A From my recollection of reading the transcript from  
11 the guilty plea. And the reason he did that was  
12 Mr. Jepertinger and I approached Judge Brown in chambers  
13 that morning to make him aware of the situation.  
14 Obviously, I told him that the family had raised concerns  
15 with me regarding Mr. Burgess's IQ level. I had obtained  
16 records. And Judge Brown had asked me just to place on  
17 the record some of the information that I had received and  
18 that he would make specific findings regarding his  
19 observations of Mr. Burgess on the record. But both  
20 Mr. Jepertinger and I did not believe that he was  
21 incompetent to proceed with a guilty plea and that's why  
22 we moved forward.

23 Q And whose decision was it to plead guilty?

24 A Mr. Burgess one hundred percent.

25 MR. HUNTER: That's all I have. Thank you,

1 Mr. Bailey.

2 THE COURT: Yes, sir.

3 MR. WALLER: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. WALLER:

6 Q Mr. Bailey, you testified that you met with Mr.  
7 Burgess four or five times?

8 A Yeah, according to the notes in my file, January the  
9 15th 2013, January the 28th 2013 at the Florence County  
10 detention center, February 11th 2013, Mr. Burgess was held  
11 in the maximum security unit in Effingham at that time. I  
12 think, I met with him one time after that which led to my  
13 sending him the February 22nd letter. And then I met with  
14 him the morning he was transported over, I think, March  
15 the 3rd.

16 Q Okay. Do you have in your notes how long you met  
17 with him each time?

18 A No, I didn't keep track of the time, but I could tell  
19 you my conversations with him we spent a significant  
20 amount of time.

21 Q Okay. An hour each time?

22 A If I had to ballpark it, I would say would be  
23 somewhere between 45 minutes and upwards of an hour and a  
24 half.

25 Q Okay. You -- how do you know that he understood?

1 How would you -- you understand that he understood your  
2 questions?

3 A Mr. Burgess explain to me at one of my first meetings  
4 with him that he was familiar with the department of  
5 correction system. He has a brother who is in prison  
6 doing a very lengthy sentence. He watched and observed  
7 how that went. When we talked about specific time for the  
8 sentences -- and, of course, I was made aware of the IQ  
9 issues very early on January the 18th is when I sent my  
10 request of the records, but my notes from the  
11 February 11th visit indicates that he was able to  
12 calculate 85 percent of ten years and he was able to  
13 calculate 85 percent of 12 years to know how much time he  
14 would specifically have to do on each one of those should  
15 he plead guilty and receive those sentences. He was able  
16 to calculate that he would be roughly 28 or 29 years old  
17 once he was released from the department of corrections.

18 Q Okay. But that's how you determined that he  
19 understood your conversations as to his Constitutional  
20 Rights or potential defenses?

21 A He understood that he had the right to a trial. And  
22 I explain to him what would happen is we'll come in and  
23 we'll pick a jury. The State presents their case. They  
24 will call as many witnesses as they deem appropriate or  
25 necessary. I explained to him that I would have the

1 opportunity to cross-examine those witnesses. And when we  
2 talked about specific witnesses, that's where his  
3 confession came into play. I made sure he understood that  
4 the federal government would also be coming in to testify  
5 against him as it relates their interview. He understood  
6 I would have the opportunity to cross-examine once the  
7 State was finished presenting their case. If we had  
8 evidence or witnesses that we wanted to put up, we would  
9 be able to do that as well.

10 Q Okay. How did you know he understood that though?  
11 What -- did you ask him if he understand?

12 A He was asking questions based on the report as to  
13 what specifically I could ask law enforcement in terms of  
14 cross-examination regarding his confession. He asked if  
15 he would be able to testify on his own behalf regarding  
16 the drug deal. He asked about the -- whether or not the  
17 jury would be allowed to see the video. He was asking the  
18 appropriate questions of someone who was considering going  
19 to trial.

20 Q Okay. When you met with him the next time the  
21 follow-up meeting or any of the follow-up meetings that  
22 you had with him, did you confirm that he still recalled  
23 your previous conversations or understood what happened  
24 from the previous meeting, that the information was still  
25 in there?

1 A Probably not. I mean, when I meet with people and go  
2 over their Constitutional Rights with them and explain to  
3 them how the jury trial system works, every time I meet  
4 with a client thereafter I don't rehash all of that. When  
5 we -- after we talked about that, it was probably just  
6 pure negotiations at that point and explaining to him what  
7 his exposure was on an armed robbery of ten to 30. The  
8 State was offering him 12. How much time he would do on  
9 12 years. We would try to get him down to ten, which was  
10 the mandatory minimum on the charge. Would I go back over  
11 his Constitutional Rights, probably not.

12 Q I guess, what I'm ultimately getting to you told  
13 Judge Brown that there was -- he had a learning deficiency  
14 and that the records you had he had an IQ of 49?

15 A That's probably accurate.

16 Q What steps did you take to make sure that he from  
17 meeting to meeting or even during the meeting, that he  
18 understood the conversations that you were having with him  
19 at a depth that he could make a determination he wanted to  
20 plead guilty or not?

21 A When I was discussing the negotiations with  
22 Mr. Burgess and he's able to do mathematical calculations,  
23 that is a pretty big sign that he understands what we're  
24 doing.

25 Q Did you ever consider filing a motion for the

1 disclosure of the CI information?

2 A Yes.

3 Q Did you file one?

4 A No.

5 Q Okay. Based on -- why did you not file one?

6 A It's almost standard practice in Florence County that  
7 when we have CI videos, they will be given to us about a  
8 day before trial or the day of trial.

9 Q Were you able to -- you viewed the video yourself?

10 A I did.

11 Q And you were able to get some still pictures from the  
12 video; is that right?

13 A They were provided to me by the Solicitor's office.

14 Q Were they still pictures -- how were they taken from  
15 the video? Were they at regular intervals or did they  
16 pick and choose?

17 A What our Solicitor's office does is they will provide  
18 us stills to show our clients to establish identity on the  
19 video because that's what a lot of times particularly in  
20 drug cases where we have videos, it's our client say it's  
21 not them until they see the video. So typically they will  
22 provide us stills of just showing the face. If they can  
23 show a hand to hand transaction of drugs, I've had that  
24 happen where we had pictures of drugs being exchanged. In  
25 reference to the pictures that were provided, I think

1 there were six of them, six photos. A lot of the photos  
2 are blurry. There is one relatively close up photo of  
3 Mr. Burgess' face.

4 Q Other than the identity of Mr. Burgess in the  
5 photos, did they match up with the conduct that you saw in  
6 the video?

7 A Yeah, 100 percent.

8 Q Okay.

9 A Some of the photos I have are of Mr. Burgess and his  
10 white hat, white T-shirt holding a gun, pointing it what I  
11 presume to be the CI because the video that was taken was  
12 from a body camera being worn by the CI.

13 MR. WALLER: Beg the Court's indulgence please.

14 THE COURT: Yes, sir.

15 (WHEREUPON, a pause in the proceedings.)

16 BY MR. WALLER:

17 Q Did you discuss with Mr. Burgess that he would be  
18 placed on community supervision when he was released from  
19 the department of correction?

20 A Yes, that is part of my standard instructions,  
21 explanation to all of my clients when they plead guilty to  
22 an 85 percent crime when is that when they are released,  
23 they'll be placed on two years of community supervision,  
24 which is similar to probation.

25 Q You do a plea affidavit or anything like that?

1 A Not since Judge Ralph King Anderson retired.

2 MR. WALLER: No further questions. Thank you.

3 MR. HUNTER: I have nothing further.

4 THE COURT: You may step down, sir.

5 (WHEREUPON, the witness leaves the witness  
6 stand.)

7 MR. HUNTER: Your Honor, the State has no more  
8 witnesses and we rest on the record.

9 THE COURT: Any closing argument from you, Mr.  
10 Waller?

11 MR. WALLER: Nothing at this time, Your Honor.

12 THE COURT: All right. I will let you know.

13 MR. WALLER: Thank you, Your Honor.

14 END OF REQUESTED HEARING

15

16

17

18

19

20

21

22

23

24

25



STATE OF SOUTH CAROLINA )  
COUNTY OF FLORENCE )

IN THE COURT OF COMMON PLEAS )  
TWELFTH JUDICIAL CIRCUIT )

Shaquille Burgess, #354554, )

Case No. 2013-CP-21-1639 )

Applicant, )

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

FILED  
2016 JUL 22 PM 3:03  
CONNIE REEL-SHEARER  
CLERK  
CCJP & GS  
FLORENCE COUNTY, SC

This matter comes before this Court by way of a post-conviction relief (PCR) application filed on June 20, 2013. Respondent made its return on December 10, 2013. An evidentiary hearing into the matter was convened on June 1, 2016, at the Florence County Courthouse. Applicant was present at the hearing and was represented by Jonathan D. Waller, Esquire. Respondent was represented by Assistant Attorney General J. Croom Hunter of the South Carolina Attorney General's Office.

**PROCEDURAL HISTORY**

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. Applicant was indicted at the November 2012 term of the Florence County Grand Jury for armed robbery and possession of a weapon during the commission of a violent crime (2012-GS-21-1654). Joshua A. Bailey, Esquire, represented Applicant. On March 4, 2013, Applicant entered a negotiated plea of guilty to armed robbery. The Honorable D. Craig Brown accepted the negotiation and sentenced Applicant to ten (10) years imprisonment. Applicant did not appeal his plea or sentence.

**ALLEGATIONS**

Page 1 of 8

*ju*

2016 JUL 22 PM 3:03  
CONNIE REEL-SHEARER  
CLERK  
CCJP & GS  
FLORENCE COUNTY, SC

At the post-conviction relief hearing, Applicant argued his confinement is unlawful based upon the following grounds:

1. Ineffective assistance of counsel.
  - a. Plea counsel did not go over discovery materials with Applicant and adequately prepare for the possibility of a trial.
  - b. Plea counsel failed to have Applicant evaluated prior to his guilty plea.
2. Involuntary guilty plea.

At the evidentiary hearing, Applicant testified on his own behalf. This Court also heard testimony from plea counsel, Joshua Bailey, Esquire. This Court also had before it a copy of the plea transcript, the Florence County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's mental evaluation. Notably, upon motion of PCR counsel, Applicant was evaluated by the Department of Mental Health prior to his evidentiary hearing. The evaluation concluded Applicant was competent.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable



professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

This Court finds Applicant failed to demonstrate that Counsel's performance was deficient in any way. This Court further finds that Applicant presented no evidence to show any prejudice resulting from Counsel's representation. Additionally, this Court finds Counsel's testimony credible and Applicant's testimony not credible.

#### 1. Failure to Prepare

Applicant alleges Counsel did not thoroughly prepare his case for trial, nor did Counsel review the evidence with Applicant. The Court finds this allegation is without merit. At the PCR hearing, Counsel testified he has been practicing law for nine years, with at least half of his work devoted to criminal defense. Counsel testified he filed the appropriate Rule 5 and Brady motions, received discovery materials from the State, and went over the evidence with Applicant. Counsel testified he went over the elements of the charges Applicant was facing with the Applicant as



well as the possible penalties he was facing. Additionally, Counsel testified he went over the constitutional rights Applicant was waiving prior to his guilty plea. Counsel testified he did not review the video of the confidential informant in Applicant's presence because it is the policy of the solicitor's office not to let defendant's see videos containing confidential informants until the case goes to trial. However, Counsel testified he did review the video, and Applicant was clearly shown on the film robbing the informant. Counsel testified that while there was no written statement given to law enforcement, Applicant did verbally confess to the officers, and that would have greatly harmed Applicant's chances at trial. Counsel refuted Applicant's testimony that he was coached how to answer the judge's questions during the guilty plea, and that it was Applicant's decision to plead guilty. Although Counsel could not recall with specificity how many times he met with Applicant, he testified he met with Applicant on multiple occasions.

This Court finds Counsel's performance was within the range required under Strickland and its progeny. Counsel's testimony indicated he was well informed regarding the facts of Applicant's case and extremely knowledgeable with respect to the relevant legal issues. Because this Court finds Counsel thoroughly investigated and prepared Applicant's case, it finds Applicant has failed to meet his obligations under Strickland, and the allegation is without merit.

## **2. Failure to Have Applicant Evaluated Prior to the Plea**

Applicant argues Counsel was ineffective for failing to have Applicant evaluated prior to his guilty plea. The Court finds this allegation is without merit.

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea." Matthews v. State, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004). "The test of competency to enter a plea is the same as required to stand trial." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). "The accused must have sufficient capability to



consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Id. "To show prejudice within the context of [plea] counsel's failure to fully investigate [a PCR applicant's] mental capacity, the [applicant] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea." Lee v. State, 396 S.C. 314, 320, 721 S.E.2d 442, 445-46 (Ct.App.2011) (fourth alteration by court) (internal quotation marks omitted). "[T]he [applicant] bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." Jeter, 308 S.C. at 232, 417 S.E.2d at 596. Ramirez v. State, 413 S.C. 351, 366-67, 776 S.E.2d 101, 110 (Ct. App. 2015), reh'g denied (Sept. 3, 2015).

This Court finds Applicant has failed to meet his burden of showing by a preponderance of the evidence presented at the PCR hearing that he was incompetent at the time of his plea. Counsel's testimony indicated he obtained Applicant's records from the Department of Juvenile Justice, the Boys' Home where lived at one point, and his prior mental evaluations. Counsel testified that he went over those records and did not believe Applicant had any competency issues at the time of his plea. Counsel testified he did not have trouble communicating with Applicant or explaining the evidence and the law in regard to Applicant's defense. Additionally, Counsel testified that Applicant was able to calculate what 85% of his potential sentence would be. Counsel testified that while Applicant certainly had a below average IQ, he had no concerns that Applicant was not competent to go forward, or that Applicant did not understand the circumstances surrounding his plea. This Court can find no reason to doubt Counsel's testimony. Additionally, this Court notes that the plea judge made a finding on the record that he observed Applicant throughout the plea and had no doubt that Applicant was competent and fully



understood what was happening. As Applicant has failed to meet his burden, this Court finds the allegation without merit.

### INVOLUNTARY GUILTY PLEA

The voluntariness of a guilty plea is determined in light of the entire record before the court. Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012) (citing Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000)). “To knowingly and voluntarily enter a plea of guilty, all that is required is that a defendant have a full understanding of the consequences of his plea and of the charges against him.” Simpson v. State, 317 S.C. 506, 508, 455 S.E.2d 175, 176 (1995) (citing Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991)). Furthermore, a defendant must only be informed of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Roddy, 339 S.C. at 33, 528 S.E.2d at 421 (citing Boykin v. Alabama, 395 U.S. 238 (1969)). “When attempting to determine the voluntary and intelligent nature of a plea, the plea colloquy ordinarily serves as confirmation that a criminal defendant is waiving the right to raise certain constitutional claims by pleading guilty.” Hyman, 397 S.C. at 44, 723 S.E.2d at 379 (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97, 98 (1975)). However, the plea judge need not provide an “enumeration of specific rights waived ... where the record otherwise reveals affirmative awareness of the consequences of a guilty plea.” State v. Lambert, 266 S.C. 574, 579, 225 S.E.2d 340, 342 (1976) (citing Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973)). Furthermore, “[a] guilty plea is a solemn, judicial admission of the truth of the charges” against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions “made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements.” Id. at 137-38, 654 S.E.2d at 874 (citing

Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)). Pleading guilty to avoid a possibly greater sentence, without more, does not render a guilty plea involuntary. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747 (1970); Wicker v. State, 310 S.C. 8, 12, 425 S.E.2d 25, 27 (1992).

The record before this Court clearly shows that Applicant was fully informed of the consequences of entering his guilty plea. The record shows Applicant's plea was not coerced, and it was Applicant's decision to plead guilty. Additionally, this Court finds Applicant's testimony not credible. Applicant was advised that by pleading guilty he gave up his right to challenge the evidence the State had against him, as well as his right to put up any affirmative defenses. Applicant has failed to present any valid reasons why he should be allowed to depart from his valid plea of guilty. Accordingly, this Court finds Applicant's plea was knowingly, intelligently, and voluntarily entered.

#### 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, this Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

#### CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Plea counsel rendered effective assistance in regard to the claims raised by Applicant. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.



This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 18<sup>th</sup> day of July

*Joelyn Newman*  
 THE HONORABLE JOCELYN NEWMAN  
 Presiding Judge  
 Twelfth Judicial Circuit

2016 JUL 22 PM 3:03  
 JENNIE F. SHEARIN  
 CLERK  
 FLORENCE COUNTY, SC

FILED

Columbia, South Carolina

... COPY  
*Gene Had ...*  
 CLERK ... S.C.  
 REC. ...

**WITNESSES**

Brad McDowell

Florence County Sheriff

DOCKET NO. 2012-GS-21-01654

The State of South Carolina

County of

FLORENCE

**COURT OF GENERAL SESSIONS**

**NOVEMBER** TERM **2012**

**THE STATE**

vs.

**SHAQUILLE TYISTER BURGESS**

John C Jeperlinger

**ARREST WARRANT NUMBER**

2012A2110200066

2012A2110200067

**ACTION OF GRAND JURY**

**TRUE BILL**

Foreperson of Grand Jury

Date:

*Kimberly Balle*  
*11-1-12*

**VERDICT**

Foreperson of Petit Jury

Date:

Indictment for

**POSSESSION OF A WEAPON DURING THE  
COMMISSION OF A VIOLENT CRIME**

**AND**

**ARMED ROBBERY**

CERTIFIED: A TRUE COPY  
*Annie Reel Shearin*  
CLERK OF COURT C.P. & G.S.  
FLORENCE COUNTY, S.C.

2012 NOV -1 AM 11:17  
DONNIE REEL-SHEARIN  
CLERK OF COURT  
FLORENCE COUNTY, SC

**FILED**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF FLORENCE )

INDICTMENT FOR  
 POSSESSION OF A WEAPON DURING THE  
 COMMISSION OF A VIOLENT CRIME  
 AND  
 ARMED ROBBERY

At a Court of General Sessions, convened on NOVEMBER 1, 2012 the Grand Jurors of FLORENCE County present upon their oath:

**COUNT ONE- POSSESSION OF A WEAPON DURING THE  
 COMMISSION OF A VIOLENT CRIME**

That SHAQUILLE TYISTER BURGESS did in Florence County, on or about July 16, 2012, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime to wit: Armed Robbery, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

**COUNT TWO- ARMED ROBBERY**

That SHAQUILLE TYISTER BURGESS, along with another, did in Florence County on or about July 16, 2012, while armed with a deadly weapon, to wit: a handgun, take and carry away property that was in the possession of a Confidential Informant of the Bureau of Alcohol, Tobacco and Firearms from or in the immediate presence of a Confidential Informant of the Bureau of Alcohol, Tobacco and Firearms with intent to deprive a Confidential Informant of the Bureau of Alcohol, Tobacco and Firearms of possession of \$260.00 cash by use of force, threats or intimidation, in violation of Section 16-11-0330(A), S. C. Code of Laws, 1976, as amended.

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




---

**E.L. Clements, III**  
 TWELFTH CIRCUIT SOLICITOR

COUNTY OF Florence
STATE VS. Shaquille Tyister Burgess
AKA:
Race: B Sex: M Age: 19
DOB: SS#
Address:
City, State, Zip: Florence, SC 29501-6989
DL#: SID#

INDICTMENT/CASE#: 2012-GS-21-01654
A/W#: 2012A2110200067
Date of Offense: 7/16/2012
S.C. Code §: 16-11-0330(A)
CDR Code #: 0139

SENTENCE SHEET

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon (10-30)

in violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
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.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:
Sheriff, John C. Depertinger, John C. SC Bar# 9826
Defendant Shaquille Burgess, Shaquille Burgess Defendant
Attorney for Defendant [Signature] SC Bar# 76965

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 10 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. 232 days
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

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 \$
Public Defender Fund
Other:
CLERK OF COURT C.P. & G.S. FLORENCE COUNTY, S.C.

Table with columns for assessment type, amount, and total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 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, § 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 (SCJA Surcharge) \$5, 3% to County (if paid in installments) \$, TOTAL \$105.00

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

Clerk of Court/ Deputy Clerk: [Signature]
Court Reporter: [Signature]
SCCA/217 (03/2011)

Presiding Judge: [Signature]
Judge Code: 2160
Sentence Date: 3-4-13