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JUN 27 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ALBERT J. CAVE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002383

APPENDIX

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E X H I B I T S

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NO.DESCRIPTIONIDEV

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(None offered)

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1 (Whereupon, on September 10, 2012 the following
2 proceedings were held:)

3 ALBERT J. CAVE, after being duly sworn,
4 testified as follows:

5 MR. MILLER: Your Honor, before the Court is
6 Mr. Albert Cave. He is here today to enter a plea to the
7 charge contained in indictment 2011-GS-02-1388. That plea
8 would be under *North Carolina versus Alford*. Your Honor
9 may remember that there was a previous motion to suppress
10 in this case. It is a burglary case where there was some
11 fingerprints found at the incident location. Those
12 fingerprints were subsequently identified as being
13 Mr. Cave's. Mr. Cave has two prior convictions for
14 burglary. This was a dwelling and he was indicted in this
15 indictment for burglary in the first degree on that basis.

16 Additionally, Your Honor, Mr. Cave went to trial and
17 was convicted on August 23 of 2011 of another burglary he
18 was arrested for at the same time. That was also a
19 burglary in the first degree and it resulted in him being
20 sentenced to 25 years. Your Honor, the negotiation from
21 the state is that we will allow Mr. Cave to plead to
22 burglary in the first degree for concurrent 25 years under
23 *North Carolina versus Alford* and we will withdraw our
24 notice of intent to seek life imprisonment on this charge.

25 Mr. Cave's concern, as I understand it, about an

1 Alford plea is that despite Mr. Katonak's discussions with
2 him he is concerned he might waive some ability to appeal
3 the Court's finding as it relates to the fingerprint
4 evidence and we don't have any real concerns with that,
5 Your Honor. We are ready to move forward and resolve
6 Mr. Cave's last case.

7 THE COURT: All right. Mr. Katonak, you advised
8 Mr. Cave this is a burglary -- this sentence sheet says
9 second degree.

10 MR. MILLER: It should be first, Your Honor. It is
11 true-billed as a first. I'll change that on the sentence
12 sheet, Your Honor.

13 MR. KATONAK: Your Honor, we will acknowledge it is a
14 first offense. That's what he is charged with.

15 THE COURT: First offense?

16 MR. KATONAK: I mean a burglary first; not a first
17 offense.

18 MR. MILLER: In fact, Your Honor, it was correct on
19 the -- sorry, Your Honor. I had to make changes in about
20 five different places.

21 THE COURT: Mr. Katonak, you represent Mr. Cave in
22 the indictment 11-GS-02-1388, an indictment for burglary
23 in the first degree. I assume that you've advised him
24 that this carries a minimum of 15 years up to life. It's
25 classified as violent and most serious. Is that correct?

1 MR. KATONAK: Yes, sir.

2 THE COURT: You also advised him of his right to
3 trial by jury?

4 MR. KATONAK: Yes, sir. Albert and I have talked
5 four or five hours about the consequences of going to
6 trial. I have been up to McCormick twice to talk to him
7 and we spent about an hour or so here today talking about
8 the fact he was on the trial list, the fact that he was
9 facing life with no parole if he was convicted.

10 I have talked to Albert extensively that I felt the
11 state had a very strong case based on the fingerprint
12 found at the scene and as Mr. Miller said the Court
13 earlier heard our motion to try to keep that evidence out
14 based on the fact that they matched them to a print that
15 was on a charge that he had been found not guilty on that
16 should have been expunged. The Court ruled that it should
17 come in and explained that to Mr. Cave that we could not a
18 reargue that same point at trial. It would be in his best
19 interest to plead guilty. It is my understanding that he
20 does understand the state would very likely and most
21 likely be able to get a conviction at trial.

22 THE COURT: Have you explained to him that if he
23 pleads or if I accept it under *North Carolina verse Alford*
24 I have to treat it as a guilty plea and Department of
25 Corrections treats it as a guilty plea and it goes on his

1 record as a guilty plea?

2 MR. KATONAK: Yes, sir.

3 THE COURT: Mr. Katonak, are you of the opinion that
4 if the case were tried the state more likely than not or
5 most probably would prove their case beyond a reasonable
6 doubt and convict your client?

7 MR. KATONAK: Yes, sir, very much so.

8 THE COURT: And do you think it is wise for him to
9 take the benefit of the bargain; i.e., 25 years concurrent
10 with his previous sentence as opposed to looking at life
11 in prison without parole?

12 MR. KATONAK: Judge, what I have discussed ad nauseum
13 with Albert is that I would hate to see him get life
14 without parole because of the state based on his
15 fingerprints -- based on the fact going forward a life
16 without parole case they could bring into evidence of his
17 previous burglary that it is extremely likely that the
18 jury would find him guilty and have him get life without
19 parole versus being rolled over and have it concurrent
20 with the sentence he's already doing.

21 THE COURT: Thank you.

22 Mr. Cave, good morning or good afternoon. How are
23 you doing now?

24 THE DEFENDANT: Fine, sir.

25 THE COURT: All right. You are before me on a charge

1 of burglary in the first degree. That carries a minimum
2 of 15 years up to life. It is classified as violent and
3 most serious. Do you understand those charges and the
4 potential sentence?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you understand that violent means that
7 you -- may affect how you're housed in the Department of
8 Corrections even though you're doing a sentence for a
9 violent offense? It is also classified as most serious
10 which would be a second strike, Mr. Miller?

11 MR. MILLER: It would be, Your Honor.

12 THE COURT: So you've already got two most serious;
13 so if and when you get out all you got to do is get
14 another charge of either most serious or serious and
15 you'll have your three strikes and you'll be looking at
16 the possibility of life in prison without parole. Do you
17 understand all that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Understanding all of that, what you're
20 charged with, the potential sentence, the classification
21 of violent and most serious and what that means, it is my
22 understanding that you want to enter a plea under the
23 theory as expressed in *North Carolina versus Alford* which
24 is this: You, basically, tell me, Judge, I've looked at
25 all the evidence. I am of the opinion that the state

1 could prove my guilt beyond a reasonable doubt. I do not
2 want to take that chance. I want to benefit from the
3 bargain that they have presented to me on the
4 negotiations; that is, a 25-year sentence which would run
5 concurrent with what you're currently doing and not seek
6 life in prison without parole. Do you understand all of
7 that?

8 THE DEFENDANT: No, sir.

9 THE COURT: Well, what don't you understand?

10 THE DEFENDANT: I don't understand the part about me
11 agreeing that I seen all the evidence because I haven't
12 seen no evidence. I'm taking this plea because I really
13 don't have no other alternative to escape receiving a life
14 sentence.

15 THE COURT: All right. Step down. We'll call your
16 case for trial.

17 MR. MILLER: Yes, sir.

18 THE COURT: Mr. Cave, I don't know how else to work
19 with you.

20 THE DEFENDANT: I mean, I am here to take a plea
21 because I cannot take the trial.

22 THE COURT: You can't take a plea if you're not
23 informed and you're not pleading---

24 THE DEFENDANT: I was not informed of the *Alford* plea
25 about me -- about the statement that you made about seeing

1 all the evidence of the case because I haven't seen -- I
2 cannot go to trial. They want to take me to trial this
3 week when I haven't seen -- there is nothing in my motion
4 of discovery at all.

5 THE COURT: Thank you. Discuss it with your lawyer.
6 (Whereupon, a break was taken.)

7 MR. MILLER: Your Honor, Mr. Cave is back before the
8 Court. He has had some time to review some information
9 with his attorney and he has indicated he would like to
10 proceed with the *Alford* plea that we had previously
11 offered to him.

12 THE COURT: Thank you. All right.

13 Mr. Cave, when we left I was asking you have you had
14 an opportunity to review the evidence and are you of the
15 opinion that if the state went forward they could convict
16 you beyond a reasonable doubt, but you don't want to take
17 that chance and face life in prison without parole and you
18 want to take the benefit of the bargain; i.e., a 25-year
19 concurrent sentence with the crime you're now serving; is
20 that correct?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And I think I told you that if you do
23 that I have to accept it as a guilty plea and it goes on
24 your record as a guilty plea and the Department of
25 Corrections treats it as a guilty plea. Do you understand

1 that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Anybody promised you anything other than
4 the recommendation in order to make you enter this plea?

5 THE DEFENDANT: No, sir.

6 MR. MILLER: Your Honor, it is a negotiation. I'm
7 sorry.

8 THE COURT: Other than the negotiated plea. Is that
9 correct?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Are you satisfied with the services
12 rendered to you by your lawyer?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: In your opinion has he had enough time to
15 research the law and spend enough time with you so he can
16 properly defend you here today?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand that by entering this
19 plea under *North Carolina versus Alford* that you're giving
20 up your right to remain silent and your right to a jury
21 trial?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you understand what a jury trial is
24 because you've already had one, but it allows you to
25 confront and cross examine everyone who testifies against

1 you.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: It allows you to present your own case,
4 your own defense by calling your own witnesses,
5 introducing relevant exhibits, and testifying in your own
6 defense. However, if you do not testify and exercise your
7 right to remain silent, I would tell the jury they could
8 not hold the fact that you did not testify against you in
9 any manner whatsoever and I would instruct them that they
10 couldn't even consider the fact that you did not testify
11 when they deliberated your guilt or innocence.

12 You would be presumed innocent throughout the trial
13 and the State of South Carolina would have the burden of
14 proving you guilty beyond a reasonable doubt to a jury of
15 12 people and in order for that jury to convict you all 12
16 would have to unanimously agree that you were, in fact,
17 guilty and even if you were found guilty you would still
18 have the right to an appeal. Now, do do you understand
19 your right to trial by jury?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Understanding those rights to trial by
22 jury, you still wish to enter this plea under *North*
23 *Carolina versus Alford*?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Are you today under the influence of

1 alcohol, drugs, or prescription medication?

2 THE DEFENDANT: No, sir.

3 THE COURT: Are you entering this plea of your own
4 free will and accord?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Now, Mr. Cave, do you believe that if
7 this case were tried that the State of South Carolina
8 would be able to prove to a jury beyond a reasonable doubt
9 that you committed the offense of burglary by knowingly
10 and willfully entering a dwelling at Pine Log Road in
11 Warrentonville on May 16, 2011 having a prior record of two
12 or more convictions for burglary; you don't want to take
13 that chance; you want to reap the benefits of the bargain;
14 i.e., concurrent sentence and they will drop their request
15 to have you committed or sentenced to the balance of your
16 life without parole? You wish to enter the Alford plea;
17 is that correct?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. I find him to be fully aware
20 of what's going on. He's entering it freely and
21 voluntarily. He had advice of counsel with whom he says
22 he's satisfied and I will accept the plea.

23 Mr. Cave, as always you have the right to an appeal
24 if you disagree with the sentence or these proceedings
25 within 10 days. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Mr. Miller?

3 MR. MILLER: Your Honor, Mr. Cave's fingerprints were
4 found at the site of resident of burglary of Pine Log
5 Road. As referenced in the indictment that burglary
6 occurred on May 16, 2011 in Aiken County. Your Honor,
7 Mr. Cave has a prior burglary conviction from August 11 of
8 2004 and a prior -- and a burglary conviction from
9 August 23 of 2011. That would be the basis for the
10 burglary in the first degree charge, Your Honor. The
11 state is withdrawing its notice of intent to seek a life
12 imprisonment sentence as a condition of this *Alford* plea.

13 THE COURT: Now do we have any other charges against
14 Mr. Cave pending in Aiken?

15 MR. MILLER: Your Honor, there is another burglary
16 charge and a grand larceny charge that will be dismissed.
17 This is intended to and it will wrap up all of Mr. Cave's
18 pending charges in Aiken County. He will have nothing
19 pending and any other warrants that are out there will get
20 dismissed.

21 THE COURT: In Aiken County?

22 MR. MILLER: In Aiken County, yes, sir.

23 THE COURT: And that 25-year sentence he's doing now,
24 what indictment is that?

25 MR. MILLER: Your Honor, that was -- Your Honor, I am

1 going to have to check on that indictment number.

2 THE COURT: Okay. Mr. Katonak, anything else you
3 need to add for Mr. Cave? He's been before me a couple --
4 well, one time on the trial and then we had a motion.
5 He's been here today.

6 MR. KATONAK: Yes, sir. He is very familiar with the
7 legal system. He'd actually had some prior charges that
8 he'd either had I think one or two trials where he had
9 been found not guilty in the past and we've been over this
10 ad nauseum as I told the Court both twice in McCormick and
11 also here and I told him and I believe he is in agreement
12 that this is in his best interest.

13 THE COURT: All right. Mr. Cave, I am going to go
14 along with the negotiation. The sentence is that you be
15 committed to the State Department of Corrections for a
16 period of 25 years. That will run concurrent with your
17 present sentence that you are serving and I will put that
18 on the sentence sheet as soon as they're able to get that
19 for me.

20 MR. MILLER: Your Honor, that's 2011-GS-02-722.

21 THE COURT: That will run concurrent with
22 11-GS-02-722. Good luck to you.

23 MR. MILLER: Your Honor, I am sorry. It is 1032 is
24 the indictment number. 2011-GS-02-1032.

25 (Whereupon, a break was taken.)

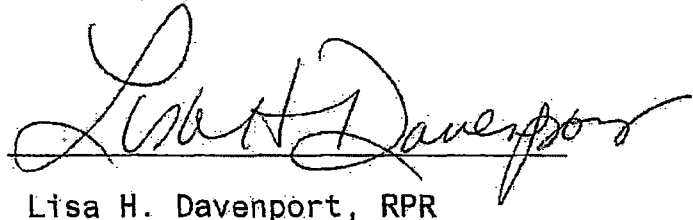
CERTIFICATE OF REPORTER

State of South Carolina
County of Aiken

I, Lisa H. Davenport, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina at
the time of this hearing, do hereby certify that the
foregoing is a true, accurate and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of General Sessions for Aiken County, South
Carolina, on the 10th day of September, 2012.

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

February 12, 2014



Lisa H. Davenport, RPR

MO26164

FORM 5

STATE OF SOUTH CAROLINA)

County of Aiken)

*189002)

Albert James Cave Jr)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014-CP-02-00004

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Mc Cormick C.I.
2. Name and location of Court which imposed sentence Aiken County Court House
109 PARK AVE Aiken SC 29802
3. Name(s) of co-defendant(s) (if any) - None -
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2011-65-02-01388
 - (b) _____

2014-CP-02-00004
2011-OS-02-01388
Filed _____
cc'd to _____
Deputy Clerk _____
Trial Judge _____
Trial Atty.: Brian Peterson
Court Reporter: Lisa Peterson
Sec: PCR Petitioner _____ Solicitor
General Sessions _____ Atty. Gen.
Appointed Atty. _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) September 10, 2012. 25 years
- (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 Alford Plea
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal was dismissed due to Attorney not providing sufficient
- ii. Reasoning for Appealing After Being Advised to do so. Attorney failed
- iii. in his duty to represent me and my appeal was dismissed without my knowledge.
- (c) the date of each such result:
- i. do not know the date my appeal was dismissed. I was not notified.
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INVOLUNTARY PLEA
- (b) INEFFECTIVE ASSISTANCE OF COUNSEL
- (c) PROSECUTORIAL MISCONDUCT / Brady violation
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Grounds set forth on additional page
- (b) ↓
- (c) ↓
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? 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 (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Motion to suppress
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Aiken County Court House, 109 Park Ave Aiken SC 29802
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

i. motion was denied

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. June 20, 2012

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) grounds were not presented in my Appeal due to Counsel failure to do so.

(b) _____

(c) _____

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

(a) your arraignment and plea? Yes

(b) your trial, if any? _____

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
Yes

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

(a) the name and address of each attorney who represented you:

i. Mr. Brian Katanax P.O. Box 1606

Aiken SC 29902

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

TO VACATE, Set ASIDE Sentence AND Demand A Fair trial

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

NO

STATE OF SOUTH CAROLINA)

County of Aiken)

VERIFICATION

I, SC [Signature], Albert James Cave Jr, 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.

SC [Signature]
Albert James Cave Jr

SWORN to and subscribed before me this 3
day of Dec., 2013

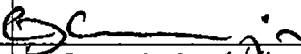
FC [Signature] (L.S.)
Notary Public

My Commission Expires: 12-16-2015

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

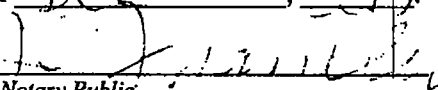
I, Albert J. Cave Jr, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (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.


Albert J. Cave Jr *Applicant*

SWORN or affirmed to and subscribed before me this

30 day of Dec, 2012


Notary Public

My Commission Expires: 12-1-2015

Additional PAGE to Support Grounds Set Forth For QUESTION #10

(A) INVOLUNTARY PLEA ① PLEA WAS INVOLUNTARY DUE TO THE FACT THAT I WAS FORCED TO TAKE PLEA AGAINST MY WILL BECAUSE THE COURT ABUSED ITS DISCRETION WHEN THE COURT DENIED MY MOTION TO SUPPRESS EVIDENCE WITH ITS DECISION BEING UNSUPPORTED BY THE EVIDENCE PRESENTED AND BY THE COURT MAKING FALSE ALLEGATIONS IN ITS RULING. THE COURT'S WRONGFUL DECISION IN DENYING MY MOTION BY ERROR OF LAW, AND ALLOWING THE PROSECUTION TO BREAK THE S.C. CODE OF LAWS STATUTE 17-1-40 AND USE ILLEGAL EVIDENCE AGAINST ME. THIS ACT DENIES ME THE RIGHT TO HAVE A FAIR TRIAL AND ENCOURAGES POLICE MISCONDUCT. DUE TO THE FACT THAT THE COURT ALLOWED PROSECUTION TO BREAK THE LAW TO PROSECUTE ME, I HAD NO OTHER ALTERNATIVE BUT TO TAKE PLEA AGAINST MY WILL, THEN TO GO TO TRIAL AND RECEIVE LIFE WHICH THE PROSECUTION INTENDED TO SEEK AFTER I REFUSED THEIR PLEA.

② PLEA WAS ALSO INVOLUNTARY MADE DUE TO THE FACT THAT THE PROSECUTION WITHHOLD MATERIAL EVIDENCE FROM MY RULE 5 DISCOVERY MATERIAL. WITHOUT THIS MATERIAL EVIDENCE I WOULD NOT HAVE HAD AN OPPORTUNITY TO PREPARE A COMPLETE DEFENSE AND WOULD NOT HAVE BEEN ABLE TO IMPERCH THE GOVERNMENT WITNESS WHOM THE GOVERNMENT WOULD RELY ON AT TRIAL. WITHOUT THIS DISCOVERY MATERIAL I WOULD NOT HAVE HAD A FAIR TRIAL DUE TO THE FACT THAT THE PROSECUTION VIOLATED THE S.C. RULES OF CRIMINAL PROCEDURES AND VIOLATED MY CONSTITUTIONAL RIGHTS. (THIS MATTER WAS BROUGHT TO THE COURT'S ATTENTION BEFORE I TOOK THE AFORE PLEA AND THE COURT REFUSED TO ADDRESS THIS ISSUE.)

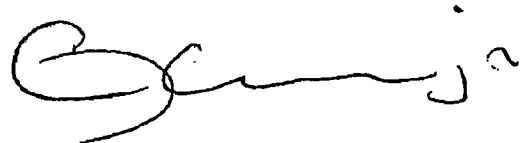
(B) INEFFECTIVE ASSISTANCE OF COUNSEL - ① COUNSEL WAS INEFFECTIVE DUE TO THE FACT THAT COUNSEL FAILED IN HIS DUTY AND OBLIGATION TO MAKE REASONABLE EFFORTS TO OBTAIN AND REVIEW DISCOVERY MATERIAL THAT HE KNEW THE PROSECUTION WOULD RELY ON AT COURT. COUNSEL ADVISED ME TO TAKE PLEA WITHOUT SEEING THE EVIDENCE THAT THE PROSECUTION PLANNED TO USE AGAINST ME. THIS WAS BROUGHT TO COUNSEL ATTENTION BEFORE PLEA AND COUNSEL STILL REFUSED TO OBTAIN THIS DISCOVERY MATERIAL AND ADVISED ME TO TAKE PLEA.

② COUNSEL WAS INEFFECTIVE BY NOT FILING PROPER MOTION TO SUPPRESS. COUNSEL WAS ASKED TO FILE MOTION TO SUPPRESS FINGERPRINT CARD. COUNSEL FAILED TO DO SO AND ONLY FILED A MOTION TO SUPPRESS EVIDENCE RECEIVED AFTER THE FACT. COUNSEL ALLOWED THE PROSECUTION TO USE EVIDENCE WHICH THE JUDGE RULED SHOULD HAVE BEEN DESTROYED PURSUANT TO THE STATUTE 17-1-40 OF THE S.C. CODE OF LAWS.

③ COUNSEL WAS INEFFECTIVE BY ADVISING ME TO TAKE A PLEA STATING THAT MY ^{ONLY} ~~ONE~~ CHANCE IN THIS CASE WAS TO PLEA AND HE WOULD HANDLE MY APPEAL AGAINST THE COURT'S DECISION WHICH HE FAILED TO PROPERLY DO. HE ADVISED ME THAT IF I DIDN'T PLEA THEN I WOULD SURELY RECEIVE LIFE IN PRISON.

(C) PROSECUTORIAL MISCONDUCT - ① PROSECUTION SHOWED MISCONDUCT BY NOT ACTING IN ACCORDANCE WITH GOVERNING LAW. PROSECUTION VIOLATED CONSTITUTIONAL RIGHTS BY BREAKING THE S.C. CODE OF LAWS STATUTE 17-1-40 BY HOLDING AND USING EVIDENCE FROM A CHARGE WHICH I WAS FOUND NOT GUILTY TO. THE COURT FOUND AND RULED THAT THE EVIDENCE THE PROSECUTION USED SHOULD HAVE BEEN DESTROYED PURSUANT TO THE STATUTE WHICH STATES THAT THEY ARE GUILTY OF CONTEMPT OF COURT. PROSECUTION STILL INTENTIONALLY HELD AND USED THIS EVIDENCE AGAINST THE DEFENDANT AND FORCED DEFENDANT TO TAKE A PLEA OR THEY WOULD SEEK LIFE WHICH THEY SERVED DEFENDANT WITH NOTICE TO DO SO AFTER DEFENDANT REFUSED TO TAKE PLEA. PROSECUTION SHOWED MISCONDUCT BY BREAKING THE LAW AND VIOLATING MY CONSTITUTIONAL RIGHTS.

- ③ Prosecution also showed misconduct by violating the S.C.R.C.P. by withholding material evidence from my discovery material. Prosecution violated my rights under Brady by not providing me or my attorney with material evidence which they planned to use against me. Defendant made attempts to receive this material discovery evidence, even brought this matter to the court's attention in court. Prosecution still failed to provide defendant or his attorney with this material which prevented me the defendant from going to trial and violated my rights.
- ④ Prosecution showed misconduct by obtaining a warrant for my arrest without establishing a probable cause to do so. Not only did they not establish a sufficient reason of probable cause backed up by evidence presented, but they also used illegal evidence to establish probable cause.
- ⑤ Prosecution showed misconduct by using illegal evidence to charge, arrest, indict and convict me the defendant. The prosecution used evidence from a charge which I was found not guilty to. The S.C. Code of Laws demands the destruction of all evidence of the record from that charge. Prosecution use evidence from that record to charge, arrest and indict me disregarding the Statute 17-1-40 of the S.C. Code of Laws. The Prosecution broke the law of S.C. and violated my constitutional rights.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
Albert James Cave, Jr., # 189002,	)	2014-CP-02-0004
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 2, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was true bill indicted at the October 2011 term of the Aiken County Grand Jury for Burglary—First Degree (2011-GS-02-01388). Brian Katonak, Esquire represented Applicant. On September 10, 2012, Applicant pled under North Carolina v. Alford before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to a negotiated twenty five year term of imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf. By Order filed March 18, 2013, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203 for failing to provide a sufficient reason for appealing a guilty plea. The Remittitur was issued on March 25, 2013. On March 18, 2013, Applicant filed a motion to reconsider, which was construed as petition for rehearing. By Order dated July 15, 2013, the South Carolina Court of Appeals gave Applicant ten days to submit his explanation. Appellate failed to provide an explanation and the South Carolina Court of Appeals denied and dismissed Applicant appeal by Order dated September 30, 2013. The Remittitur was issued November 13, 2013.

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

II.

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

1. Involuntary guilty plea.
 - a. Forced to enter guilty plea when "Court abused its discretion when the Court denide (sic) my motion to suppress evidence with its decision..."
 - b. "I had no other alternative but to take plea against my will, then to go to trial and receive life which the prosecution intended to seek after I refused their deal."
2. Ineffective Assistance of Counsel
 - a. Failed to obtain and review discovery material that he knew the prosecution would rely on at court.
 - b. Counsel was ineffective for not filing the proper suppression motion, i.e., motion to suppress the finger print card.
 - c. "Counsel was ineffective by advising me to take a plea stating that my only chance in this case was to plea and he would handle my appeal against the courts decision which he failed to properly do he advised me that if I didn't plea then I would surely receive life in prison."
3. Prosecutorial Misconduct/Brady Violation
 - a. "prosecution violated constitution rights by...holding and using evidence from a charge which I was found not guilty."
 - b. Prosecution withheld material evidence.
 - c. "Prosecution showed misconduct by obtaining a warrant for my arrest without establishing a probable cause to do so not only did they not establish a sufficient reason of probable cause backed up by evidence presented, but they also used illegal evidence to establish probable cause."
 - d. "Prosecution showed misconduct by using illegal evidence to charge arrest, indict and convict me the defendant. The prosecution used evidence from a charge which I was found not guilty to. The S.C. Code of laws demands the destruction of all evidence of the record from that charge. Prosecution use evidence form that record to charge, arrest, and indict me

disregarding the statute 17-1-40 of the S.C. Code of laws. The prosecution broke the law of S.C. and violated my constitutional rights.”

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

The Applicant’s assertion that 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. See Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (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 Applicant 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) (citations omitted). An Applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove that counsel’s advice was not “within the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal

defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal defendant entering a guilty plea "must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citation omitted). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

The Respondent submits the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

IV.

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

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises

questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

V.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed.

VI.

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

[Signature block on following page]

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

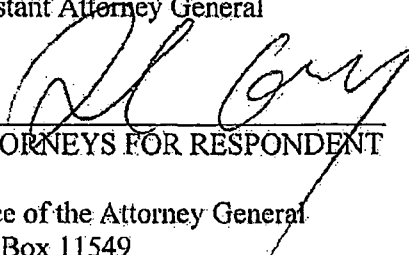
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 29, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2014-CP-02-0004
	)	
ALBERT JAMES CAVE, JR., #189002,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Lance S. Boozer, Esquire
The Boozer Law Firm, LLC
1331 Park Street
Columbia, SC 29201

DATED this the 29th day of July, 2014.

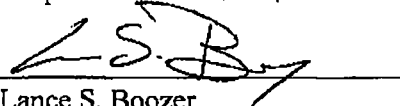

 Caroline Kaiser, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	C/A NO: 2014-CP-02-0004
	)	
Albert James Cave, Jr., #189002,	)	
	)	
Applicant,	)	
	)	AMENDMENT TO PRIOR PCR
v.	)	APPLICATION
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

The Applicant, through appointed counsel below, makes the following additional claims and amendments to his prior application for post-conviction relief filed January 2, 2104:

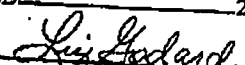
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) Ineffective assistance of counsel for failure to motion to recuse Solicitor.

Respectfully submitted,



Lance S. Boozer
 Attorney for Applicant
 807 Gervais Street, Suite 203
 Columbia, SC 29201
 Phone: (803) 608-5543
 Fax: (803) 926-3463

Columbia, South Carolina
 March 16, 2015

FILED 3-18 2015

 C.C.P. & G.S.

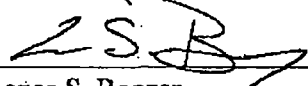
 Deputy Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	C/A NO: 2014-CP-02-0004
	)	
Albert James Cave, Jr., #189002,	)	
	)	
Applicant,	)	
	)	AFFIDAVIT OF SERVICE BY MAIL
v.	)	
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

I, the undersigned, of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing Amendment to Prior PCR Application upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, addressed as follows:

Daniel Gourley
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211

THE BOOZER LAW FIRM, LLC


 Lance S. Boozer
 Attorney for Applicant
 807 Gervais Street, Suite 203
 Columbia, SC 29201
 Phone: (803) 608-5543
 Fax: (803) 926-3463

Columbia, South Carolina
 March 16, 2015

FILED 3-18 2015

 C.C.C.P. & G.S.

 Deputy Clerk 2:00 PM

THE BOOZER LAW FIRM, LLC

Lance S. Boozer, Esq.*

*Also admitted in Florida

807 Gervais Street, Suite 203
Columbia, SC 29201

Telephone: 803-608-5543
Fax: 803-926-3463

Email: lsb@boozerlawfirm.com
Website: www.boozerlawfirm.com

March 16, 2015

The Honorable Liz Godard
Clerk of Court
PO Box 583
Aiken, SC 29802-0583

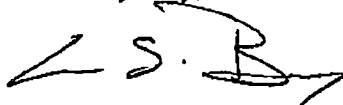
**RE: Albert James Cave, Jr., #189002, v. State of South Carolina
2014-CP-02-0004**

Dear Madam Clerk:

I represent Mr. Cave in the above-referenced action. Please clock and file the enclosed document considered an Amendment to his prior PCR Application and return a clocked copy to me in the envelope provided.

Should you have any questions or concerns, please do not hesitate to contact me. I appreciate your assistance in this matter.

Yours very truly,



Lance S. Boozer

cc: Mr. Albert James Cave, Jr., #189002
Daniel D. Gourley, AAG

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2014-CP-02-00004
& 2013-CP-02-01498

3
4
5 ALBERT JAMES CAVE, JR.,
Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post-Conviction Relief Hearing
Heard on Friday, September 23, 2016
11 Aiken, South Carolina

12 BEFORE:

13 THE HONORABLE ROBERT E. HOOD
14
15

16 APPEARANCES:

17 Counsel on Behalf of the Applicant:
Aimee J. Zmroczek, Esq.
18 Lance S. Boozer, Esq.

19 Counsel on Behalf of the Respondent, State of SC:
Julie A. Coleman, Esq.
20
21
22

23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29803-5232
25

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1 ON FRIDAY, SEPTEMBER 23, 2016 AT 12:05 P.M.:

2 THE COURT: Who's next?

3 MS. COLEMAN: We have Albert James Cave, Jr.,
4 up next.

5 This is an interesting situation because he
6 has two separate appeals and two different
7 attorneys on those.

8 THE COURT: All right.

9 MS. COLEMAN: And they might have a motion to
10 make.

11 THE COURT: Okay.

12 MS. ZMROCZEK: Your Honor, what we were doing
13 was moving to consolidate the testimony. I guess
14 keep the cases separate so they have separate CP
15 numbers. I've been working on my case and
16 Mr. Boozer has been working on his case but -- and
17 Mr. Boozer and I talked about it. He can address
18 you. I think it would be more judicially
19 efficient.

20 MR. BOOZER: Judge, just briefly.

21 Mr. Cave's first PCR case involves a --
22 time line wise, his first PCR with Ms. Zmroczek
23 involves a trial that was in 2011 when he was found
24 guilty. I'm on a case that was subsequent to that
25 on a plea where he pled guilty.

1 I think a lot of his allegations are going to
2 kind of intermingle and the testimony is going to
3 be about, pretty much very similar. So I think if
4 Your Honor would just consider having the testimony
5 and whatnot, everything consolidated, but keep two
6 separate CP numbers, two orders, I think it makes
7 sense time line wise.

8 THE COURT: Are you okay with that?

9 MS. COLEMAN: Yeah, I'm fine with that. No
10 objection.

11 THE COURT: Are you Mr. Cave?

12 THE APPLICANT: Yes, sir.

13 THE COURT: Stand up for me. How are you
14 doing?

15 THE APPLICANT: I'm doing okay.

16 THE COURT: Raise your right hand.

17 (Defendant placed under oath.)

18 THE COURT: All right. So, Ms. Zmroczek to
19 your right, do you know her?

20 THE APPLICANT: Yes, sir.

21 And Mr. Boozer to your left, do you know
22 him?

23 THE APPLICANT: Yes, sir.

24 THE COURT: So you got two PCRs, right?

25 THE APPLICANT: Yes, sir.

1 THE COURT: That stem out of two different
2 cases; is that right?

3 THE APPLICANT: Yes, sir.

4 THE COURT: Okay. And what they're asking me
5 to do is to essentially combine them into one
6 hearing just for the purpose of gathering the
7 information. Does that make sense?

8 THE APPLICANT: Yes, Your Honor.

9 THE COURT: And then when I rule on them I
10 will rule on them separately but instead of you
11 having to tell me the same thing twice or anything
12 like that we're just going to kind of do it all at
13 one time.

14 THE APPLICANT: Yes, sir.

15 THE COURT: Is that okay with you?

16 THE APPLICANT: Yes, sir.

17 THE COURT: Are you sure?

18 THE APPLICANT: Yes.

19 THE COURT: Okay. Great. Let's do it.

20 MS. ZMROCZEK: Thank you.

21 Your Honor, since my case is chronologically
22 first I'll question him first and then Mr. Boozer
23 can question him.

24 THE COURT: All right. Let Ms. Coleman set
25 up where we are. Hold on one second.

1 MS. COLEMAN: Procedural history. This is
2 Albert Cave.

3 THE COURT: Hold on.

4 MS. COLEMAN: I'm sorry.

5 (Pause.)

6 THE COURT: All right. Ms. Coleman?

7 MS. COLEMAN: If it please the Court.

8 This is Albert Cave versus the State of South
9 Carolina, Docket Number 2013-CP-02-1498.

10 Applicant is presently confined in the South
11 Carolina Department of Corrections pursuant to
12 orders of commitment of the Aiken County Clerk of
13 Court. Applicant was true-bill indicted during the
14 July 2011 Term of the Aiken County Grand Jury for
15 grand larceny more than 2,000 but less than 10,000,
16 and burglary in the first degree. David Hayes,
17 Esquire, represented the Applicant.

18 On May 9th through the 12th, 2011, a jury
19 trial was held before the Honorable Doyet A. Early
20 the Third. The jury convicted Applicant as
21 indicted.

22 On May 12th, 2011, Judge Early sentenced
23 Applicant to 30 days for larceny and 25 years for
24 burglary first degree with the two sentences to run
25 concurrently.

1 A notice of appeal was filed with the South
2 Carolina Court of Appeals, and an Anders brief was
3 submitted. The Court of Appeals confirmed
4 Applicant's sentence and conviction on December
5 28th, 2012. Remittitur was issued on July 1st,
6 2013.

7 Applicant filed a timely application for
8 post-conviction relief on July 8th, 2013, alleging
9 that he was being held in custody unlawfully based
10 on the following allegations: Ineffective
11 assistance of counsel; prosecutorial misconduct;
12 and malicious prosecution.

13 The State filed its return October 16th,
14 2013. The Applicant subsequently filed an
15 amendment on March 1st, 2014, alleging the
16 following allegations: Ineffective assistance of
17 counsel; ineffective assistance of appellate
18 counsel; and prosecutorial misconduct.

19 He's present today and represented in this
20 matter by Ms. Aimee Zmroczek.

21 THE COURT: All right. Do you want to go on
22 and do the next one?

23 MS. COLEMAN: Sure.

24 The second PCR application is Albert James
25 Cave, Jr., versus the State of South Carolina,

1 Docket Number 2014-CP-02-0004. Applicant is
2 presently confined in the South Carolina Department
3 of Corrections pursuant to orders of commitment of
4 the Aiken County Clerk of Court.

5 Applicant was true-bill indicted at the
6 October 2011 Term of the Aiken County Grand Jury
7 for burglary first degree. Brian Katonak, Esquire,
8 represented the Applicant.

9 On September 10th, 2012, Applicant pled
10 guilty under North Carolina v. Alford before the
11 Honorable Doyet A. Early the Third. Judge Early
12 sentenced Applicant to a negotiated 25-year term of
13 imprisonment. This sentence was to run
14 concurrently to the 25-year sentence he was already
15 serving for 2011-GS-02-1031.

16 A timely notice of appeal was filed on
17 Applicant's behalf. By order filed March 18th,
18 2013, the South Carolina Court of Appeals dismissed
19 Applicant's appeal pursuant to Rule 203 for failing
20 to provide a sufficient reason for appealing a
21 guilty plea. The remittitur was issued on March
22 25th, 2013.

23 On March 18th, 2013, Applicant filed a motion
24 to reconsider which was construed as a petition for
25 rehearing. By order dated July 15th, 2013, the

1 South Carolina Court of Appeals gave Applicant 10
2 days to submit his explanation. Appellant failed
3 to provide an explanation and the South Carolina
4 Court of Appeals denied and dismissed Applicant's
5 appeal by order dated September 30th, 2013. The
6 remittitur was issued November 13th, 2013.

7 Applicant filed a timely application for
8 post-conviction relief on January 2nd, 2014,
9 alleging that he was being held in custody
10 unlawfully based on the following allegations:
11 Involuntary guilty plea; ineffective assistance of
12 counsel; prosecutorial misconduct; and Brady
13 violation. The State filed its return July 29th,
14 2014.

15 Applicant filed an amended application on
16 March 16th, 2015, adding an additional allegation
17 of ineffective assistance of counsel for failing to
18 move to recuse the solicitor.

19 Applicant is present today and is represented
20 in this matter by Mr. Lance Boozer.

21 THE COURT: All right. Ms. Zmroczek, are you
22 ready?

23 MS. ZMROCZEK: Yes, Your Honor.

24 THE COURT: All right. You may call your
25 first witness.

ALBERT JAMES CAVE, JR - DIRECT BY ZMROCZEK

1 MS. ZMROCZEK: Thank you. Call Albert Cave.

2 THE COURT: Come on forward, Mr. Cave.

3 ALBERT JAMES CAVE, JR., having been duly
4 sworn, was examined and testified as follows:

5 THE CLERK: Please take a seat in the witness
6 box and state your full name for the Court.

7 THE APPLICANT: My name is Albert James Cave,
8 Jr.

9 DIRECT EXAMINATION

10 BY MS. ZMROCZEK:

11 Q. Mr. Cave, I know you're nervous but speak
12 up. Okay?

13 A. Yes, ma'am.

14 Q. How old are you?

15 A. I'm 47.

16 Q. 47?

17 A. Yes, ma'am.

18 Q. Where are you housed?

19 A. Ma'am?

20 Q. Where do you live?

21 A. In Aiken. Aiken, South Carolina.

22 Q. Right, right. Where are you housed right
23 now?

24 A. Oh, Lieber Correctional Institution.

25 Q. Which one?

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1 A. Lieber.

2 Q. Okay. I want to talk a little bit about your
3 history with Aiken County, okay, because that's
4 part of the reason why we're here today.

5 A. Yes, ma'am.

6 Q. So, I want to talk about some charges that
7 you had -- talk about -- tell the Judge about how
8 many times you've been arrested in Aiken County.

9 A. Well, I've been arrested a few times. I
10 don't have the exact number. But, the rest of
11 them --

12 Q. What have you been accused of every time
13 you've been arrested in Aiken County?

14 A. Ma'am?

15 Q. What's the charge that you're always being
16 accused of?

17 A. Most of them is burglary, burglary charges.
18 I had a few forgery charges, but the last few years
19 everything been burglary charges.

20 Q. And sometimes grand larceny attached to those
21 burglary charges?

22 A. Yes, ma'am. Yes, ma'am.

23 Q. All right. So I want to go back to -- do you
24 remember 2008 when you were charged?

25 A. Yes, ma'am.

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1 Q. All right. Tell, tell the Court a little bit
2 about what you were charged with in 2008.

3 A. Well, in 2008 I was wrongfully charged with
4 burglary, burglary first degree, grand larceny. I
5 went to trial and I was acquitted on them charges
6 after being found not guilty.

7 Q. Eventually you were acquitted?

8 A. I was acquitted; yes, ma'am.

9 Q. And when you went to trial, was -- who was
10 the prosecuting agency?

11 A. Well, when I went to trial the Attorney
12 General prosecuted my case because a order was done
13 recusing the Second Circuit Solicitor's Office
14 because the victim was the solicitor of the office,
15 a former deputy solicitor of the office.

16 Q. Okay.

17 Your Honor, may I approach the witness?

18 I'm handing you what's been marked as
19 Plaintiff's Exhibit 1 and ask if you recognize
20 that.

21 A. Yes, ma'am.

22 Q. Your Honor -- is that a copy of the order?

23 A. Yes, ma'am, just -- yes.

24 MS. ZMROCZEK: Your Honor, at this time we
25 would move Plaintiff's Exhibit 1 which is a filed

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1 copy of the order recusing the solicitor's office.

2 MS. COLEMAN: No objection.

3 MS. ZMROCZEK: If you can hand that up. I
4 know it's hard.

5 THE COURT: I need to be able to see it.

6 THE APPLICANT: Yes, sir.

7 THE COURT: Thank you very much.

8 THE APPLICANT: Yes, sir.

9 (Applicant's Exhibit No. 1, order of recusal,
10 received into evidence.)

11 BY MS. ZMROCZEK:

12 Q. So, Mr. Cave, I want to focus on this order
13 because it kind of, it lays the foundation for a
14 lot of your claims subsequent, in your current
15 pending charges, right?

16 A. Yes, ma'am.

17 Q. Okay. So I want to talk to you about this
18 order. So the victim, the victim you said was the
19 solicitor?

20 A. Yes, ma'am.

21 Q. Or an assistant solicitor at the time,
22 correct?

23 A. He was a former deputy solicitor of that
24 office.

25 Q. A former deputy solicitor?

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1 A. Yes, ma'am.

2 Q. And that was in 2008?

3 A. Yes, ma'am.

4 Q. And there was a hearing in front of, I
5 think -- oh, here it is -- a hearing in front of
6 Judge Williams, right?

7 A. Yes, ma'am.

8 Q. And he signed an order and it was your
9 understanding -- and, Your Honor, I'm referring to
10 the first paragraph, therefore it's ordered -- when
11 it said the Second Circuit Solicitor's Office shall
12 be recused from prosecuting the above-captioned
13 cases -- and those were for burglary and larceny,
14 right?

15 A. Yes, ma'am.

16 Q. -- or any charges or indictments stemming
17 from the same incident or indictments -- or, excuse
18 me, or incidents alleged to be related or part of a
19 pattern of criminal activity including the
20 above-captioned charges, including but not
21 specifically limited to the possible indictments
22 mentioned by Solicitor Morgan at the hearing,
23 right?

24 A. Yes, ma'am.

25 Q. So at that hearing what -- was there talk of

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1 outstanding indictments that were also --

2 A. Yes, ma'am. When we had that hearing
3 Ms. Morgan which was the solicitor at the time and
4 she put me and the Courts on notice that they was
5 looking to indict me -- well, possibly indictment
6 me on some other charges.

7 Q. And were these the charges that you were
8 eventually indicted for and went to trial on later?

9 A. No, them charges never came.

10 Q. Those never came?

11 A. Dismissed. Yes, ma'am.

12 Q. But then you eventually got some more
13 burglary charges, right?

14 A. Yes, ma'am.

15 Q. And that -- that's what you went to trial on?

16 A. Yes, ma'am.

17 Q. When you met -- were you appointed an
18 attorney in this case?

19 A. Yes, ma'am.

20 Q. And that was who?

21 A. Mr. David Hayes.

22 Q. David Hayes. And did you tell Mr. Hayes
23 about this order?

24 A. No. At the time we did not discuss that
25 order but he knew about that prior case because we

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1 discussed that prior case because they used
2 evidence in this case from that case. So he knew
3 about that and he knew about the misconduct that he
4 was seeing from that office. So, I mean...

5 Q. And I want to talk about that a little bit.
6 You said that he knew about the evidence they used
7 from that case in this case. What are you talking
8 about, specifically?

9 A. They charged me with this case because they
10 said that the prints that they found at the crime
11 scene matched the prints that they found from that
12 prior charge I was acquitted of.

13 Q. And that was -- and so those prints that they
14 were using were based on the charge that you
15 eventually were acquitted on that the solicitor's
16 office was removed from, right?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. Okay. So -- so, their initial basis for your
19 arrest was that fingerprint card?

20 A. Yes, ma'am.

21 Q. Stemming out of that 2008 case?

22 A. Yes, ma'am.

23 Q. Okay. And so you had told him about that?

24 A. Yes, ma'am.

25 Q. What if anything did he -- did you ask him to

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1 do about that?

2 A. I asked him to file a motion to have that
3 evidence suppressed.

4 Q. Okay. And we'll get to that. Did you also
5 ask him to have somebody else prosecute it instead
6 of the solicitors?

7 A. No, no, ma'am. No, ma'am, I did not.

8 Q. Okay. So you had told him about this case?

9 A. Yes, ma'am.

10 Q. So -- and the reason that you asked him to
11 suppress the evidence, he handed you all of your
12 discovery in this case, right? Or he gave you a
13 copy of the discovery?

14 A. Yes, ma'am.

15 Q. Sorry. I'm not trying to confuse you.

16 And one of those things he gave you was a
17 property receipt --

18 A. Yes, ma'am.

19 Q. -- that included fingerprints, right?

20 A. Yes, ma'am.

21 Q. I'm going to hand you what's been marked for
22 identification as Plaintiff's Exhibit 2 and ask you
23 if that's -- if that's the same evidence sheet that
24 you received?

25 A. Yes, ma'am.

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1 Q. Okay.

2 Your Honor, at this point we would move
3 Plaintiff's 2 into evidence.

4 MS. COLEMAN: No objection.

5 THE COURT: Without objection.

6 (Applicant's Exhibit No. 2, evidence property
7 receipt, received into evidence.)

8 BY MS. ZMROCZEK:

9 Q. Okay. And that piece of paper which has been
10 handed up to Judge Hood, that is an evidence
11 property receipt that you had received in
12 discovery, right?

13 A. Yes, ma'am.

14 Q. And one of the motions that you had asked
15 your attorney to file and argue was to suppress the
16 fingerprint evidence, correct?

17 A. Yes, ma'am.

18 Q. And that was, one, because the prints that
19 they used to match it was off of a charge for which
20 you'd been acquitted?

21 A. Yes, ma'am.

22 Q. And from which the solicitor's office had
23 been recused?

24 A. Yes, ma'am.

25 Q. And then the second reason you said was that

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1 you had an issue with the chain of custody, right?

2 A. Yes, ma'am.

3 Q. And one of your issues -- I know that he has
4 a copy of it. I'm going to hand you an unmarked
5 copy. So, what were one of the issues that you had
6 with the receipt?

7 A. The issue on the receipt is the investigator
8 officer, Mr. Clay Adams, who alleged to have
9 identified my print, on May the 11th his signature
10 is nowhere on the chain of custody showing that he
11 had possession of this evidence.

12 Q. And Mr. Adams, Mr. Clay Adams is the one who
13 testified to this evidence, correct?

14 A. Yes, ma'am.

15 Q. And, Your Honor, I'm referring to in the
16 trial transcript beginning on page 1 -- well, it's
17 136 on the trial transcript and 171 on the
18 appellate transcript. They provided me the
19 appellate transcript, so I'm not really sure which
20 one, which one they provided you.

21 MS. COLEMAN: You probably have the
22 appellate.

23 THE COURT: Okay.

24 MS. COLEMAN: So that would be 171, Your
25 Honor.

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1 BY MS. ZMROCZEK:

2 Q. And so, the property receipt that you
3 received from your -- in your motion of
4 discovery --

5 A. Yes, ma'am.

6 Q. -- right, didn't list Mr. Adams anywhere on
7 here, correct?

8 A. Correct.

9 Q. But it did list that you were already
10 identified as the suspect, right?

11 A. Yes, ma'am, it did. The original copy shows
12 that I was identified. The evidence was stored in
13 ID only.

14 Q. And Mr. Adams was nowhere written on -- so
15 that was one of the bases for you to ask the
16 attorney to make those motions, correct?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. And, when -- did your attorney discuss this
19 with the Court in trial?

20 A. Yes. Right before trial I had a pretrial
21 hearing. And he put the Court on notice that he
22 had a motion to suppress based on the chain of
23 custody evidence.

24 Q. And what, and what --

25 A. The Courts told him that, they informed him

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1 that he could make this motion when the State tried
2 to introduce it as evidence at trial.

3 Q. And so, what -- so, that was prior to Mr. --
4 in your understanding, that was prior to Mr. Adams
5 getting up to testify, correct?

6 A. Yes, ma'am?

7 Q. And was that done?

8 A. No, ma'am.

9 Q. Okay.

10 A. He never objected. Never made his motion.

11 Q. And you talked about that they relied on
12 evidence. So was it the fingerprints? Did you
13 have any of these discussions with your appellate
14 counsel?

15 A. Yes, ma'am.

16 Q. Okay. And what kind of discussions did you
17 have with your appellate counsel regarding your
18 concerns for appeal?

19 A. All the issues that we are speaking on today
20 except for the order to recuse.

21 Q. Okay. So recuse and the fingerprints?

22 A. Yes, ma'am.

23 Q. And, did your appellate counsel raise -- he
24 didn't raise the accuse -- or, excuse me, the
25 recuse issue in front of the trial court, did he?

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1 A. No, he, he did an Anders brief to be relieved
2 because he didn't see no merits in my case.

3 Q. So he did an Anders brief, but he did argue
4 the testimony as to the fingerprints based on the
5 limited training that the --

6 A. Yes, ma'am.

7 Q. -- that the expert that was qualified had,
8 correct?

9 A. He was not certified.

10 Q. Okay. So that was the only thing that he
11 argued on your --

12 A. Yes, ma'am.

13 Q. -- appellate brief? Okay. And did you have
14 any contact with your appellate attorney after
15 that?

16 A. No, ma'am.

17 Q. After he filed the Anders brief?

18 A. No, ma'am.

19 Q. So going back to the case that, the trial
20 that we had. How often did you meet with
21 Mr. Hayes?

22 A. I'm not for sure how many times that we -- he
23 came to meet with me because all our meetings went
24 sour. All of them went terrible because he was,
25 like, you know, he was understanding -- he seen

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1 where the prosecution was acting out of order, but
2 he refused to do anything about. I even tried to
3 have him fired as my attorney to obtain another
4 attorney but the Court shot me down. They turned
5 it down.

6 Q. Okay.

7 A. But every time he came to see me we argued
8 about this, especially about the motion because I
9 asked him to file a motion to suppress the evidence
10 because he's telling me that the State's not
11 supposed to have this but he refused to file a
12 motion. So we argued about that.

13 Q. And so your biggest issue with him was always
14 this fingerprint card?

15 A. The fingerprint card, basically, yes, ma'am.
16 Yes, ma'am.

17 Q. Okay. All right. And you felt like
18 Mr. Hayes wasn't arguing those motions for you?

19 A. Right.

20 Q. And did Mr. Hayes ever provide you a copy of
21 that order that he -- do you know if he was aware
22 of it?

23 A. Which order?

24 Q. The order that we handed up recusing the
25 Second Circuit Solicitor's Office?

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1 A. No, ma'am.

2 Q. Okay. And during the trial did you remind
3 Mr. Hayes to object -- to make that motion to renew
4 or make that motion again during trial about the
5 fingerprints and --

6 A. Yes.

7 Q. -- the origination of them?

8 A. Yes, ma'am. Because -- you're talking about
9 the fingerprints or the chain of custody?

10 Q. Chain of custody. Sorry.

11 A. Yes, ma'am. Because the State introduced
12 into trial a chain of custody report, evidence that
13 was never provided to me or my attorney prior to
14 trial. They introduced into trial another chain of
15 custody that had an added signature on it that was
16 not on the original copy of the chain of custody
17 that was provided to us.

18 Q. So the evidence that they -- the chain of
19 custody that they entered in the trial, had you
20 ever seen that before?

21 A. No, ma'am.

22 Q. Prior to it being handed up at trial?

23 A. Never. Me or my attorney, because my
24 attorney admitted to me right then that they never
25 handed him the chain of custody but he still

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1 refused to make his motion.

2 Q. So Plaintiff's Exhibit 2, that chain of
3 custody was the only one that you had ever
4 received?

5 A. Yes, ma'am.

6 Q. Okay.

7 A. And the chain of custody that I did receive
8 was the same chain of custody that was presented
9 when I had my preliminary hearing.

10 Q. I'm sorry?

11 A. And the chain of custody that I did receive
12 was the same chain of custody that they presented
13 in court when I had my preliminary hearing. There
14 was never no other chain.

15 Q. So Defense {sic} Exhibit 2 was the same one
16 that they admitted into Court but it had an
17 additional signature on it? I mean, I'm sorry,
18 Plaintiff's Exhibit 2.

19 A. In trial?

20 Q. In trial.

21 A. In trial they came up with a different
22 receipt that we never seen, that had an added
23 signature.

24 Q. That had an added signature?

25 A. Yes, ma'am, right. And as you can see, the

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1 original copy of the chain of custody that we had
2 shows that. The investigator had to write this on
3 the chain of custody on or after May 11th after he
4 claimed he identified that print. At the time he
5 wrote that his signature was nowhere on the chain
6 of custody.

7 Q. Okay. And, I want to talk about one of the
8 things that you discussed in trial was that -- I'm
9 sorry. I'm sorry. Let me -- okay. Yeah.

10 And had you asked -- had you asked your
11 attorney to look into the latent print card
12 destruction and how that had -- before y'all got to
13 trial --

14 A. Yes, ma'am.

15 Q. -- did you ask him to explain to you why that
16 latent print card wasn't destroyed?

17 A. He told me that I never did an application
18 for expungement order. So that's why he refused to
19 do the motion and all. But then later after my
20 trial, because this evidence was also used against
21 me in another case, and Judge Early found and ruled
22 that I was correct that this evidence should have
23 been destroyed pursuant to the statute when I was
24 acquitted on that charge.

25 Q. And that's the case that Mr. Boozer --

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1 A. He told me the State's saying the same thing,
2 that I didn't do an expungement order and Mr. Early
3 let them know that there's nothing in the language
4 of the statute that says that the mandates are in
5 any way contingent on inactions by me. So he
6 explained that.

7 Q. All right. Thank you. And I think that
8 we'll segue now into Mr. Boozer's case, Your Honor.
9 And so that's all the questions that I have for him
10 on this case.

11 THE COURT: Anything else you want to say
12 about your trial?

13 THE APPLICANT: Yes. I had another issue
14 dealing with a stipulation.

15 THE COURT: Okay.

16 THE APPLICANT: The State never proved each
17 and every element of the offense or charge. They
18 charged me with a burglary because they said I had
19 a prior offense -- I mean, a prior charge of
20 burglary. But they never produced any evidence.
21 They did a stipulation. The stipulation was
22 never -- they signed the stipulation after my trial
23 had already started, after we had picked our jury.
24 I never seen the stipulation. The stipulation was
25 never provided to the jury during their

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1 deliberation. It was a Court Exhibit only and it
2 stayed with the Judge. It never --

3 THE COURT: Okay.

4 THE APPLICANT: So that was the other thing.

5 MS. ZMROCZEK: And that's something you
6 didn't agree to?

7 THE APPLICANT: Right. I never agreed to it.

8 MS. ZMROCZEK: Okay. Thank you. Thank you,
9 Your Honor.

10 THE COURT: Mr. Boozer?

11 MR. BOOZER: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. BOOZER:

14 Q. Mr. Cave, how are you doing?

15 A. I'm doing fine, sir.

16 Q. Good. I'm going to stay right here. Can you
17 see me from where you are?

18 A. Yes, sir.

19 Q. You can hear me okay?

20 A. Yes, sir. Yes.

21 Q. Mr. Cave, now following this trial that
22 you've already been testifying about where
23 Ms. Zmroczek is representing you in regards to that
24 PCR, did you then have a guilty plea in another
25 case?

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1 A. Yes, sir.

2 Q. Okay. When was that?

3 A. I'm not for sure the exact date.

4 Q. And that's fine, but would you agree with me
5 that it was sometime in September, 2012?

6 A. Yes, sir.

7 Q. And did you actually -- was it -- what's your
8 understanding, was it an Alford plea?

9 A. Well, I was at court to go to trial. I was
10 supposed to be having a trial. When I got to court
11 for trial, the State, the solicitor's office never
12 provided me with no evidence in my motion to
13 discovery. I brought this to the Judge attention
14 and the Judge, the Court never ordered them to
15 provide me with this information. So I had no
16 other alternative but to try to take an Alford plea
17 to escape from catching a life sentence because my
18 attorney was, like, you know --

19 Q. And let's get to that in a second when we
20 talk about your allegations.

21 A. Okay.

22 Q. But let's go back a little bit in time. In
23 2008, you had testified earlier that you had been,
24 you were acquitted in a trial on a burglary first
25 where the alleged victim was someone who worked for

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1 the solicitor's office?

2 A. Yes, sir.

3 Q. Did you have any other trials in which you
4 were either acquitted or found not guilty for --

5 A. Yeah.

6 Q. Hang on a second. Hang on a second.

7 A. Yes, sir.

8 Q. Let me finish my question.

9 Did you have any other trials during that
10 year or sometime around that time where you were
11 either found not guilty or acquitted or something
12 happened?

13 A. Yes, sir.

14 Q. Okay. Tell us about that.

15 A. I had two trials; one for the solicitor's
16 office, the other one was for the Mayor of Aiken
17 son.

18 Q. Okay. Were those tried together or separate?

19 A. No, they was tried separately. And both of
20 them was tried by the Attorney General's Office. I
21 had a mistrial with one, and they decided to
22 dismiss the charges. They was not going to re-try
23 me on that. So they dismissed them charges.

24 Q. And so that's the case that's different from
25 the case involving the solicitor?

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1 A. Yes, it's -- yes, yes.

2 Q. Okay. Who was alleged to have been the
3 victim in this case?

4 A. The mayor -- a relative of the Mayor of
5 Aiken.

6 Q. And your understanding is that the Attorney
7 General's Office prosecuted both of those cases?

8 A. Yes, sir.

9 Q. Now fast forward to this case in which you
10 had the plea in, the Alford plea. Who was alleged
11 to have been the victim in that case?

12 A. A police officer by the name of Jeffrey
13 Nations.

14 Q. Okay. A police officer where?

15 A. Was with, I think, Aiken County.

16 Q. Okay. Now you've made a number of
17 allegations with regard to your plea in your
18 original application. And I want us to walk
19 through those. Okay?

20 A. Yes, sir.

21 Q. You've alleged that your plea was
22 involuntarily entered because you felt you were
23 forced to take a plea against your will because the
24 Court abused its discretion when it decided -- when
25 it denied your motion to suppress evidence. Is

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1 that one of your allegations?

2 A. Yes, sir.

3 Q. Okay. If you would, explain what you mean by
4 that.

5 A. Well, it was dealing with the same evidence
6 that they used from that prior trial that I was
7 found not guilty on.

8 Q. What evidence are you talking about?

9 A. The fingerprint card from the arrest and
10 booking record of that prior charge.

11 Q. Okay. How was that used with your case that
12 you ended up entering the Alford plea?

13 A. They used that card to -- they initially used
14 that card for the -- to charge me with that crime,
15 the same as the other. They say that my print
16 matches the print that was on that fingerprint
17 card.

18 Q. Okay. And who was your lawyer at that time
19 for your plea?

20 A. Mr. Katonak.

21 Q. Was he appointed or retained to represent
22 you?

23 A. Appointed.

24 Q. Did Mr. Katonak actually make a motion with
25 regard to trying to keep any evidence out or what's

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1 your allegation with that?

2 A. Yes, sir. The same as I asked Mr. Hayes to
3 make, do an order to suppress. I asked him to do a
4 order to suppress that evidence. And he did a
5 order to suppress but his order to suppress was to
6 suppress the identification evidence that they
7 received after I was already arrested for this
8 charge. The State excluded the evidence from where
9 they used that fingerprint card and they only used
10 the identification that they did two months after
11 my arrest.

12 Q. Okay. So y'all -- did you actually proceed
13 to a trial initially in that case?

14 A. No. I was supposed to be going to trial but
15 the only evidence that I received in my motion to
16 discovery was the identification where I was
17 identified two months later. It was nothing else
18 in my motion to discovery so I couldn't go to trial
19 because I couldn't prepare a defense to defend
20 myself.

21 Q. What do you think your lawyer, Mr. Katonak,
22 should have done?

23 A. He should have got this evidence that was not
24 in my Rule Five. We never seen no fingerprints
25 from the crime scene, no chain of custody from

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1 where they collected no evidence, no investigative
2 report. There's no evidence showing where my print
3 was identified at the time that they arrested me
4 for that trial -- for that charge.

5 So I felt that he should have at least got
6 this evidence before, you know, he made a ruling
7 that, you know, because he told me if I go to trial
8 he felt like I was going to get life. And I don't
9 understand how he could make the allegations
10 without seeing the evidence that they had against
11 me.

12 Q. Let's kind of step back a little bit. When
13 did you -- how many times did you meet with
14 Mr. Katonak prior to your plea?

15 A. I'm not, I'm not for sure how many times we
16 met.

17 Q. Did you meet with him prior to the plea?

18 A. Yes, sir. Yes, sir.

19 Q. Okay. What did y'all discuss, if you can
20 recall, in any of your meetings?

21 A. Well, we discussed about the fingerprint
22 evidence, about them, you know, violating Section
23 17.4 of the South Carolina Code of Laws. And, we
24 discussed about the evidence, because when I was
25 here before I took the plea, when I first brought

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1 this to the Court's attention that I was taking
2 this plea because I never seen no evidence against
3 me, the Judge told them to just call my case for
4 trial. So me and Mr. Katonak went back there and
5 we talked and I explained to him about this
6 evidence.

7 He went and he was supposed to have been
8 talking to the solicitors about getting this
9 evidence. When he came back to see me, he came
10 back and told me that they agreed to accepting my
11 plea for a Alford plea. They still never provided
12 me with no evidence and -- in this case. So I had
13 to take a plea. If I wouldn't have, I was going to
14 get life in prison.

15 Q. Have you seen any evidence since your plea
16 that you didn't review with Mr. Katonak?

17 A. No. I still was never provided with no
18 evidence from that case.

19 Q. You got some other allegations that I want to
20 walk through those. You've also alleged under your
21 involuntary plea -- that you feel that your plea
22 was involuntary due to the fact the prosecution
23 held material evidence from your Rule Five
24 materials.

25 A. And this --

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1 Q. Is that what you're talking about?

2 A. Yes, sir. Yes, sir.

3 Q. Okay. Now, you've also got a couple of
4 claims of ineffective assistance of counsel. You
5 say that counsel failed to obtain and review
6 discovery material that he knew the prosecution
7 would rely on.

8 A. Yes, sir.

9 Q. What evidence are you talking about?

10 A. The chain of custody report showing where the
11 State collected evidence. No fingerprints were
12 ever seen where they say they obtained fingerprints
13 from the crime scene. The only evidence was in my
14 motion to discovery was showing that my
15 fingerprints matched two months after my arrest.
16 They didn't even show me where they even had a
17 probable cause to arrest me for this charge. They
18 said that they had a match but it's not in my
19 motion to discovery. Nothing's in my motion to
20 discovery.

21 Q. You've also got an allegation -- you may have
22 touched on this, but please explain it more if you
23 need to, that your lawyer was ineffective for not
24 filing the proper motion to suppress. Counsel was
25 asked to file a motion to suppress fingerprint

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1 card.

2 A. Yes, sir. Because my argument was based on
3 this fingerprint card because this is what they
4 used to arrest me. In that case they excluded all
5 evidence of that fingerprint card.

6 Q. And when --

7 A. And they --

8 Q. -- you're talking about the fingerprint card,
9 you're referring back to --

10 A. The prior fingerprint card from when I was
11 found not guilty at trial.

12 Q. And it's your opinion that under the South
13 Carolina statutes that that, that material should
14 not have ever been used again for any of your
15 cases?

16 A. No, sir, because up under 17-1-40 of the
17 South Carolina Code of Laws it says that all
18 evidence pertaining to that charge must be
19 destroyed.

20 Q. Okay. Now you've also got an allegation that
21 your lawyer was ineffective for advising you to
22 take a plea stating that this was your only chance,
23 and in this case was -- your only chance was to
24 plea and then he handled the appeal against the
25 Court's decision which he failed to properly advise

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1 you that at a plea you would surely receive life in
2 prison.

3 A. Yes, sir.

4 Q. Please explain that to the Court.

5 A. Well, like it shows in my trial transcript,
6 he felt that, you know, the State had a strong case
7 against me which I still don't understand how he
8 felt that without seeing the evidence. And he felt
9 that this plea would be my only, my best option.
10 So I had to take that plea.

11 Q. Okay. Now, you also have some claims that
12 you've alleged prosecutorial misconduct?

13 A. Yes, sir.

14 Q. And let's just go through one by one the ones
15 that you've alleged.

16 A. Okay.

17 Q. You've alleged that the prosecution did not
18 act in accordance with the laws and you refer back
19 to 17-1-40?

20 A. Yes, sir.

21 Q. Is that one of your claims?

22 A. Yes, sir, because they violated that statute
23 and illegally obtained evidence to be used against
24 me. That's one of the claims.

25 Q. Now you also have another allegation that

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1 you've alleged where you say the prosecution also
2 showed misconduct by violating the rules of
3 procedure by withholding material evidence from
4 your discovery material.

5 A. Yes, sir.

6 Q. Explain what -- explain that to the Court.

7 A. Well, like I said, it was nothing in my
8 motion to discovery. So the State, they withheld
9 all evidence against me. Either they withheld it
10 or they exclude it. Either way it was not in my
11 motion to discovery.

12 Q. All right. Now you've also got the
13 prosecution showed misconduct by obtaining a
14 warrant for your arrest without probable cause.
15 Please explain that allegation.

16 A. There's nothing in my record showing where
17 they had a probable cause to arrest me. I know
18 that they said they arrested me because my print
19 was a match but the only evidence showing that my
20 print was ever identified is two months after my
21 arrest.

22 Q. Let me ask you this. Did you ever discuss
23 having any sort of preliminary hearing with
24 Mr. Katonak?

25 A. No, sir. I hadn't -- already had my

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1 preliminary hearing for both charges.

2 Q. For this case?

3 A. For that case.

4 Q. Was someone representing you?

5 A. Mr. Hayes, David Hayes represented me.

6 Q. Was Mr. Hayes initially representing you on
7 all of this?

8 A. Yes, sir. He was over both my charges.

9 After my trial he asked to be relieved for a
10 conflict of interest, but it already was a conflict
11 of interest before he even represented me in the
12 first trial. So he asked to be excused and that's
13 when the Court excused him and gave me Mr. Katonak.

14 Q. Okay. So let me get this straight.

15 Mr. Hayes was representing you with regard to the
16 charges you faced at that trial but also with
17 regard to this charge --

18 A. Yes, sir.

19 Q. -- that you pled to?

20 A. Yes, sir.

21 Q. And, he was relieved after the trial of
22 this --

23 A. After my first trial.

24 Q. -- after his representation on this charge?

25 A. With Ms. Aimee case. After I had my trial

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1 and I was convicted, then he removed his self.

2 Q. Was there a hearing held or how was that
3 done?

4 A. I received some papers that, you know, they
5 was appointing me Mr. Katonak because my counsel
6 asked to be relieved because of a conflict of
7 interest.

8 Q. Okay. You also have an allegation that the
9 prosecution showed misconduct by using illegal
10 evidence to charge, arrest, indict and convict you,
11 used evidence for the charge which you were found
12 not guilty to. Have we already discussed that?

13 A. Yes. That's still dealing with the violation
14 of 17-1-40.

15 Q. Now by amendment you've alleged that your
16 lawyer was ineffective for failing to make a motion
17 to have the solicitor's office recused from
18 prosecuting your case. Is that also one of your
19 allegations?

20 A. Yes, sir.

21 Q. Okay. And I know you've touched on that with
22 regard to your trial aspect. But as far as the
23 plea, explain to the Court what you mean by that
24 and why you feel like your lawyer should have made
25 such a motion.

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1 A. Because he seen all the misconduct that was
2 being done by the solicitor's office and all this
3 conduct was being done in connection to that prior
4 charge that involves their office. So I felt that
5 my attorney should have did a motion to recuse them
6 to prevent them from the unlawful misconduct that
7 was shown towards me.

8 Q. Did you ever have any discussions with
9 Mr. Katonak about the order that's already been
10 marked as Plaintiff's Exhibit 1 recusing the
11 solicitor's office?

12 A. No, sir.

13 Q. Okay. Why not?

14 A. Because -- I remember when I had the trial in
15 2008, I remember that we did an order to recuse the
16 Second Circuit Solicitor's Office. And it just, it
17 slipped my mind at that time. So this evidence --
18 Ms. Aimee, she got in touch with the other attorney
19 that I had and he presented her with that order so
20 after I got that order that's where we amended it
21 to my application.

22 Q. What -- have you reviewed the order?

23 A. Yes, sir.

24 Q. What's your -- is your interpretation of it
25 that the solicitor's office was recused from

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1 prosecuting you for anything or tell us what your
2 opinion is.

3 A. The order says that they are recused from
4 prosecuting me for any charges or indictments that
5 are alleged to be related to that prior charge but
6 not only alleged to be related to that prior charge
7 but for any charges or indictments that was part of
8 a pattern of criminal activity which also included
9 that prior charge.

10 Q. Let me ask you this. Obviously there was
11 what's called an Alford plea in your case. Why was
12 it that you went in and entered this plea to this
13 charge?

14 A. I had no other choice, no other choice
15 because if I wouldn't have took that plea I was
16 going to get life in prison. And they made this
17 clear to me. They made this known to me. And I
18 couldn't go to trial because I couldn't prepare no
19 defense. I wouldn't know how to impeach the
20 witnesses the State was using against me. So I had
21 to take that plea.

22 Q. Do you recall at your plea -- and, Your
23 Honor, I'm referring to the plea transcript page
24 8. Do you recall the Court asking you, the Court
25 goes through a litany of things with you and asking

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1 you do you understand all of that. You indicate on
2 line eight page 8: No, sir. The Court asks you:
3 Well, what don't you understand. And you said: I
4 didn't understand the part about me agreeing that I
5 seen all the evidence because I haven't seen no
6 evidence. I'm taking this plea because I really
7 don't have no other alternative to escape receiving
8 a life sentence. And the Court says: All right.
9 Step down. We'll call your case.

10 A. Yes, sir.

11 Q. And then the plea resumes after that. What
12 were you -- why were you saying that?

13 A. At that time?

14 Q. Yes, sir.

15 A. Because I, I wanted the Court to know that I
16 didn't have -- that I was not taking this plea
17 voluntary, that I had no choice but to take this
18 plea because I couldn't properly defend myself.
19 And the Court just told them to call me to trial.
20 So, I mean.

21 Q. Now, you received a 25-year sentence
22 concurrent with the trial conviction?

23 A. Yes, sir.

24 Q. Okay. And we didn't do this earlier but I'm
25 going to ask you some questions about that. Do you

ALBERT JAMES CAVE, JR., - DIRECT BY BOOZER

1 understand that, what we're doing here today?

2 A. Yes, sir.

3 Q. Why are we here?

4 A. We're here to, hopefully to correct these
5 issues that was --

6 Q. Okay. And you filed, obviously you filed an
7 application for post-conviction relief?

8 A. Yes, sir.

9 Q. With regard to the plea which I'm
10 representing you on, do you understand that really
11 the only thing the Court can do is basically send
12 this case back if this Court grants your
13 application basically to day one as though you
14 first got arrested on this charge and you would go
15 back and face this burglary first all over again;
16 do you understand that?

17 A. Yes, sir.

18 Q. Okay.

19 A. Yes, sir.

20 Q. And you certainly may have some defenses or
21 motions that you would want to make at that time
22 but do you understand that by doing that you are
23 exposing yourself to the 15-to-life? That's the
24 potential range on the burglary first. Do you
25 understand that?

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1 A. Yes, sir.

2 Q. And knowing that, do you still want to go
3 forward with your application?

4 A. Yes, sir, because I want a trial like I
5 wanted from the start.

6 Q. Okay. Mr. Cave, we've been through your PCR
7 application, your allegations. Is there anything
8 that we have not covered with regard to your
9 application or anything that you feel like your
10 lawyer should have done for you or anything that
11 you feel like your lawyer did for you but did
12 improperly, is there anything else that you want to
13 tell this Court?

14 A. No, sir.

15 MR. BOOZER: Okay. Thank you, Mr. Cave.
16 That's all the questions I have.

17 THE APPLICANT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MS. COLEMAN:

20 Q. Good morning, Mr. Cave. How are you?

21 A. All right. Fine.

22 Q. I've just got some questions for you. I'm
23 going to start with the trial.

24 A. Yes, ma'am.

25 Q. So this is Ms. Zmroczek's case with you and,

ALBERT JAMES CAVE, JR., - CROSS BY COLEMAN

1 we're talking about Mr. David Hayes who was your
2 attorney at trial.

3 How many times did you meet with Mr. Hayes
4 before your trial?

5 A. I'm not for sure how many times but he came
6 to see me a few times.

7 Q. Okay. Let me step over here, actually.

8 Do you recall reviewing discovery with
9 Mr. Hayes before the trial?

10 A. You're talking about going over my motion to
11 discovery material?

12 Q. Yes.

13 A. Yes, ma'am.

14 Q. Do you recall discussing possible defenses
15 with Mr. Hayes?

16 A. Mr. Hayes really never came with no defense.
17 He was basically going off the State's
18 technicalities because he said my whole case was
19 blotched. I guess he felt there was no need to go
20 over the defense so he just relied on the
21 technicalities done by the State.

22 Q. And did you give him any possible defenses to
23 look into or to investigate?

24 A. Yes, ma'am.

25 Q. Did you give your attorney any potential

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1 witnesses to investigate?

2 A. No, ma'am.

3 Q. As far as the evidence that you wanted
4 suppressed, is it just the fingerprints that we've
5 been discussing today?

6 A. The fingerprints and the chain of custody
7 report.

8 Q. Okay.

9 THE COURT: You're talking about this, right;
10 Plaintiff's Number 2?

11 THE APPLICANT: Yes, sir.

12 THE COURT: When you say chain of custody
13 report, that's what you mean?

14 THE APPLICANT: Yes, sir.

15 THE COURT: I just want to make sure I follow
16 you.

17 THE APPLICANT: Because it was two now, but
18 the other one we didn't know nothing about, the
19 other chain of custody. Everything was based on
20 that chain of custody right there.

21 THE COURT: I apologize, Ms. Coleman.

22 THE APPLICANT: Yes, sir.

23 MS. COLEMAN: No, that's fine.

24 Q. You testified that your attorney stipulated
25 to your prior burglary charges. Did he ever

ALBERT JAMES CAVE, JR., - CROSS BY COLEMAN

1 discuss this stipulation with you?

2 A. No.

3 Q. No?

4 A. No, ma'am. I found out about the stipulation
5 during trial because I wanted him to bring up the
6 issue about my past burglary because this happened
7 in 1986. It was 20-some years ago. So I wanted
8 the jury to know that, you know. They was trying
9 to make it seem like this was an ongoing thing and
10 I just wanted to show the jury it was 20-some years
11 ago.

12 Q. Right.

13 A. Yes, ma'am.

14 Q. So those prior burglaries would have come in
15 at trial anyways; is that right?

16 A. Yes, ma'am. They would have came in; yes,
17 ma'am.

18 Q. Okay. Let's go back to the date you were
19 arrested in 2008, January of 2008. Were you
20 arrested for possession of marijuana second?

21 A. Yes, ma'am.

22 Q. And were you arrested for resisting arrest
23 stemming from this January 2008 arrest? Were you
24 charged with that as well?

25 A. I don't -- I don't think I was resisting no

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1 arrest.

2 Q. Did you plead guilty to possession of
3 marijuana second on March 18th of 2010?

4 A. Yes, ma'am.

5 Q. And did you plead guilty to resisting arrest?

6 A. I don't think I had a resisting arrest.

7 Q. Okay.

8 A. And the marijuana, they stopped -- I was
9 stopped and -- to be arrested for the burglary
10 charge. Once they stopped me for the burglary
11 charge, they found me in possession of marijuana.
12 So after they arrested and booked me for the
13 burglary charge, they used them same prints to, as
14 to arrest and book me for the marijuana charge.

15 Q. Okay. So they used those fingerprints for
16 the marijuana charge as well?

17 A. Yes, ma'am. Yes, ma'am.

18 Q. Okay. Let's see. All right. I'm going to
19 move onto your guilty plea now. So, Mr. Boozer's
20 case with you. This is with Mr. Katonak when he
21 was your attorney.

22 A. Okay.

23 Q. How many times did you meet with Mr. Katonak
24 before your guilty plea?

25 A. I think I met with Mr. Katonak. He came to

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1 see me, and then we had a few phone calls. I
2 didn't see him no more until the day that I came
3 for my hearing, my court hearing.

4 Q. And did you review discovery with
5 Mr. Katonak?

6 A. Yes, ma'am.

7 Q. Over the plea?

8 A. Yes, ma'am.

9 Q. And Mr. Boozer brought this up earlier. At
10 the guilty plea, Judge Early actually stopped the
11 plea because you said you had not seen all the
12 discovery, the evidence against you, right?

13 A. Yes, ma'am.

14 Q. And he did not continue and start your plea
15 again until after you had discussed this issue with
16 Mr. Katonak; is that right?

17 A. Yes, ma'am.

18 Q. Did you give Mr. Katonak any possible
19 defenses to investigate for this charge?

20 A. Just basically, just saying the same defenses
21 that I was using on my other case.

22 Q. Did you give him any leads or witnesses to
23 investigate for these charges?

24 A. No, ma'am. There was never no witnesses.

25 Q. Okay. Do you remember waiving your

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1 constitutional rights, like, your right to a jury
2 trial and your right to remain silent, at the
3 guilty plea?

4 A. You talking about when I took the plea?

5 Q. Yes.

6 A. Yes, ma'am.

7 Q. Okay. Do you recall telling Judge Early that
8 you were satisfied with your attorney's services?

9 A. Yes, ma'am. But these -- this is -- this is
10 the procedure I had to go through in order for them
11 to accept the plea.

12 Q. Uh-huh.

13 A. So I had to tell the Courts that.

14 Q. And you had no complaints against Mr. Katonak
15 at the guilty plea, right?

16 A. Not to the Court. I didn't present it to the
17 Court.

18 Q. Okay. Do you remember telling the judge that
19 no one was promising or threatening you to plead
20 guilty?

21 A. Yes, ma'am. Which is, once again, these are
22 procedures -- when they ask you questions -- like,
23 when he started asking me questions the first time
24 and I explained about not seeing the evidence, he
25 said -- well, once I went back and they explained

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1 to me that I would have to agree to them, agree to
2 them statements in orders for him to accept my
3 plea, other than that they wouldn't accept my plea.

4 Q. Okay. And you pled guilty under North
5 Carolina v. Alford, right?

6 A. Yes, ma'am.

7 Q. Do you remember telling Judge Early that you
8 understood that an Alford plea is treated just like
9 a guilty plea?

10 A. Yes, ma'am, because it's a guilty plea but
11 under up under Alford, I know that you're not
12 really pleading guilty to the charges, you're just
13 pleading guilty because you don't think you can
14 beat the evidence that the State has against you.
15 But an Alford charge is not admitting guilt to that
16 charge.

17 Q. Just one moment. And Mr. Boozer has already
18 asked you this but if you go to trial on this
19 charge that you pled guilty to you face a possible
20 sentence of life without parole. Do you want a
21 trial on these charges?

22 A. Yes, I do.

23 Q. And one last question. I'm sorry. I'm
24 backtracking.

25 Back to the trial with Mr. Hayes. Did you

ALBERT JAMES CAVE, JR., - REDIRECT BY ZMROCZEK

1 get along with Mr. Hayes by the end of the trial?

2 A. Me and Mr. Hayes did not get along before the
3 trial.

4 Q. Okay. So you didn't have a good relationship
5 with him?

6 A. No, ma'am.

7 MS. COLEMAN: Okay. Thank you. No further
8 questions.

9 THE APPLICANT: Yes, ma'am.

10 MS. ZMROCZEK: Just a follow-up question.

11 One, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. ZMROCZEK:

14 Q. As far as going back to our trial, what
15 you're asking the Court to do is to grant you a new
16 trial for the case for which I'm representing you
17 on, right?

18 A. I would like to have a new trial without this
19 illegally-obtained evidence and without the Second
20 Circuit Solicitor's Office.

21 Q. And understand that he can't make evidentiary
22 decisions, but you're asking the Court to grant a
23 new trial so that someone can look at, specifically
24 this, the prosecution aspect of it and then --

25 A. Make sure that I have --

1 Q. -- to properly identify the fingerprint
2 evidence?

3 A. Yes, ma'am.

4 Q. Okay. You're not asking the Judge to make an
5 evidence ruling?

6 A. Right.

7 Q. Okay. I wanted to be clear.

8 MR. BOOZER: No questions, Your Honor.

9 MS. COLEMAN: Nothing further from this
10 witness.

11 THE COURT: Do you understand that if I grant
12 you a new trial, I do not have the power in my
13 capacity as your post-conviction relief application
14 judge to excuse the Second Circuit Solicitor's
15 Office from your case?

16 THE APPLICANT: Yes, sir.

17 THE COURT: And do you understand that if I
18 grant your post-conviction relief application, I do
19 not have the power as your PCR judge to exclude the
20 fingerprints or the exhibit list? That's a
21 decision that your trial, your new trial judge, if
22 I granted your PCR, would have to make.

23 THE APPLICANT: Yes, sir. Yes, sir.

24 THE COURT: So you could -- do you understand
25 that on your trial, the case that Mr. Hayes

1 represented you on --

2 THE APPLICANT: Uh-huh.

3 THE COURT: -- if I grant that, you go back
4 to day number one and you're back to facing life.
5 Is it a burglary first?

6 THE APPLICANT: Yes, sir.

7 THE COURT: You're back to facing life and
8 that judge can look at you and say: The
9 fingerprint card's admissible and the Second
10 Circuit Solicitor's Office is handling the case,
11 and there's nothing I can do about it.

12 THE APPLICANT: Yes, sir. Can I respond to
13 something?

14 THE COURT: Sure. I want to make sure you
15 understand what you're doing.

16 THE APPLICANT: Yes, sir. Even if that
17 happened because if they used this evidence in
18 trial against me, then I have a right to show the
19 jury in my defense how the State's being allowed to
20 use evidence. But, yes, sir, I understand.

21 THE COURT: And I'm not saying you don't.
22 I'm just saying, I want to make sure that you
23 understand if I decide to grant your application
24 it's not going to say the Second Circuit
25 Solicitor's Office can't prosecute your case --

1 THE APPLICANT: Right, right.

2 THE COURT: -- and this evidence is
3 inadmissible. It's just going to say that I find
4 you've had a violation of your constitutional
5 rights and therefore I'm granting you a new trial.

6 THE APPLICANT: Yes, sir. I understand.

7 THE COURT: You understand and you're willing
8 to take that risk?

9 THE APPLICANT: Yes, sir, I am.

10 THE COURT: Okay. That's all the questions I
11 have. Do you want to ask him anything else,
12 Ms. Coleman?

13 MS. COLEMAN: No, Your Honor.

14 THE COURT: Ms. Zmroczek?

15 MS. ZMROCZEK: No, Your Honor. That's what I
16 was trying to clarify.

17 THE COURT: Mr. Boo -- Mr. Boozer. I'm
18 sorry. I almost called you Booker. Mr. Boozer,
19 anything you want to ask this young man?

20 MR. BOOZER: I've been called worse, Your
21 Honor. No further questions.

22 THE COURT: Thank you, Mr. Cave.

23 THE APPLICANT: Thank you, sir.

24 THE COURT: Who's next?

25 MS. ZMROCZEK: I don't have any additional

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1 witnesses. It's my understanding that Mr. Boozer
2 does not have any additional witnesses.

3 THE COURT: Is that right, Mr. Boozer?

4 MR. BOOZER: That's correct, Your Honor.

5 THE COURT: Ms. Coleman?

6 MS. COLEMAN: Yes, Your Honor. The State
7 calls David Miller.

8 THE COURT: All right. Come on forward,
9 Mr. Miller.

10 DAVID W. MILLER, having been duly sworn, was
11 examined and testified as follows:

12 THE CLERK: Have a seat in the witness box.
13 State your full name for the Court.

14 THE WITNESS: Deputy Solicitor David Miller,
15 M-I-L-L-E-R.

16 DIRECT EXAMINATION

17 BY MS. COLEMAN:

18 Q. Good morning, Mr. Miller. How are you?

19 A. Good morning.

20 Q. Where are you currently employed?

21 A. The Second Circuit Solicitor's Office.

22 Q. How long have you been employed there?

23 A. Since January of 2009.

24 Q. Were you the solicitor who prosecuted the
25 case of Albert James Cave, Jr.?

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1 A. Yes.

2 Q. And he -- there was a trial in this case and
3 a guilty plea that's at issue here. Did you
4 prosecute both of these cases?

5 A. I did.

6 Q. Starting with the trial, will you tell us
7 what the facts of this case were?

8 A. Essentially in May of 2011, Mr. Cave went
9 into the home of a family in North Augusta and he
10 stole some items from that home. Whenever it was
11 discovered that a burglary had occurred the
12 arrest -- or, the officer who responded to the
13 scene was a deputy, Deputy Costic. And he went
14 through the house with the victim and asked if
15 anything had been moved. And one of the things
16 that had been moved was a stack of papers that had
17 been taken off of a laptop so that the laptop could
18 be stolen.

19 Deputy Costic preserved those papers by
20 putting them into a bag and submitted them for
21 evidence or for fingerprint identification to the
22 Aiken County Sheriff's Office. And once there
23 Lieutenant Clay Adams developed some prints and
24 they were run through AFIS and they came back with
25 a match.

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1 Q. And as far as the guilty plea, the Alford
2 plea that he entered, can you tell us the facts of
3 these charges?

4 A. It's largely the same only this time it was a
5 home in the Warrenville area. An air-conditioning
6 unit had been removed and latent -- a window unit,
7 and latent prints from that window unit and the
8 window seal where that unit was removed from were
9 developed and somebody had gone into the home and
10 stolen a couple laptops and some other items.
11 Those prints were also -- latent prints were also
12 examined and there was a match made on those based
13 upon an AFIS hit as well. And the matches in both
14 cases were to the Defendant.

15 Q. Okay. From the trial. Did the Applicant's
16 attorney, Mr. Hayes, file Rule Five or Brady
17 motions in this case?

18 A. He did.

19 Q. Did you turn that material over to him?

20 A. We did.

21 Q. Was there any material that they requested
22 from you that you did not turn over?

23 A. There was none that we did not turn over.
24 Their Rule Five and Brady motions are generic.
25 There were some things that were not applicable,

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1 but there was nothing that was responsive to his
2 motion that we, or, in our knowledge, law
3 enforcement had that did not get turned over.

4 Q. Okay. The same question for the guilty plea
5 charges. Did Mr. Katonak file Rule Five or Brady
6 motions?

7 A. He did.

8 Q. And did you turn that material over to him?

9 A. We did.

10 Q. Was there anything that they requested that
11 you did not give to them?

12 A. No.

13 Q. Now you've already testified a bit about the
14 State's evidence in both the trial and the plea.
15 And there were fingerprints in both charges,
16 correct?

17 A. Both of the cases were prosecuted based
18 entirely upon the fingerprints.

19 Q. Okay. Now the Applicant has alleged that
20 the fingerprints were taken from a prior trial in
21 which he was found not guilty and was acquitted of
22 the charges. Can you tell us a little bit about
23 when you took the Applicant's fingerprints and what
24 charges they were used for?

25 A. On April 14th of 20 -- or, excuse me.

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1 January the 14th of 2008, Mr. Cave was arrested, as
2 he just testified, for a number of things. But
3 during his arrest for the burglary, a burglary that
4 had occurred on January the 7th of 2008, he was
5 found to be in possession of marijuana and he was
6 charged with resisting arrest. He was charged with
7 a litany of charges. I believe that there were 12
8 or 14 different charges that he was arrested for on
9 that day of January the 14th, 2008.

10 He remained incarcerated in the Aiken County
11 Detention Center until March the 18th of 2010, when
12 he pled guilty to the possession of marijuana
13 second offense and the resisting arrest charge from
14 that January 14th, 2008, arrest.

15 Q. Okay.

16 A. Before that guilty plea to those two charges,
17 he had a trial on January the 6th of 2010, on one
18 of his burglary charges. And after that trial the
19 jury found him not guilty.

20 And so as far back as I can recall in this
21 case, Mr. Hayes and then Mr. Katonak, both to me
22 and to the Court, has been saying the same argument
23 over and over and over again for Mr. Cave. But the
24 fact of the matter is, that fingerprint card from
25 his January 14th, 2008, arrest is the card that was

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1 used to compare his fingerprints to the latents
2 that were found in both of my cases. And as it
3 related to his burglary charge that he was found
4 not guilty on and any of the other charges that
5 were subsequently dismissed or nolle prossed or
6 whatever, he would have been entitled to have the
7 record of those charges taken out of the system,
8 expunged.

9 But the fact is he pled guilty to charges
10 from that arrest so there was never any
11 requirement, and even today he cannot go back and
12 apply for an expungement and get the record of his
13 arrest, to include his fingerprint card, that was
14 done on January 14th of 2008, removed from the
15 records because he pled guilty to charges from that
16 arrest.

17 He could certainly have his burglary charges
18 and any of the other charges that ended up being
19 dismissed or he was found not guilty on, any of
20 those charges he could have taken off of his rap
21 sheet, off of his record of arrest. But he can't
22 have that fingerprint card taken away.

23 And Mr. Hayes made the argument to me and I
24 made the argument back to Mr. Hayes and we went to
25 Judge Early pretrial and he made this argument

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1 before the Court and Judge Early said: No, I'm not
2 suppressing the fingerprints. For two reasons; the
3 first reason being, even if the fingerprints had
4 been -- even if the fingerprint card had been taken
5 out, Mr. Cave had 15 arrests in the State of South
6 Carolina.

7 Your fingerprints don't change over time.
8 Even if it hadn't been that card, that arrest card
9 that they happened to compare, it would have been
10 one of his other fingerprint cards that they
11 compared it to.

12 The second reason was, he wasn't entitled to
13 have that fingerprint card expunged, only the
14 charges he was found not guilty on.

15 And so, Judge Early ruled that the
16 fingerprint identification based on the card from
17 the 2008, January 14, 2008, arrest came in at the
18 trial. Subsequently Mr. Hayes was relieved as
19 counsel, Mr. Katonak was appointed. Mr. Katonak
20 came in and he filed a motion to suppress the
21 fingerprints. Again, the same argument that he's
22 made then, the same argument that he's making
23 today, the same argument that he was making before
24 the trial.

25 That motion was filed April 17th of 2012.

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1 The motion was heard May 14th of 2012. And Judge
2 Early filed his order denying the motion to
3 suppress on June the 20th. He signed it June the
4 20th, it was filed June the 21st of 2012.

5 And, so that -- the first, I guess, issue
6 with the fingerprint is that fingerprint card does
7 not legally go anywhere. Even if he had moved for
8 it to be expunged following his acquittal, it would
9 not have been expunged. It would not have been
10 taken out of the system because he pled to those
11 charges subsequently.

12 Second of all, and this is what we argued at
13 the motion hearing, we alleged that the expungement
14 required some affirmative act by the defendant
15 because the statute -- we don't start the
16 expungement process until the defendant comes in
17 and requests that it be expunged. Now we don't
18 charge anything for an expungement if there's a
19 dismissal or there's an acquittal, but it still has
20 to be a process started by the defendant.

21 That's where Mr. Cave seems to get confused,
22 because Judge Early in his written order denying
23 the motion to suppress in the plea case said --
24 found that -- quoting from the statute it says --
25 he quoted from the statute and he says, the

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1 defendant based, argues that based on the language
2 above his fingerprint record from his 2008 burglary
3 arrest that he was found not guilty on should have
4 been destroyed. The State alleges that the
5 provisions of the statute are not automatic and
6 that there's no obligation on the State to destroy
7 the records until the defendant makes application
8 for expungement pursuant to 17-22-910 et sec.
9 Judge Early found Section 17-1-40 does not contain
10 any language to indicate that its mandates are in
11 any way contingent on any action by the defendant.

12 Accordingly he found and ruled that the
13 defendant is correct that the arrest record,
14 including the fingerprint card from his 2008
15 burglary arrest, should have been destroyed
16 pursuant to the statute when he was acquitted on
17 that charge. However, because of what was next in
18 the order he then went on to say, the defendant has
19 15 prior arrests that resulted in at least 12 prior
20 convictions. Accordingly even if the fingerprint
21 card from the 2008 burglary charge had been
22 destroyed, there would have been 10 or more other
23 fingerprint cards with the same fingerprint images
24 on them for comparison. Obviously the defendant's
25 fingerprints would be the same on any card obtained

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1 during any of his arrests dating back to his first
2 arrest in 1986. And then he said, based on that
3 I'm saying it's inevitable discovery and the
4 State -- the fingerprints would not be suppressed.

5 We actually considered and talked about going
6 back and asking Judge Early to reconsider the
7 statement that the 2008 burglary arrest should be
8 expunged because you can't separate the two of
9 them. The 2008 burglary arrest, it's the same
10 card, it's the same fingerprint card as the 2008
11 resisting arrest and possession of marijuana. You
12 can't separate the two of them. You can't separate
13 charges.

14 But at the end we decided it really doesn't
15 make any difference because of the fact that he did
16 not suppress the fingerprints, and we were moving
17 forward with the plea at that time.

18 Q. Okay. Thank you.

19 As far as chain of custody goes for the
20 fingerprints, did you think there were any issues
21 with the chain of custody in this case?

22 A. I didn't think that there were any issues
23 with the chain of custody but I can say when
24 discovery is sent out to a defendant, and that
25 defense attorney says this is a trial, we start

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1 preparing the case for trial, one of the things
2 that we do and we did in this case is we always
3 invite defense attorneys to come in, look at the
4 evidence, see everything that's there, see
5 everything we've got.

6 In this case Mr. Hayes actually had a former
7 SLED agent who was an expert in fingerprint
8 identification go to Lieutenant Adams' office area
9 where these fingerprints were going to be looked at
10 by his expert and that he was allowed to see the
11 fingerprints and do all of that stuff.

12 But that's inside a secure, contained area.
13 And, I do not know whether they listed on the chain
14 of custody every time that they take it out or they
15 only list it on the chain of custody when they
16 actually remove it from that secure, contained area
17 where they do their examinations.

18 But it is -- in my experience, never happened
19 that when we send out the discovery to the defense,
20 in this case Mr. Hayes, that they have a complete
21 chain of custody because anything that happens with
22 that item, whether it gets sent to SLED or just
23 stays in play, eventually it's going to get removed
24 from evidence storage because it will be brought
25 for trial.

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1 And at that point in time the chain of
2 custody has to change. So we -- the last
3 opportunity for us to give them the completed chain
4 of custody is at the trial. Maybe it's a day
5 before the trial, but it's whenever that evidence
6 gets brought to us for the very last time.

7 So that is the normal course of business.
8 Certainly Mr. Hayes didn't indicate that he had any
9 problem with the chain. I didn't see any problem
10 with the chain. I understand why the chain that
11 was provided initially is incomplete because it
12 would have to be.

13 So, that's all I can tell you about the
14 chain. I had no idea that there was an issue with
15 that until just now.

16 Q. Okay. Thank you.

17 Moving onto the next issue. The Applicant
18 has submitted as their Exhibit 1, an order of
19 recusal from a prior case that he had which I
20 believe was the 2008 charge that you referred to
21 earlier. Was the order of recusal -- in your
22 opinion did it, did it apply to this case, to this
23 trial or to the guilty plea?

24 A. It is absolutely astounding to me how someone
25 can read that order that was issued in October of

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1 2008 and believe that Judge Williams or any Court
2 intended that completely unrelated charges with
3 completely unrelated victims that occur three years
4 after the issuance of the order would somehow
5 conflict the Second Circuit Solicitor's Office out
6 of the trial of the case.

7 You have to have such a tortured reading of
8 that order it is ridiculous. And, I had no idea
9 that the order existed. Lawrence Brown did not
10 work for this office when I came to work here in
11 2009. He was working somewhere else. He did not
12 work for the solicitor's office.

13 I was actually more familiar with the trial
14 of the 2008 charges because I'm good friends with
15 Aaron Walsh. I'm -- that was really the most I
16 knew about the case. It was an old case that
17 involved Lawrence Brown. And once there was an
18 acquittal in the case and the remaining charges in
19 March ended up getting dismissed or pled out, that
20 was the end of that as far as I knew.

21 And, frankly, whenever it came up that there
22 was this order that was even out there, I read the
23 order and I was, like, oh, well, I didn't know
24 about it but if you read it it doesn't make any
25 sense at all to say that that somehow conflicts our

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1 office out. If I knew about it, if I had known
2 about it beforehand I would have read that order
3 that said this doesn't conflict us out of the case
4 and we would have prosecuted it the same way.

5 Q. Was this order brought up at all at the trial
6 or at the guilty plea?

7 A. Never. The first time this order was brought
8 up was whenever I was informed by -- or testimony I
9 heard earlier that Ms. Zmroczek had filed a
10 misconduct allegation because we were prohibited
11 from trying her client.

12 Q. As far as the plea, the Alford plea, what do
13 you recall about plea negotiations with the
14 Applicant on those charges?

15 A. As far as the negotiations with Mr. Katonak?

16 Q. Yes.

17 A. When he first got appointed in the case he
18 came and talked to me about it after he had looked
19 at the discovery and he said: What can we do with
20 it. And I told him that my intention was to either
21 plead to burglary first for a concurrent time, or
22 in the alternative I retry the case as an LWOP
23 case. Mr. Cave certainly had a record to justify
24 it so that was what my intention was to do.

25 I did tell him in our first meeting, he's

DAVID W MILLER - DIRECT BY COLEMAN

1 made this argument about the fingerprints so many
2 times you're going to have to make that argument to
3 Judge Early or whatever judge it happened to be.
4 You're going to have to make the motion, but I'll
5 leave the offer open until you make the motion and
6 you have a chance to get a ruling on the motion.
7 And then if he doesn't take it then I'm going to
8 pull the offer and we're going to go to trial.

9 And so Mr. Katonak made the motion. And I
10 would note, Judge Early -- when the motion was made
11 at the trial, Judge Early didn't issue a written
12 order but because it had come up so much, by the
13 time he heard it again for the plea he actually
14 issued a written order. And I don't know that
15 anybody's made that order a part of the record in
16 this case yet.

17 So he issued a written ruling on that -- at
18 that second time when Mr. Katonak made it.

19 Q. So there was a pretrial hearing before the
20 guilty plea regarding these prints?

21 A. Absolutely. It was a couple months before
22 the guilty plea.

23 Q. Okay. Let's see.

24 Mr. Miller, is there anything else about
25 either of these, the trial or the guilty plea,

DAVID W MILLER - CROSS BY ZMROCZEK

1 regarding the allegations today that you think
2 should be known, just in general?

3 A. No.

4 Q. Thank you very much. No further questions.

5 MS. ZMROCZEK: Your Honor, I'm having marked
6 that order we keep referring to, just so we can
7 have a clean record.

8 (Plaintiff's Exhibit No. 3, Judge Early's
9 order, marked for identification.)

10 MS. ZMROCZEK: Thank you. May I approach,
11 Your Honor?

12 THE COURT: Sure.

13 CROSS-EXAMINATION

14 BY MS. ZMROCZEK:

15 Q. I'm showing you Plaintiff's Exhibit 3. Is
16 this the order that you were referring to that
17 hasn't been made a part of the record yet?

18 A. It is.

19 MS. ZMROCZEK: Okay. Your Honor, at this
20 time we would move Plaintiff's or Applicant's 3
21 in.

22 MS. COLEMAN: No objection.

23 THE COURT: All right.

24 MS. ZMROCZEK: Thank you.

25 (Plaintiff's Exhibit No. 3, Judge Early's

DAVID W MILLER - CROSS BY ZMROCZEK

1 order, received into evidence.)

2 BY MS. ZMROCZEK:

3 Q. Would you agree with me that on page 2 of the
4 bottom of that order it says that the State does
5 not argue or contest that the fingerprints came
6 from the burglary print card. If you read -- do
7 you have a copy of the order or do I need to give
8 it back to you?

9 A. You're talking about the footnote?

10 Q. Correct.

11 A. That is correct.

12 Q. The State doesn't contest it.

13 A. There's -- and that's still the State's
14 position. There is not a separate fingerprint card
15 for the burglary charge. It did -- it is the
16 fingerprint card that came from his burglary
17 arrest. It is also the fingerprint card that came
18 from his arrest on other charges that he pled
19 guilty to.

20 Q. And I want to talk about those other charges
21 he pled guilty to. The AG actually handled those
22 pleas as well, right?

23 A. Yes.

24 Q. And those were after this?

25 A. No.

DAVID W MILLER - CROSS BY ZMROCZEK

1 Q. Those were after his trial?

2 A. They were after his trial.

3 Q. After his acquittal?

4 A. Right.

5 Q. So at that point the AG was still prosecuting
6 on behalf of the Second Circuit Solicitor's
7 Office?

8 A. The AG prosecuted him for everything that was
9 related to his arrest, January of 2008.

10 Q. Okay. And you would agree with me that the
11 fingerprint card slash second -- possession second
12 offense came out of that 2008 charge? That's
13 evidence that came out of that charge; you would
14 agree with me on that?

15 A. It wasn't evidence that came out of a charge.
16 That fingerprint card was -- that fingerprint card
17 came from an arrest.

18 Q. Okay.

19 A. That's it.

20 Q. But that came from an arrest --

21 A. Okay.

22 Q. -- in 2008?

23 A. Correct.

24 Q. So that -- the evidence that y'all relied on,
25 that the State relied on in this trial -- and I'm

DAVID W MILLER - CROSS BY ZMROCZEK

1 just focusing on the trial not the plea -- in the
2 trial, the evidence that y'all relied on came out
3 of the 2008 arrest?

4 A. No, that is not accurate.

5 Q. Okay. So where did the fingerprint match
6 come from?

7 A. The fingerprint match that was used at trial
8 came from a 10-print card that was taken by
9 Lieutenant Adams at the jail about a week before
10 the trial.

11 Q. All right. Let me rephrase the question.
12 But to arrest him for that charge that he went to
13 trial --

14 A. Correct.

15 Q. -- that came out of 2008 arrest card?

16 A. No, it came -- it came based on a comparison
17 of his fingerprints with that arrest card --

18 Q. Right.

19 A. -- that came --

20 Q. From 2008?

21 A. Yes.

22 Q. Thank you. That's what I'm talking about.

23 So there was evidence that linked the two
24 cases at least. The probable cause for making the
25 arrest in his trial came from the 2008 match, hit;

DAVID W MILLER - CROSS BY ZMROCZEK

1 correct?

2 A. It came from the 2008 hit, yes.

3 Q. Correct. Okay. Thank you.

4 So there is some link to the 2008 case slash
5 2010 case, whatever, 2008?

6 A. There's -- yes.

7 Q. Okay. So to say that it's a tortured,
8 twisted reading, it's -- at least it's a legitimate
9 argument that someone should have made had anybody
10 known about this order, right?

11 A. I don't think that it is a legitimate
12 argument.

13 Q. Okay. But it's an argument that could have
14 -- you would have taken a position that a tortured,
15 twisted reading would say that they're not related
16 and the defense counsel could have taken another
17 position?

18 A. Could have?

19 Q. Could have.

20 A. You are.

21 Q. Right. Right. But I'm doing it under PCR.
22 What I'm saying is it wasn't even brought to the
23 Court's attention?

24 A. It wasn't.

25 Q. Okay. Thank you.

DAVID W MILLER - CROSS BY ZMROCZEK

1 A. Because none of the three attorneys involved
2 being me, Mr. Katonak, or Mr. Hayes knew anything
3 about the order.

4 Q. And when did you talk to Mr. Walsh about it?
5 That was after I brought it to the Court's
6 attention?

7 A. No. I never talked to Mr. Walsh about the
8 order.

9 Q. Oh, okay.

10 A. I was talking to Mr. Walsh as the case, as it
11 was being tried back in 2011, I guess -- or, 2010.
12 I'm sorry.

13 Q. So back in 2011 -- when this case was tried,
14 I think it was August 2011, right?

15 A. Correct.

16 Q. And you had at least talked to Mr. Walsh at
17 that time?

18 A. About the 2011 case?

19 Q. About -- no -- you were talking with
20 Mr. Walsh in 2011 about the previous case at least,
21 so you --

22 A. No.

23 Q. -- had knowledge -- when did you first learn
24 that there was a previous case prior to 2011?

25 A. When I was working here and we had a term of

DAVID W MILLER - CROSS BY ZMROCZEK

1 court going on and Aaron Walsh was coming in as a
2 defense attorney every morning and the AG's office
3 was prosecuting the case.

4 Q. Okay.

5 A. That's when I learned. It was as it was
6 going on.

7 Q. So that was in 2010?

8 A. Correct.

9 Q. Okay. So prior to this trial?

10 A. Yes.

11 Q. So you had some knowledge that at least the
12 Second Circuit Solicitor's Office had been recused
13 because the AG's office was here every day and
14 Mr. Walsh was here every day?

15 A. Yes.

16 Q. Okay. So you just didn't know there was an
17 order but you had knowledge?

18 A. No. Everyone's understanding was the AG's
19 office was trying that case because the victim in
20 that case was Lawrence Brown.

21 Q. Okay. So you didn't know about the order?

22 A. No.

23 Q. Okay. All right. I want to talk about the
24 defense -- or, I keep saying defense. I do that
25 all the time. I'm sorry. -- plaintiff's,

DAVID W MILLER - CROSS BY ZMROCZEK

1 Applicant's Exhibit 2 which is the evidence
2 property list which --

3 A. Okay.

4 Q. -- I think mine has writing on it, but does
5 the Court have -- oh, it's over here. Sorry.

6 Now, I understand that you testified that
7 evidence gets collected at the sheriff's office and
8 brought over here and that's when the absolute
9 chain is complete, right?

10 A. Yes.

11 Q. Okay. So, you would agree with me that this
12 looks like what you turned over in evidence to
13 Mr. Hayes pursuant to his Rule Five requests?

14 A. Yes.

15 Q. Okay. You would agree with me that it says:
16 ID Albert James Cave, Jr., stored in '91,
17 written --

18 A. Yes.

19 Q. Okay. Do you know who wrote that?

20 A. I do not.

21 Q. Okay. Can you show me on that page anywhere
22 where Mr. Clay Adams' name appears on the chain of
23 custody?

24 A. It doesn't.

25 Q. So what we see is Investigator Causkey?

DAVID W MILLER - CROSS BY ZMROCZEK

1 A. Costic.

2 Q. That was -- he's the one who you said
3 collected the papers?

4 A. Correct.

5 Q. And then he properly secured them and then he
6 filled out the chain, right?

7 A. Right.

8 Q. And then J Roberts moved it from the evidence
9 locker?

10 A. Correct.

11 Q. And then it goes to CG Turner to log
12 evidence. Who's that? Do you know who that is?

13 A. Gerald Turner.

14 Q. And what relationship did he have to the
15 case?

16 A. He is the evidence technician.

17 Q. Okay.

18 A. He takes all of the evidence out of the
19 evidence locker for the sheriff's office in all of
20 their cases and he logs it into the system and
21 creates this little barcode and he sticks the
22 barcode on the item of evidence and he sticks it
23 onto the evidence custody receipt so that they can
24 keep them in line with each other.

25 Q. Certainly. And then the last one it says is

DAVID W MILLER - CROSS BY ZMROCZEK

1 processing. And who is that?

2 A. Chris Johnson.

3 Q. Okay. And Chris Johnson is not the same as
4 Clay Adams, right?

5 A. Chris Johnson is the fingerprint examiner and
6 evidence technician that -- and this is based on my
7 recollection. I know at least one of the cases,
8 Chris Johnson takes, took the piece of paper,
9 because this was two pieces of paper, and he took
10 them to the evidence processing section which is a
11 different place than the place where evidence is
12 just secured, and that Chris Johnson worked with
13 those items and then called Investigator Adams to
14 confirm his identification.

15 Q. Okay. So, when would Mr. Adams' name have
16 been added to the chain of custody?

17 A. Whenever Mr. Adams had custody of the item.

18 Q. Okay. And I guess that was submitted into
19 evidence at trial?

20 A. It would have been submitted -- the chain
21 wouldn't have been submitted. The chain would have
22 been something that was available for the defense
23 to look at and for, quite frankly for us to look at
24 because we decide who we need to call to establish
25 the chain based on that, but the actual pieces of

DAVID W MILLER - CROSS BY BOOZER

1 paper were -- would have been put into evidence
2 during the course of the trial.

3 Q. All right. And so the chain -- so, I guess,
4 my point is, Mr. Hayes never asked to see that
5 chain?

6 A. Mr. Hayes never had to ask to see the chain
7 because we show it to him before the trial when we
8 got the evidence here.

9 Q. Okay.

10 A. Mr. Hayes certainly would have seen it,
11 wanted to see it and he was given that opportunity
12 but he did not make a request to see it because we
13 gave it to him.

14 Q. Okay. And to your -- you have no knowledge
15 of whether that was given to Mr. Cave?

16 A. I have no idea that it was. In fact, I would
17 say that it probably wasn't because I don't know
18 that -- well, it may have been. We usually give
19 them photocopies of the final chain just so they'll
20 have them.

21 MS. ZMROCZEK: Thank you. I have no further
22 questions.

23 MR. BOOZER: No questions, Your Honor --
24 well, actually, I do have one question.

25 CROSS-EXAMINATION

DAVID W MILLER - CROSS BY BOOZER

1 BY MR. BOOZER:

2 Q. Mr. Miller, with regard to the Alford plea,
3 the fingerprints -- just for thoroughness. The
4 fingerprints that were used in that case, were they
5 matched with the fingerprint card from all the 2008
6 issues; do you know?

7 A. I don't know, because we didn't get that far
8 into that. I will say that -- because it came up
9 about a week before the trial. Sometime a week to
10 10 days before the trial, I actually requested that
11 Lieutenant Adams go over to the jail and roll new
12 fingerprints for the defendant and retain that
13 10-print card, keep it in his hands, secure it in
14 his office, do not let it out of his custody.

15 He did that. He went over -- and there was
16 testimony about it in the trial -- he rolled those
17 prints and then he went back and he compared the
18 prints that he rolled that day, that day, 10 days
19 before the trial or whenever it was, to the latents
20 from both, both of these cases because at that time
21 we didn't have any idea that the attorneys were
22 going to change. At that time we didn't have any
23 idea that one of them was going to end up being a
24 plea.

25 And the reason that I asked him to do that is

DAVID W MILLER - CROSS BY BOOZER

1 because fingerprints don't change. And so, if in
2 fact he was to roll Mr. Cave's prints today, they
3 should still match the latent prints. And I didn't
4 want there to be any issue about the chain of
5 custody.

6 So, as we went through these processes, and
7 as I was telling Mr. Hayes because obviously I got
8 somebody from law enforcement that's going over to
9 the jail where his client's incarcerated and he's
10 going to tell him he's got to let him roll his
11 fingerprints, I'm letting Mr. Hayes know this stuff
12 so that there's not some confusion if his client
13 calls him and says, hey, do I have to do this.

14 And so, it's a long answer to your question
15 but the thing is by the time we got to the plea, by
16 the time Mr. Katonak got appointed, Mr. Cave's
17 fingerprints had been compared to the newest
18 10-print card that we had for him which was the one
19 that was taken in preparation for trial.

20 I do not know whether the initial match to
21 the latent prints came off of that January 14th,
22 2008, arrest card or not. It could have been that
23 one or one of 14 other ones.

24 MR. BOOZER: Okay. Thank you. No further
25 questions.

C DAVID HAYES - DIRECT BY COLEMAN

1 MS. COLEMAN: Nothing further.

2 THE COURT: Thank you.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: All right. It's 1:40. How long
5 are Katonak and Hayes going to be?

6 MS. COLEMAN: Maybe 20 minutes.

7 THE COURT: Total or each?

8 MS. COLEMAN: Total.

9 MS. ZMROCZEK: I probably have about 10
10 minutes questioning, Your Honor.

11 MR. BOOZER: And I don't anticipate being
12 more than five or 10 minutes with Mr. Katonak.

13 THE COURT: Where is Anita?

14 (Off-the-record discussion.)

15 MS. COLEMAN: The State calls David Hayes.

16 C. DAVID HAYES, having been duly sworn, was
17 examined and testified as follows:

18 THE CLERK: Please have a seat and state your
19 name for the Court.

20 THE WITNESS: Charles David Hayes, H-A-Y-E-S.

21 DIRECT EXAMINATION

22 BY MS. COLEMAN:

23 Q. Hey, Mr. Hayes, how are you?

24 A. Doing fine.

25 Q. How long have you been practicing law?

C DAVID HAYES - DIRECT BY COLEMAN

1 A. Since 2009. And prior to that I worked under
2 the practicing rule in Michigan for a term while I
3 was in law school.

4 Q. Okay. Do you recall whether you were
5 appointed or retained in this case?

6 A. I was appointed.

7 Q. How many times did you meet with the
8 Applicant prior to this trial?

9 A. It was five or six times from May to August.

10 Q. Did the Applicant cooperate during the course
11 of your representation?

12 A. No. This was absolutely the worst
13 relationship I've ever had with any client.

14 Q. Okay. And just to go into that a little.
15 The Applicant has alleged that there was some kind
16 of conflict of interest which is the reason why you
17 terminated your relationship with him. Is that the
18 case?

19 A. Not, it wasn't a conflict of interest. As he
20 said, we had an absolute horrific relationship to
21 where we argued and fought to the point it was
22 ridiculous. The last time I spoke with him was a
23 conference from the prison after he was convicted
24 on the trial as to the Jeffrey Nation robbery.

25 We went over everything, and I had been able

C DAVID HAYES - DIRECT BY COLEMAN

1 to get Mr. Miller to agree to a concurrent 25. We
2 discussed that offer. He said he was willing to
3 accept it. We met over in the grand jury box. I
4 went over the sentencing sheet with him. We
5 discussed that. My understanding was that he was
6 accepting that offer. We got up to plead guilty
7 and it was not a guilty plea. It became a tirade
8 from Mr. Cave blasting me that he didn't know
9 anything, he didn't have discovery, he'd never seen
10 anything about it.

11 As a result of that, that plea was over.
12 Mr. Miller walked over, served me and Mr. Cave with
13 the LWOP notice. I knew that our relationship was
14 at a point that it didn't matter what I said, it
15 was going to be the opposite.

16 To protect my client afterwards, I grabbed
17 Mr. Miller at a break and went into chambers with
18 Judge Early and explained that our relationship had
19 broken down to a point that I think it was in the
20 best interests of my client to protect him from
21 himself that he needed another lawyer.

22 Q. And after that Mr. Katonak was appointed; is
23 that correct?

24 A. That's correct.

25 Q. As far as the charges for the trial, did you

C DAVID HAYES - DIRECT BY COLEMAN

1 file any Brady or Rule Five motions?

2 A. Yes.

3 Q. And did you review the discovery material
4 with the Applicant?

5 A. I did. I even hand-delivered his copies to
6 him.

7 Q. Okay. Did you ever discuss with the
8 Applicant stipulating to his prior burglaries?

9 A. I do not recall.

10 Q. Why did you choose to stipulate to this at
11 trial?

12 A. There's -- the theory I operate under is that
13 it was much better to stipulate and have a brief
14 rendition that we're stipulating than to have the
15 clerk of court come in and testify and maybe or may
16 not enter sentencing sheets from prior convictions.
17 I think it was less, it's less damaging to your
18 client.

19 Q. Okay.

20 A. And in this case, that stipulation was not
21 sent back to the jury. It was actually kept here
22 in the courtroom.

23 Q. Okay. Did you ever discuss the Applicant's
24 version of the facts?

25 A. All I remember is fighting a lot.

C DAVID HAYES - DIRECT BY COLEMAN

1 Q. Did he present you with any possible defenses
2 to investigate?

3 A. There was an alibi but that alibi was more in
4 relation to with Mr. Nation's burglary. And this
5 burglary, I do not recall any witnesses or alibis
6 or actual legal defenses.

7 Q. Can you briefly describe the State's evidence
8 against the Applicant?

9 A. Absolutely beautiful fingerprints. They were
10 Ninhydrins off of a piece of paper.

11 Q. And let's go into those fingerprints. Did
12 you see any -- was there a pretrial hearing, a
13 motion to suppress these prints?

14 A. I don't think I made a motion to suppress.
15 We -- that was part of the reason why our
16 relationship was so bad. There's two things that
17 he fixated on. And the two things he fixated on, I
18 believe that there was not grounds to make the
19 motion that he was asking for.

20 First was to the chain of custody. That is
21 not a suppression motion. My case law research
22 says that it goes to the weight, not admissibility.
23 So I don't believe there's a motion to suppress.

24 Also the chain that we had went all the way
25 through Chris Johnson. Chris Johnson developed the

C DAVID HAYES - DIRECT BY COLEMAN

1 fingerprint and when the Ninhydrin print and my
2 understanding from the case law chain of custody is
3 once it's developed to the point it's never going
4 to change again, it's done.

5 So we had that part. Yes, at the trial
6 though we were given a more complete chain which I
7 believe is completely unnecessary because once you
8 have developed the item, the question of whether
9 it's been tampered with or changed is over.

10 In this case once Chris Johnson developed it,
11 I believe the true chain is over, the question that
12 we've argued about. Then it was given to
13 Mr. Adams. And as Mr. Miller stated, I did meet
14 with -- I had my investigator, Benny Williams at
15 the time, who was an ex-sheriff's investigator who
16 did fingerprints, and then after his opinion was
17 the prints were my client's, I had Mr. Don Kirk
18 come in and we went over to the sheriff's
19 department again, sat down and he reviewed the
20 fingerprints. And it was his opinion that it was
21 those prints. I then questioned him as to whether
22 they could be faked or changed and he told me that
23 it would be extremely hard to do something like
24 that with a Ninhydrin print.

25 Q. So you saw no legal basis to move to suppress

C DAVID HAYES - DIRECT BY COLEMAN

1 either the admissibility of the prints or the chain
2 of custody?

3 A. Well, no. And as to the print, that's a
4 separate issue. As to the actual fingerprint and
5 the card, Section 17-1-40 is what he was arguing.
6 I actually provided him with that statute.

7 As Mr. Miller indicated, I was familiar with
8 his two priors, trials. I then watched him enter
9 the guilty plea for the burg -- for the possession
10 second which I believe he pled to possession first
11 if I recall right. Either way it was time served.

12 So there was a conviction for the same arrest
13 with the burglaries and that fingerprint card would
14 never be expunged. Also he never filed for
15 expungement on it and I believe that that would
16 have been a frivolous motion.

17 Q. Okay. Did you have ample time to prepare for
18 this trial?

19 A. Yes.

20 Q. Sorry. Going back to the fingerprint issue.
21 If this issue had been raised on appeal, do you
22 think this would have been successful?

23 A. No.

24 Q. What was your general trial strategy in this
25 case?

C DAVID HAYES - DIRECT BY COLEMAN

1 A. I was doing everything I could to cast doubt
2 or question the prints. And I believe if I
3 remember right my closing was that his fingerprint
4 could have been placed on the paper that it was
5 found on at a job fair or something at Augusta
6 State University.

7 Q. Okay. Since the State had this fingerprint
8 to use as evidence against him, would you classify
9 the State's evidence as overwhelming?

10 A. I mean, it was convincing enough for 12
11 jurors.

12 Q. Okay.

13 A. I had two experts that I definitely wasn't
14 going to put on the stand.

15 Q. Did you ever feel that there was any reason
16 for the solicitor's office to recuse them self
17 based on an order of recusal in this case?

18 A. No, as to that I was present and watched the
19 prior two trials. One was an acquittal, one was a
20 mistrial. And my understanding at that time was
21 that the AG's office was trying it, as Mr. Miller
22 said, because Lawrence Brown was the victim in one
23 of the cases.

24 I never knew of this order until I received
25 the PCR packet. However I do not believe that it

C DAVID HAYES - CROSS BY ZMROCZEK

1 applies because those two burglaries and all of
2 those charges were several years prior to this, and
3 these victims had no connection to the solicitor's
4 office.

5 And as to Jeffrey Nation, he was charged with
6 a crime and tried here and was an ex-sheriff's
7 deputy. So I don't see any conflict with the
8 solicitor's office being able to try these cases.

9 Q. Okay. Was there any reason to request a
10 continuance based on new evidence given before the
11 trial?

12 A. Not that I'm aware of.

13 Q. And was there any reason to object to
14 improper judicial remarks throughout the trial?

15 A. Not that I'm aware of. I glanced through the
16 transcript and I made objections. If I thought it
17 was objectionable I objected.

18 MS. COLEMAN: Thank you. No further
19 questions.

20 THE COURT: Yes, ma'am?

21 MS. ZMROCZEK: Thank you. Briefly, Your
22 Honor. Very briefly, I hope.

23 CROSS-EXAMINATION

24 BY MS. ZMROCZEK:

25 Q. Do you have a copy of the transcript with

C DAVID HAYES - CROSS BY ZMROCZEK

1 you?

2 A. Yes. Point me where you want me to go.

3 Q. Can you turn to page 6? I think it's 6, or

4 41. It might be 41 if you have the appellate

5 transcript.

6 A. Okay. What line?

7 Q. And it says that -- you told the Court on

8 line 15 -- or, excuse me, beginning on line 13 you

9 had a small motion for suppression based on the

10 chain of custody?

11 A. Okay.

12 Q. So you agree that you at least told the Court

13 that you had that motion, you just never made it?

14 A. Well, the State proved it. Once they went

15 through all the witnesses and then went to enter

16 the evidence that I would object to and they have

17 actually gone through the full chain, I then don't

18 have an objection.

19 Q. Okay. And would you agree with me that the

20 Court would frequent -- well, at least three times

21 the Court just interrupted from the bench and said

22 things, like, for example, on page 25 --

23 A. Wait a minute. 25?

24 Q. Yes.

25 A. Okay. What line?

C DAVID HAYES - CROSS BY ZMROCZEK

1 Q. On line one, the Court interrupted your
2 questioning and said: Mr. Hayes, if you want to
3 let -- if you want to know what was, specifically
4 was in his bedroom I could sit here all day long
5 and tell you what's in my bedroom. That was in
6 front of the jury, correct?

7 A. I don't know. I would assume so.

8 Q. Okay. Additionally the Court on page 73 --
9 or, excuse me, 38. I don't know which pages you
10 have. I think --

11 A. I've got the trial transcript.

12 Q. Okay. Page 38.

13 A. Okay.

14 Q. During the direct examination of Delane
15 Smiley the Court on line 14, when you make an
16 objection the Court says, stop, and he starts
17 asking questions. He asks at least one question
18 from the bench saying: What did he do with them.
19 So apparently there was maybe some confusion about
20 some papers, I guess. This was the one who
21 collected the papers or at least was talking about
22 papers from which the fingerprints came, correct?

23 A. I think when the judge is telling him stop,
24 he's telling the witness to quit answering
25 because -- that would be the way it's reading to me

C DAVID HAYES - CROSS BY ZMROCZEK

1 is that the victim, the witness did not stop
2 talking and as I made my objection the judge told
3 him to quit talking.

4 Q. Okay. And then on page 101 when you were
5 making your objection about the latent print
6 examiner --

7 A. 101. Okay.

8 Q. -- did you have the policies and procedures
9 of Aiken County Sheriff's Office regarding --

10 A. Yep.

11 Q. -- latent fingerprints? And did you hand
12 those up as part of your argument that he either
13 didn't follow the policies and procedures or wasn't
14 qualified?

15 A. I don't remember.

16 Q. Okay.

17 A. You said page 101?

18 Q. Oh, yeah. So 101 when he was overruling your
19 objection talking about how he lets all kinds of --
20 I let doctors testify in here all the time who
21 weren't board certified but they're doctors
22 nonetheless. There weren't any doctors that had
23 anything to do with this case, right?

24 A. No.

25 Q. Okay. So he was just making a comment about

C DAVID HAYES - CROSS BY ZMROCZEK

1 experts in general?

2 A. Yes.

3 Q. Okay. When -- I want to ask you about
4 when -- your relationship with Mr. Cave. You said
5 it was the worst relationship you ever had with a
6 client. When did that break down?

7 A. It never was one. It was bad from the
8 get-go.

9 Q. Do you feel like -- do you feel like that
10 that hindered your ability to defend him?

11 A. No.

12 Q. Okay. But you're saying there never was a
13 relationship so you were never able to talk to him?

14 A. No, we talked and then we'd fight because we
15 would always go back to the same two things; chain
16 of custody and fingerprints.

17 And we never -- we could never get around
18 that. And then I'd leave, we'd cool down, I'd come
19 back, we'd go through more of the discovery. I
20 went through even Jeffrey Nation discovery and
21 there was another charge he was charged with and we
22 went through that discovery. We did go through the
23 stuff, but by the end in a full discussion there
24 would be a fight. And it was always because we
25 were going back to stuff we had already discussed.

C DAVID HAYES - CROSS BY BOOZER

1 Q. Right. The fingerprints?

2 A. The fingerprints and the chain of custody.

3 Q. And you would agree with me that even though
4 you weren't aware of this order in 2008, that the
5 evidence that they used to connect him to this
6 crime came from that case in 2008?

7 A. The evidence they used to connect him, no.

8 Q. The fingerprint card that they used.

9 A. The fingerprint card they used to compare to
10 the evidence --

11 Q. Yes. Sorry. That's what I mean.

12 A. -- was the cards that they had from when they
13 arrested him in 2008.

14 Q. Okay. So, so that was -- their probable case
15 was that fingerprint card from 2008 based on -- and
16 the fingerprints that they had gathered from the
17 new break-in?

18 A. Yes.

19 Q. Okay. Thank you.

20 MS. ZMROCZEK: No further questions, Your
21 Honor.

22 MR. BOOZER: Just one.

23 CROSS-EXAMINATION

24 BY MR. BOOZER:

25 Q. Did you handle a preliminary hearing for the

BRIAN A KATONAK - DIRECT BY COLEMAN

1 charge in the plea?

2 A. Yes.

3 Q. Okay.

4 A. I actually -- we actually stood here to enter
5 a plea before I moved, before I asked the Court to
6 relieve me because of the situation.

7 MR. BOOZER: Thank you.

8 MS. COLEMAN: Nothing further from this
9 witness.

10 THE COURT: Have a good week.

11 THE WITNESS: You too, sir. Thank you.

12 THE COURT: Next?

13 MS. COLEMAN: State calls Brian Katonak.

14 BRIAN A. KATONAK, having been duly sworn, was
15 examined and testified as follows:

16 THE CLERK: Will you please have a seat in
17 the witness box? State your full name for the
18 Court.

19 THE WITNESS: Brian Austin Katonak.

20 DIRECT EXAMINATION

21 BY MS. COLEMAN:

22 Q. Hi, Mr. Katonak. Thank you for being here
23 today.

24 A. It's great to be here.

25 Q. How long have you been practicing law?

BRIAN A KATONAK - DIRECT BY COLEMAN

1 A. Since 1992.

2 Q. Were you appointed in this case?

3 A. Yes, I was.

4 Q. How many times did you meet with the
5 Applicant prior to his guilty plea?

6 A. Oh, I'm not really sure. I know I had a
7 lengthy meeting with him up at, in prison in
8 McCormick in April of the year he pled. But I
9 can't recall how many other times. You know,
10 sometimes we'd talk on the phone since he was an
11 hour-plus away. I know we did some of our
12 conversations on the phone.

13 Q. Did you file any Rule Five or Brady motions?

14 A. I'm not sure if I had to. Since I got in the
15 case somewhat late, I'm not sure if Mr. Hayes just
16 gave me what he had or Mr. Miller just gave it to
17 me. So I'm not sure if I even had to file
18 anything.

19 Q. Okay. So you received the discovery?

20 A. I received it, yes.

21 Q. Did you review this with the Applicant, the
22 discovery material?

23 A. I did. And it was actually kind of unusual
24 on a case, usually I'm sitting down with my client
25 reviewing the documents. Since this case had been

BRIAN A KATONAK - DIRECT BY COLEMAN

1 going on for sometime and Mr. Hayes already had the
2 discovery items and already given them to Mr. Cave,
3 he actually already was very familiar with all the
4 items in there. And actually when I met with him
5 he was more versed with them than I was at that
6 time.

7 Q. Did you discuss the Applicant's version of
8 the facts?

9 A. Well, I'm not sure what the question is. His
10 primary issue was on the fingerprint card, what's
11 been discussed as far as the case that he was found
12 not guilty on that, that they should not have been
13 able to use that card to compare his fingerprints
14 to the Nation case.

15 Q. And did you have -- did you make a motion to
16 suppress these fingerprints?

17 A. Yes.

18 Q. And what was the result of this motion?

19 A. Well, I think the -- Judge Early's order was
20 made part of the record but, as Mr. Miller stated,
21 Judge Early denied our motion.

22 Q. Okay. Did the Applicant present you with any
23 possible defenses?

24 A. Not that I can recall. It was all basically
25 that they should not be able to use his

BRIAN A KATONAK - DIRECT BY COLEMAN

1 fingerprints on the Nation case since he had gotten
2 found not guilty on his previous case.

3 Q. Did you discuss the elements of the charge
4 with the Applicant?

5 A. Yes.

6 Q. How would you describe the State's evidence
7 including his fingerprints against the Applicant?

8 A. Well, I've been involved in a lot of these
9 cases. I mean, it's a pure fingerprint case, you
10 know, we don't have other eyewitnesses or other
11 evidence. In my opinion, those are difficult cases
12 because the State certainly could have their
13 experts testify to it. You know, my defense I
14 think would have been the same as Mr. Hayes' case,
15 but I was well aware of how that case came.

16 My concern in talking to Mr. Cave and I told
17 him countless times, hey, listen, if you don't take
18 this plea and you're convicted, you're going to
19 have a life sentence. Additionally he had, I know,
20 another burglary and, I believe, a grand larceny
21 that were still out there pending.

22 Now Mr. Hayes, I think, was still technically
23 counsel on those cases but they're still pending,
24 too, and so he would be looking at those as well,
25 too. I was checking as I was sitting in here

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1 today. Those were actually dismissed on the same
2 day that he did his plea.

3 Q. Did you review the Applicant's constitutional
4 rights before he pled guilty?

5 A. Yes.

6 Q. Did he tell you that he did not understand
7 something at the guilty plea?

8 A. No. Mr. Cave is a smart individual. In
9 fact, I'll say he's actually more versed in the law
10 than a lot of people I represent and he's certainly
11 very competent and understood what was going on.

12 Q. And he pled guilty under North Carolina
13 versus Alford?

14 A. That's right.

15 Q. And did you explain what an Alford plea was
16 to him?

17 A. I had explained it. He had some
18 understanding of it, I'm not sure if from Mr. Hayes
19 or just his research, but he had some understanding
20 that he would not be admitting that he committed a
21 crime but essentially he understood that the
22 charging facts against him were such that the
23 chance of conviction was highly likely and
24 therefore was taking the Alford.

25 Q. Ultimately whose decision was it to plead

BRIAN A KATONAK - DIRECT BY COLEMAN

1 guilty?

2 A. I always tell my client you're the one that
3 has to do the time. It's not me. I'm not -- I've
4 never forced any client of mine to take a plea.
5 It's always up to them and Mr. Cave seemed to
6 understand that and he took the plea.

7 Q. Did the Applicant ever indicate that he
8 wanted to go to trial instead of plead guilty?

9 A. Well, that's a hard one to answer. His big,
10 big fight in this case was always on that
11 fingerprint card. It's one of the situations he
12 didn't want to plead but he didn't want to go to
13 trial.

14 Q. Right.

15 A. And then once we got here, he saw that the
16 ball was going to roll down the hill, you know; if
17 he did not enter an Alford plea that a trial was
18 going to be starting. And so at that point I
19 explained to him, listen, we're either going to go
20 out and you're going to enter the plea or, you
21 know, a jury's going to be picked. And I'm not
22 sure if the jury was going to be picked that day or
23 sometime that week.

24 But a jury is going to be picked on this case
25 and it's going to go forward. If you don't take a

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1 plea, I know Mr. Miller very well and I've had a
2 lot of cases with him. And when he says the deal's
3 off the table, the deal's off the table. You go
4 pick the first person on the jury and you say, I
5 want the deal, that deal is gone. And, you know,
6 I'm very well aware of that fact and told Mr. Cave
7 that as well.

8 Q. So, knowing that the State was going to use
9 the fingerprint evidence against him and that he
10 was facing life without parole, do you believe it
11 was in your client's best interests to plead guilty
12 to this?

13 A. I think it would have been ridiculous for him
14 not to take it.

15 Q. But, again, it was his decision to plead
16 guilty?

17 A. It's always my client's decision.

18 Q. Did he ever ask you for an appeal?

19 A. He spoke about an appeal. I can't recall
20 whether I filed the notice or he filed the notice
21 on the appeal.

22 Q. Okay. All right. Thank you. No further
23 questions.

24 THE WITNESS: Thank you.

25 THE COURT: Cross?

BRIAN A KATONAK - CROSS BY BOOZER

1 MR. BOOZER: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. BOOZER:

4 Q. Mr. Katonak, how are you?

5 A. Great. Thank you.

6 Q. Good. Do you recall what specific evidence
7 you would have reviewed with Mr. Cave prior to the
8 plea?

9 A. What specific evidence. No, I can't recall.

10 Q. Was there a lot of evidence against Mr. Cave;
11 do you recall?

12 A. I mean, it's primarily a fingerprint case.
13 That's -- so for many cases, I would not say that's
14 a lot of evidence.

15 Q. And you actually -- you made a motion to
16 suppress evidence. What was your motion that you
17 made prior to trial?

18 A. You know, Mr. Cave, as I stated, his big
19 issue was on the fingerprints. I think my motion
20 was actually in suppressing the fingerprint card
21 from his arrest on the Nation case. At the hearing
22 itself we discussed the overall issue of all the
23 fingerprint cards. And I want to say it was a
24 pretty lengthy motion that was made. I think it
25 took over an hour between my argument and

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1 Mr. Miller's argument.

2 Q. We'll come back to that in just a moment.

3 A. Okay.

4 Q. Did you have any discussion with Mr. Cave
5 prior to the plea about any situation involving a
6 prior recusal of the Second Circuit Solicitor's
7 Office prosecuting him?

8 A. Sitting here today, I was thinking I can't
9 recall that ever coming up and when I heard the
10 discussion about this order, today was the first I
11 knew about any order.

12 Q. Have you reviewed that order?

13 A. I've never seen it.

14 MR. BOOZER: Your Honor, may I approach the
15 witness?

16 THE COURT: Absolutely.

17 MR. BOOZER: Thank you.

18 Q. Mr. Katonak, I'm going to hand you what's
19 been marked as Applicant's Exhibit 1. And I
20 represent to you that that is a copy of the order
21 that we're referencing. If you would just take a
22 moment and review it to yourself.

23 A. (Complying.) Okay.

24 Q. Have you had an opportunity to review that
25 exhibit?

BRIAN A KATONAK - CROSS BY BOOZER

1 A. Yes, I have.

2 Q. All right. And in looking at it, what's your
3 interpretation or opinion of this order?

4 A. That the Second Circuit Solicitor's Office is
5 recused from charges stemming from that indictment.

6 Q. Okay. Do you recall in your case who the
7 victim was alleged to have been?

8 A. Jeffrey Nation.

9 Q. And what was that?

10 A. He was a former, I'm not sure if he's a
11 county deputy or a City of Aiken Deputy.

12 Q. Okay. Were you aware that the -- that he
13 had been tried before and found not guilty or
14 acquitted on a couple of charges of burglary first?

15 A. That's one of the first things he told me,
16 yes.

17 Q. Okay. Were you aware of who the alleged
18 victims were in those cases?

19 A. I mean, I learned during the case it was
20 Lawrence Brown.

21 Q. Who was -- do you know who that was?

22 A. He worked either for the solicitor's office
23 or for the PD's office at that time.

24 Q. Okay. And do you know who the other case
25 involved?

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1 A. The one he went to trial on?

2 Q. Correct.

3 A. No, not that I recall today.

4 Q. If he represented that it was someone who may
5 have been the son or a relative of the Mayor of
6 Aiken, would you have any reason to dispute that?

7 A. Like I say, I don't recall who the victim in
8 that case was.

9 Q. Since this case, the one you represented him
10 on involved someone who, I guess, was it -- was an
11 employee of Aiken County, you said?

12 A. He was a past employee.

13 Q. Past employee. Do you think that you could
14 kind of make the argument and try to wedge it in
15 there that this was part of a pattern of criminal
16 activity that he was, you know, allegedly breaking
17 into folks who work for Aiken County or a member of
18 law enforcement, do you think that you could make
19 that argument?

20 A. I tend to agree with Mr. Miller's assessment
21 of that so, no.

22 Q. Let me ask you this. Had you known about
23 this order, would you have attempted to make any
24 sort of motion or attempt to make any sort of
25 argument to have the solicitor's office recused

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1 from prosecuting the case?

2 A. You know, in representing criminal defendants
3 you try to do whatever you can to protect them.
4 Though, you know, if I would have known about it
5 and he would have asked me to make that motion I
6 would have said, well, what that's going to mean is
7 instead of Mr. Miller prosecuting it someone else
8 is going to prosecute it as opposed to a motion
9 where, or a motion on the evidence, trying to
10 suppress evidence that could really change or alter
11 the outcome of the case. It was just going to be
12 changing who was at the State's bench, so whether
13 that would have been advantageous for him or not I
14 don't know.

15 MR. BOOZER: Your Honor, may I approach the
16 witness one more time?

17 THE COURT: Sure.

18 BY MR. BOOZER:

19 Q. Mr. Katonak, I'm going to hand you another
20 document. If you would, it's going to be marked as
21 Plaintiff's Exhibit Number 4, take a moment to
22 review that to yourself.

23 A. (Complying.) Okay.

24 Q. Could you identify that, please?

25 A. Yes, that's a motion to suppress that I filed

BRIAN A KATONAK - CROSS BY BOOZER

1 on April 12th, 2012.

2 Q. All right. And is that a true and accurate
3 copy of that motion that you filed?

4 A. Yes, it is.

5 MR. BOOZER: Your Honor, at this time we
6 would move to make this Plaintiff's Exhibit Number
7 4.

8 THE COURT: Any objection, Ms. Coleman?

9 MS. COLEMAN: No objection.

10 THE COURT: All right. Admitted without
11 objection.

12 (Plaintiff's Exhibit No. 4, motion to
13 suppress, received into evidence.)

14 BY MR. BOOZER:

15 Q. And, Mr. Katonak, if you would, just take a
16 look at that. And what was the basis of your
17 motion or your request, I guess? Then there on the
18 second page, kind of near the end there, what were
19 you asking the Court to do?

20 A. Well, essentially almost a fruit of the
21 poisonous tree-type theory. Well, In fact, I used
22 that exact line in there. We were trying to argue
23 that the fingerprint record on the Nation arrest
24 should not be admissible based on the fact that it
25 was compared or allegedly compared to the

BRIAN A KATONAK - CROSS BY BOOZER

1 fingerprint evidence on the case he got dismissed.

2 Q. Okay. Did you make any sort of argument that
3 the entire case should have been dismissed because
4 of the fingerprint card that was used from 2008?

5 A. I can't recall if I did or not though if the
6 fingerprints didn't come in, I don't think the
7 State had a case.

8 Q. Okay. And also do you agree that the -- was
9 the 2008 fingerprint card used in the case that you
10 were handling? Were those fingerprints used to
11 match him to the fingerprints lifted from the case
12 that you were handling?

13 A. I spoke with Mr. Miller on that issue. And
14 when I did he informed me of the fact that he
15 testified to that -- after his arrest in the trial
16 case that he went and had an officer take
17 additional fingerprints from him. So, I can't
18 state today that the fingerprints came from the
19 case he was found not guilty on or on the card that
20 was later rolled from his prints.

21 Q. But would you agree with me that in the order
22 that Judge Early entered that in the footnote that
23 the State doesn't contest the initial comparison
24 was made between the latents lifted in the 2008
25 burglary fingerprint card?

BRIAN A KATONAK - CROSS BY BOOZER

1 A. It may be in that order but for me
2 personally, I don't know one way or another. And I
3 don't know how one could show that it was taken
4 from one or the other.

5 Q. Do you recall Mr. Cave sort of contesting at
6 the plea that you had reviewed evidence with him?

7 A. Well, when we got -- when we got him to
8 initially plead, he did state that he hadn't
9 reviewed everything. And that's why Judge Early
10 said step off, and we had to go back and talk some
11 more.

12 Q. What did you go and talk about?

13 A. I didn't really know. We went back there and
14 I asked him: What, what additional things do you
15 need to see. And I will say this. I got along
16 with Mr. Cave fine. I mean, I understood he and
17 Mr. Hayes had great conflicts and that's why I got
18 on the case.

19 But, he had all the evidence already when I
20 initially met him. The items I had were the same
21 items he had. I didn't have anything new and I
22 basically said, what else do you want to see,
23 there's nothing else to show.

24 And, again, I stressed to him, hey, if you
25 don't want to do this plea, that's your right to do

1 so, but just know when we walk back out there and
2 tell the judge we don't have a plea, then you're
3 looking at a life charge if you're convicted.

4 MR. BOOZER: Thank you, Mr. Katonak. No
5 further questions.

6 MS. COLEMAN: Nothing further from the State.

7 THE COURT: Have a good one.

8 THE WITNESS: Thank you.

9 MS. COLEMAN: And no further witnesses.

10 THE COURT: Any further witnesses,
11 Ms. Zmroczek?

12 MS. ZMROCZEK: I don't have any, Your Honor.
13 I just wanted to clarify that I need to move
14 Plaintiff's Exhibit 4 in. For the purposes of just
15 clarification, can we make, like, since there are
16 two separate records, can we have -- I would like
17 for it to be part of ours just --

18 THE COURT: It is.

19 MS. ZMROCZEK: -- so it's, like, part of both
20 of ours.

21 THE COURT: The four exhibits are introduced
22 as to both cases.

23 MS. ZMROCZEK: Right.

24 THE COURT: Anything further?

25 MS. ZMROCZEK: Nothing further.

1 THE COURT: Mr. Boozer?

2 MR. BOOZER: Nothing further, Your Honor.

3 THE COURT: All right. I'll let you know by
4 the end of next week.

5 MR. BOOZER: Thank you, Your Honor.

6 MS. COLEMAN: Thank you, Your Honor. Sorry
7 that took longer than I thought.

8 END OF PROCEEDINGS: 2:28 P.M.

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2 CERTIFICATE OF REPORTER

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF AIKEN)

5 I, Cheri L. Young, Registered Professional
6 Reporter and Official Court Reporter for the
7 State of South Carolina, Second Circuit-At Large,
8 do hereby certify that the foregoing proceedings
9 were written stenographically by me using
10 computer-aided translation; further, that the
11 foregoing is a true, accurate and complete
12 record, to the best of my skill and ability, of
13 all the proceedings had and evidence introduced
14 in the hearing of the captioned case, relative to
15 appeal, in the Court of Common Pleas for Aiken
16 County, on the 23rd day of September, 2016.

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

19 I have hereunder set my hand this 4th day
20 of January, 2017.

21 
22 _____
23 Cheri L. Young, RPR
24 Official Court Reporter
25

IN THE COURT OF GENERAL SESSIONS
SECOND JUDICIAL CIRCUIT

ORDER RECUSING THE SECOND
CIRCUIT SOLICITOR'S OFFICE
FROM PROSECUTING DEFENDANT

Warrant #s: I 090325, I 090482, I 090483

This matter came before the court upon motion of the Defendant. The grounds for the motion were that one alleged victim is a former Deputy Solicitor in the Aiken office of the Second Circuit, and the other alleged victim is the son or a close blood relative of the Mayor of the City of Aiken.

A hearing was held on September 10, 2008 on this matter. The Defendant was represented by his attorney Aaron G. Walsh, the State by the Honorable Barbara R. Morgan, Solicitor for the Second Judicial Circuit. At that hearing, Defense Counsel presented argument in favor of recusal, which was opposed by the State.

During the September 10, 2008 hearing, Solicitor Morgan put the Court and the Defense on notice that additional indictments would be sought for several separate and distinct incidents, and that the State might seek Life Without Parole (LWOP) for the Defendant.

This Court believes the Second Circuit could effectively and fairly prosecute this case, however to avoid even the appearance of impropriety or favoritism, especially considering the possibility of a future life sentence, the Court agrees with the Defense that prudence is the best course of action. Mr. Cave shall be prosecuted by either another circuit or the Attorney General's Office. The Court believes the Attorney General's Office may best and properly make that determination.

THEREFORE IT IS ORDERED:

1. The Second Circuit Solicitor's Office shall be recused from prosecuting the above-captioned offenses, or any charges or indictments stemming from the same incidents or incidents alleged to be related or part of a pattern of criminal activity including the above captioned charges, including but not specifically limited to, the possible indictments mentioned by Solicitor Morgan at the hearing.
2. The Attorney General shall have the discretion to designate his office or the Solicitor of a

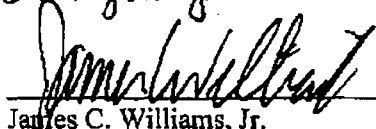
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the Superior of a
 FILED November 14 2009
Liz Hodard
 R.C.C.P. & G.S. 51
Sharon Thompson
 Deputy Clerk

08-65-02-326

different Circuit to prosecute Mr. Cave.

It is so ordered this 29 day of October, 2008 in Orangeburg County.


James C. Williams, Jr.
Circuit Court Judge

p2 pwb

EVIDENCE/PROPERTY RECEIPT

ACSO Form AD400 (02/28/05)

FILED 9/23/2012
Lei Hadard
William R. Byrd
2012

157
PLAINTIFF'S
EXHIBIT
3 9/23/12

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
THE STATE OF SOUTH CAROLINA,)
VS.)
ALBERT JAMES CAVE, JR.,)
Defendant)

IN THE GENERAL SESSIONS COURT
SECOND JUDICIAL CIRCUIT

ORDER DENYING MOTION
TO SUPPRESS EVIDENCE

2011-GS-02-01388

FILED *June 21* 2012
Lei Hadard
William R. Byrd

This matter comes before the Court as a motion to suppress fingerprint identification evidence in the above-captioned case. A hearing on the motion was conducted at the Aiken County Courthouse on May 14, 2012. The Defendant was present for the hearing and was represented by his attorney, Brian A. Katonak. The State was represented at the hearing by Assistant Solicitor David W. Miller. It appears from the arguments before the Court that a fingerprint was obtained from the scene of a residential burglary. Later, crime scene investigators with the Aiken County Sheriff's Office determined that the print from the crime scene matched a known fingerprint image of the Defendant herein, Albert James Cave, Jr. Based on the identification of the fingerprint, the Defendant was arrested and charged with Burglary.

The Defendant bases his motion to suppress on his belief that the known fingerprint image that was compared to the latent print to make the identification was obtained in a prior case where the Defendant was ultimately found not guilty at trial. The Defendant argues that following his acquittal on the prior charge, his fingerprint record should have been destroyed pursuant to South Carolina Code §17-1-40, but that was not done. Continuing that line of reasoning, the Defendant claims that if his fingerprint card had been destroyed, investigators would not have been able to identify the latent fingerprint as a match to his own because they would have had no fingerprint card to compare it to. Accordingly, the Defendant claims that the identification of the fingerprint and his subsequent arrest are the "fruit of the poisonous tree" and

No Capias Given

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should be suppressed. The State argues several grounds for the preservation of the fingerprint identification that are discussed more fully below. After considering the arguments of counsel and the evidence offered to the Court, I find that the Defendant's motion should be DENIED and that the fingerprint evidence should not be suppressed based upon the allegations stated in the motion.

DISCUSSION

Section 17-1-40 of the South Carolina Code of Laws provides, in relevant part, "A person who after being charged with a criminal offense and ... the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person *must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency...*" (emphasis added). The Defendant argues that based on the language above his fingerprint record from his 2008 burglary arrest that he was found not guilty on should have been destroyed¹. The State alleges that the provisions of the statute are not automatic, and that there is no obligation on the State to destroy the records until the Defendant makes application for an expungement pursuant to §17-22-910, *et seq.* Section 17-1-40 does not contain any language to indicate that its mandates are in any way contingent on any action by the Defendant. Accordingly, I find and rule that the Defendant is correct that the arrest record, including the fingerprint card, from his 2008 burglary arrest should have been destroyed pursuant to the statute when he was acquitted on that charge.

The State alleges, however, that the identification of the Defendant's fingerprint was inevitable because the Defendant has at least fifteen (15) prior arrests that resulted in at least twelve (12) prior convictions. Accordingly, even if the fingerprint card from the 2008 burglary charge had been destroyed, there would have been ten or more other fingerprint cards with the same fingerprint images on them for comparison. Obviously, the Defendant's fingerprints would be the same on any card obtained during any of his arrests dating back to his first arrest in 1986.

¹ For the purpose of this motion, the State does not contest the fact that the initial comparison was made between the latent fingerprint lifted at the crime scene and the Defendant's fingerprint card from the Defendant's 2008 burglary arrest.

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Because the comparison of the latent print to any of the properly retained cards would have resulted in the identification of the Defendant's fingerprint, I find that the State would have inevitably discovered the fingerprint match. Accordingly the fingerprint evidence should not be suppressed.

Additionally, the Court notes that when the Defendant was arrested on May 19, 2011 he was once again fingerprinted. On May 20, 2011, Investigator Clay Adams of the Aiken County Sheriff's Office again confirmed the match of the latent fingerprint from the crime scene to the Defendant's fingerprints.

Based on the foregoing, I find that the Defendant's motion to suppress should be, and hereby is DENIED.

IT IS SO ORDERED.


Doyet A. Early, III
Resident Judge
Second Judicial Circuit

Aiken, South Carolina
June 20, 2012

FILED

9/23 2016

Shirley Hodges
Albert M. Cave
 200

 PLAINTIFF'S
 EXHIBIT

4 9/23/16

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

STATE OF SOUTH CAROLINA

VS.

 ALBERT CAVE, JR.
 DEFENDANT.

 COURT OF GENERAL SESSIONS
 SECOND JUDICIAL CIRCUIT

 NOTICE OF MOTION AND MOTION
 TO SUPPRESS FINGERPRINT
 EVIDENCE

2011-GS-02-1388

 TO: Hon. J. Strom Thurmond, Jr.
 Aiken County Solicitor's Office

PLEASE TAKE NOTICE that the above named Defendant by and through his undersigned attorney, will move, whenever the Court shall direct, for an Order to suppress fingerprint evidence. The basis of this motion is as follows:

1. The Defendant is charged with Burglary 1st in the above captioned case.
2. The primary evidence that the State involves fingerprints found at the scene.

The evidence that the State is relying on is as follows:

- a) In its investigation, law enforcement lifted fingerprints on a storm window and window frame.
- b) The fingerprints were then allegedly matched against fingerprints of the Defendant from a previous case.
- c) Based on this fingerprint match, a warrant was issued against the Defendant and he was arrested.

3. The Defendant believes that the fingerprint evidence should be suppressed for the following reason:

FILED April 12 2012

Shirley Hodges
 C.C.P. & G.S.

Anna Sanders
 1

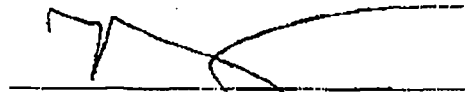
Submitted By Brian Katonak

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 TRUE & CORRECT

- a) The Defendant was previously charged with burglary, and from the crime, his fingerprints were taken.
- b) The Defendant went to trial for that charge, and he was found not guilty.
- c) Upon being found not guilty, the Defendant believes that his fingerprint record from that charge should have been destroyed.
- d) The Defendant is informed and believes that the fingerprint record that the State used in arresting him in this current case is his fingerprint record from his previous case that should have been destroyed. Therefore, the Defendant believes that the use of this evidence constitutes 'fruits from the poisonous tree' and should not be admissible.
- e) As the Defendant was wrongfully arrested by the use of these fingerprints, he does not believe any subsequent fingerprint evidence taken after his arrest should be admissible.

I SO MOVE:

LAW OFFICES OF BRIAN A. KATONAK



Brian A. Katonak
Attorney for the Defendant
P.O. Drawer 1606
Aiken, SC 29802
(803) 644-5535

April 9, 2012

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Albert James Cave, Jr., #189002,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

2014-CP-02-0004

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S.C. SUPREME COURT

ORDER OF DISMISSAL

FILED

11-16 2016 12:50
SP

L. H. Land
CLERK S.C.S.
Shodell Park
Deputy Clerk

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on January 2, 2014. Respondent submitted its return on July 29, 2014. An evidentiary hearing into the matter was convened on September 23, 2016, at the Aiken County Courthouse. Applicant was present at the hearing and was represented by Lance Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant was true bill indicted at the October 2011 term of the Aiken County Grand Jury for Burglary—First Degree (2011-GS-02-01388). Brian Katonak, Esquire, represented Applicant. On September 10, 2012, Applicant pled guilty under North Carolina v. Alford before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to a negotiated twenty-five year term of imprisonment to run concurrently to a prior sentence he was currently serving for 2011-GS-02-01031 and 2011-GS-02-01032.

A timely Notice of Appeal was filed on Applicant's behalf. By Order filed March 18, 2013, the South Carolina Court of Appeals dismissed Applicant's appeal pursuant to Rule 203 for failing to provide a sufficient reason for appealing a guilty plea. The Remittitur was issued on

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March 25, 2013. On March 18, 2013, Applicant filed a motion to reconsider, which was construed as petition for rehearing. By Order dated July 15, 2013, the South Carolina Court of Appeals gave Applicant ten days to submit his explanation. Appellate failed to provide an explanation and the South Carolina Court of Appeals denied and dismissed Applicant's appeal by Order dated September 30, 2013. The Remittitur was issued November 13, 2013.

Applicant filed a timely application for post-conviction relief on this charge on January 2, 2014.

II. ALLEGATIONS

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

1. Involuntary guilty plea.
 - a. Forced to enter guilty plea when "Court abused its discretion when the Court denide (sic) my motion to suppress evidence with its decision..."
 - b. "I had no other alternative but to take plea against my will, then to go to trial and receive life which the prosecution intended to seek after I refused their deal."
2. Ineffective Assistance of Counsel
 - a. Failed to obtain and review discovery material that he knew the prosecution would rely on at court.
 - b. Counsel was ineffective for not filing the proper suppression motion, i.e., motion to suppress the finger print card.
 - c. "Counsel was ineffective by advising me to take a plea stating that my only chance in this case was to plea and he would handle my appeal against the courts decision which he failed to properly do he advised me that if I didn't plea then I would surely receive life in prison."
3. Prosecutorial Misconduct/Brady Violation
 - a. "prosecution violated constitution rights by...holding and using evidence from a charge which I was found not guilty."
 - b. Prosecution withheld material evidence.
 - c. "Prosecution showed misconduct by obtaining a warrant for my arrest without establishing a probable cause to do so not only did they not establish a sufficient reason of probable cause backed up by evidence presented, but they also used illegal evidence to establish probable cause."

- d. "Prosecution showed misconduct by using illegal evidence to charge arrest, indict and convict me the defendant. The prosecution used evidence from a charge which I was found not guilty to. The S.C. Code of laws demands the destruction of all evidence of the record from that charge. Prosecution use evidence from that record to charge, arrest, and indict me disregarding the statute 17-1-40 of the S.C. Code of laws. The prosecution broke the law of S.C. and violated my constitutional rights."

Applicant filed an amendment on March 16, 2015, adding an additional allegation of ineffective assistance of counsel for failure to move to recuse Solicitor.

III. SUMMARY OF RELEVANT TESTIMONY PRESENTED

The evidentiary hearing was held before this Court on September 23, 2016. Due to unusual circumstances, the hearing was combined with the hearing for another PCR application that Applicant filed on different convictions stemming from similar events. The following is a summary of testimony from the hearing that is relevant to the convictions in this application.

At the PCR hearing, Applicant testified on his own behalf. Respondent presented testimony from Deputy Solicitor David Miller (hereinafter "Solicitor"), and Plea Counsel Brian Katonak ("hereinafter Plea Counsel").

Applicant

Applicant testified that he had been arrested several times for burglary and forgery. He stated that in 2008 he was charged with burglary first degree and grand larceny. He stated that he went to trial on these charges and was acquitted, and the South Carolina Attorney General's Office prosecuted the case because the victim was a member of the Second Circuit Solicitor's Office and they were recused from the action. Applicant entered into evidence Applicant's Exhibit #1, "Order Recusing the Second Circuit Solicitor's Office from Prosecuting Defendant."

Applicant testified that this Order read that the Second Circuit Solicitor's Office was recused from prosecuting his 2008 offense, "or any charges or indictments stemming from the same incidents or incidents alleges to *be related or part of a pattern of criminal activity including*" the 2008 charge. App. Ex. #1 (emphasis added). He opined that the 2011 charge listed in this PCR application for which he was currently serving time was part of a pattern of criminal activity related to his 2008 charges, and therefore under this Order the Second Circuit Solicitor's Office should have been recused from this case, as well.

Applicant testified that he did not ask Plea Counsel to move to have Solicitor recused based on this order. He stated that he never discussed the order of recusal with Plea Counsel.

Applicant stated that he met with Plea Counsel when he came to see him and that they spoke on the phone a few times prior to his guilty plea. He stated that he did not give Plea Counsel any leads or witnesses to investigate. He stated that the victim of this crime was a police officer in Aiken County. He stated that he felt forced to take a guilty plea because the trial court denied his motion to suppress his fingerprint card. Applicant testified that he recalled telling the plea judge that he understood that a North Carolina v. Alford plea is treated just like a guilty plea, and he wished to plead guilty under Alford. He stated that he took the Alford plea because he was facing Life Without Parole.

Applicant stated that law enforcement had no probable cause to arrest him for these crimes because the warrant was based on a match from the fingerprints from his previous charges on which he was acquitted, and that fingerprint card should have been destroyed. However, he was told that because he had not applied to have his previous charges expunged, the card had not been destroyed. Applicant stated that his fingerprints were not matched to the fingerprint card until two months after he was arrested.

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Additionally, Applicant testified that he pled guilty to possession of marijuana second degree on March 18, 2010. He stated that this was one of the charges he was arrested for in January, 2008, along with the charges on which he was later acquitted at trial.

Solicitor

Deputy Solicitor David Miller testified that he has been employed at the Second Circuit Solicitor's Office since January of 2009, and he was the solicitor who prosecuted this case against Applicant.

Solicitor testified that law enforcement was able to match Applicant to the crime because of latent fingerprints found at the scene of the burglary that matched up to his prints in their database. He stated that Applicant's fingerprints were in their possession because he was arrested on January 14, 2008 for several different charges, including possession of marijuana, resisting arrest, and about twelve other charges. Solicitor stated that Applicant had a trial on some of the charges from the January 2008 arrest and was acquitted, but remained in custody until March 18, 2010, when he pled guilty to possession of marijuana and resisting arrest.

Solicitor testified that, because Applicant pled guilty to possession of marijuana and resisting arrest, the fingerprint card from his January 2008 arrest, which was used to match the prints from the crimes address in this PCR application, could not be destroyed. Solicitor testified that Applicant was entitled to have the charges he was acquitted on expunged from his record, but he was not entitled to have his fingerprint card destroyed because of the charges he pled guilty to.

Solicitor further testified that Plea Counsel filed a motion to suppress the fingerprints, and a hearing was held. He stated that Judge Early ruled that he would allow the prints into evidence because Applicant was not entitled to have the card destroyed and because he had

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fifteen prior arrests and twelve prior convictions in South Carolina and several other fingerprint cards. He stated that Judge Early allowed these prints because of their inevitable discovery. The Order denying this motion was entered into evidence at the evidentiary hearing.

Solicitor testified that he did not know that the Order of Recusal existed until it came up in the allegation in this PCR action. He stated that it was completely unrelated to the charges and victims in this case, and it did not make sense to recuse the Second Circuit Solicitor's Office from this case. He stated that he saw no reason to recuse himself from this case.

Solicitor testified that there were plea negotiations in this case because Applicant faced a sentence of Life Without Parole if convicted at trial. He stated that gave a plea offer and left the offer open until after Plea Counsel moved to suppress the fingerprints months before the guilty plea. Solicitor testified that he had an officer go over to the jail a week before the plea to roll new fingerprints from Applicant to compare to the latent prints found at the scene of the crime. He noted that fingerprints do not change, and Applicant's prints matched both the 2008 fingerprint card and the crime scene prints.

Plea Counsel

Plea Counsel testified that he had been practicing law since 1992 and he was appointed to represent Applicant in this case after Applicant's previous counsel had been relieved. He stated that he and Applicant had a lengthy meeting at the jail in April, and they spoke on the phone multiple times. He stated that he reviewed discovery with Applicant, and Applicant had already reviewed the discovery with his previous attorney. Plea Counsel did not recall discussing any defenses with Applicant.

Plea Counsel testified that he made a motion to suppress the fingerprint card from the 2008 charges, but it was denied. He stated that he explained to Applicant what a North Carolina

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v. Alford plea was and he reviewed his constitutional rights, and Applicant never told him that he did not understand anything. He stated that it was Applicant's decision to plead guilty, and he agreed that it was in Applicant's best interest to plead. Plea Counsel opined that, knowing that the State was going to use Applicant's fingerprints and that he was facing Life Without Parole, it was within Applicant's best interests to plead guilty.

Plea Counsel testified that he did not know about the Order of Recusal until this PCR action. He stated that, if he had known about this Order, he probably would not have used it anyway, because if his motion to recuse the Solicitor's Office had been successful, it only would have changed who prosecuted the case, not the evidence, and the outcome of the case would have been the same.

APPLICABLE LAW

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds Plea Counsel's testimony to be credible and persuasive. This Court further finds Solicitor's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

INVOLUNTARY GUILTY PLEA

Applicant argues his plea was not given freely and voluntarily. This Court finds otherwise and concludes that Applicant's plea was entered freely and voluntarily. To find a guilty

plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L.Ed.2d 136 (1977)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

Applicant claims his plea was given involuntarily because his motion to suppress the fingerprint card was denied and he knew he would get Life Without Parole if he was convicted at trial. This Court agrees that the motion to suppress was properly denied and finds that the trial judge was within his discretion in denying the motion. Furthermore, this Court finds that the potential sentence of Life Without Parole was properly noticed and the Solicitor's Office was within their authority under South Carolina law to notice him of their intent to seek Life Without Parole.

Applicant cannot claim that he was coerced into pleading guilty simply because he faced a life sentence if he went to trial. South Carolina courts have held that this does not amount to an involuntary guilty plea. "Thus, counsel advised respondent to plead guilty based, at least in part,

on the likelihood of what counsel believed the sentence would be. We find that this is not an inappropriate concern for counsel to communicate to his client." Bennett v. State, 371 S.C. 198, 204-05, 638 S.E.2d 673, 676 (2006) (citing Wade v. State, 698 S.W.2d 621, 623 (Mo.Ci.App.1985) (where appellant claimed his guilty plea was not voluntary because counsel told him he would receive a life sentence if he went to trial, the court rejected the claim, stating that "[c]ounsel should discuss with clients the potential results of trial, and life imprisonment was a possible sentence on both charges" against appellant)). Plea Counsel credibly testified that he believed it was in Applicant's best interest to accept the plea offer rather than face a life sentence at a trial where the State had Applicant's fingerprints that matched to the crime scene. He credibly testified that it was Applicant's decision to plead guilty, and he believed that Applicant fully understood what he was doing and the rights that he was giving up.

This Court finds that the record reflects that Applicant was fully advised of the rights he was giving up by pleading guilty. Applicant presented no credible evidence as to why he should be able to depart from his statements at the plea hearing. This Court finds very credible Plea Counsel's testimony that he advised Applicant of all facts and risks of pleading guilty, and that Applicant fully understood what it meant to plead under North Carolina v. Alford.

Alford pleas are treated exactly the same as a standard guilty plea, and Applicant indicated that he understood this both at the plea and at the evidentiary hearing. "A guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 129 (2014) (citing State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013); Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Notably the South Carolina Supreme Court has held "[a] guilty plea represents a break in the chain of events which has preceded it in the criminal process." Id. (citations

omitted). Applicant admitted at the plea that he believed the State had enough evidence to prove beyond a reasonable doubt that he was guilty of committing a burglary. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* (citing *Rice*, 401 S.C. at 332, 737 S.E.2d at 486). Therefore, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. Accordingly, this allegation must be denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they are denied and dismissed with prejudice.

Applicant's allegation that Plea Counsel failed to properly move to suppress the fingerprint card is meritless. This Court finds that there was no legal reason to move to suppress these fingerprints as any motion to suppress would not have been successful. Plea Counsel did in fact make a motion to suppress these fingerprints and the motion was denied.

Solicitor credibly testified that Applicant's fingerprint card is not eligible to be destroyed after his 2008 acquittal because it was taken after the same arrest as two charges to which Applicant pled guilty. Furthermore, even if the card had been destroyed, law enforcement could have collected more fingerprints from Applicant to compare to the crime scene based on his other charges and arrests; as Solicitor noted, fingerprints do not change. Finally, as noted by Solicitor, Applicant did have a hearing over a motion to suppress these fingerprints, and the motion was denied based on inevitable discovery. Applicant had 15 prior arrests and 12 convictions, and there were multiple other sets of his fingerprints through the state of South

Carolina with which to compare to the prints at the crime scene. Any motion to suppress the fingerprints clearly would not have been successful.

Applicant has further failed to meet his burden in proving any prejudice. Even if Plea Counsel had managed to successfully suppress the fingerprint card from 2008, law enforcement could have pulled any other fingerprint card from Applicant's prior arrests and convictions throughout the state. Applicant's fingerprints would have been matched to the crime scene even without this specific fingerprint card from 2008. Thus, any failure to move to suppress this card would not have changed the outcome of the trial.

In regards to the Order of Recusal, this Court finds that Plea Counsel was not ineffective for failing to move to have the solicitor recused from Applicant's case. The Order of Recusal introduced by Applicant is meant to apply only to the charges from the trial in which it was ordered. The charges in the case at issue are completely separate and unrelated from Applicant's prior trial and cannot be viewed as a "pattern of criminal activity" stemming from his prior charges. The Order was clearly written only for the purpose of recusing an office that might be swayed because of the victim in the prior case. The victims in the case at hand have no relation to the previous case, and there is no reason why this Order would apply to different charges. This Court finds that this allegation is meritless and that there was no reason for the Second Circuit Solicitor's Office to be recused from this case. Therefore, Trial Counsel cannot be ineffective for failing to move to have Solicitor recused. Thus, this allegation is denied and dismissed.

Finally, Applicant has failed to prove that there was any discovery material that Plea Counsel did not obtain that he should have, or that it was prejudicial in any way. Thus, this allegation is meritless.

Applicant has also failed to prove any prejudice under the second prong of the Strickland test for any of these allegations. None of these alleged deficiencies would have made Applicant choose to go to trial and risk a sentence of Life Without Parole rather than pleading guilty and accepting the negotiated sentence of twenty-five years. Therefore, Applicant can show no prejudice.

This Court finds that Applicant has failed to meet his burden of proving that Plea Counsel was ineffective in any regard or that he was prejudiced by any of his actions, and these allegations are denied and dismissed with prejudice.

PROSECUTORIAL MISCONDUCT

This Court finds that Applicants claims of prosecutorial misconduct are meritless and must be denied and dismissed with prejudice.

Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(B) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). The Respondent submits the Applicant has not carried his burden of proving actual prosecutorial misconduct, therefore, this allegation should be summarily dismissed. As addressed above, the Order of Recusal introduced by Applicant clearly does not apply to the convictions at hand, and there was no reason for the Second Circuit

Solicitor's Office to be recused from this case. Furthermore, Applicant has failed to meet his burden in proving that Solicitor used the "threat" of a sentence of Life Without Parole to force Applicant to go to trial. Applicant has not shown in manner in which Solicitor acted improperly or outside the bounds of what is allowed under South Carolina law. Therefore, these allegations are denied and dismissed with prejudice.

BRADY VIOLATION

This Court finds that Applicant has failed to present any credible evidence on his allegation of a Brady violation.

Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Applicant has shown no specific evidence that the State failed to release to Applicant or to Plea Counsel regarding this charge. Plea Counsel credibly testified that he reviewed all discovery material with Applicant, and that Applicant had already reviewed all discovery material with his previous counsel. Applicant has failed to meet his burden of proof, and this allegation is denied and dismissed with prejudice.

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 the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the 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 is denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10 day of NOV, 2016.

R. Hood

ROBERT E. HOOD
Presiding Judge
Second Judicial Circuit

G. Harris, South Carolina

WITNESSES

Aiken County Sheriff

Greg Savell

Law Enforcement Case #: 11-030823

DOCKET NO. 2011GS0201388

The State of South Carolina

County of Aiken

DWM

ARREST WARRANT NUMBER

FILED October 13 2011

M026164

Liz Hodard
S.C.C.P. & G.S.Amey Sanders
Page 1 of 1**COURT OF GENERAL SESSIONS**

OCTOBER TERM 2011

THE STATE

vs.

ALBERT JAMES CAVE JR

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: October 13, 2011

VERDICT

CDR #: 0079

Indictment for

BURGLARY FIRST DEGREE

§ 16-11-0311

Foreperson of Petit Jury

Date:

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT FOR
BURGLARY FIRST DEGREE

§ 16-11-0311

At a Court of General Sessions, convened on October 17, 2011, the Grand
Jurors of Aiken County present upon their oath:

That **ALBERT JAMES CAVE JR** did in Aiken County, South Carolina on or
about May 16, 2011 did knowingly and willfully enter a dwelling, to wit: Pine Log
Road, Warrentville, South Carolina, such being the dwelling of [REDACTED] without
consent and with the intent to commit a crime therein and the defendant has a prior
record of two or more convictions for burglary or housebreaking or a combination of
both, in violation of § 16-11-311 of the Code of Laws of South Carolina, 1976, as
amended.

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


J. STROM THURMOND, SOLICITOR