

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

DeAndrea G. Benjamin, Circuit Court Judge

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S.C. Supreme Court

ROBERT FLETCHER HERBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001507

A P P E N D I X

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	—)	2012-GS-32-1452
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		2012-GS-32-2167
		2012-GS-32-2176
		2013-GS-32-1259

STATE OF SOUTH CAROLINA	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
ROBERT F. HERBERT	)	
DEFENDANT	—)	

June 6, 2013
Lexington, South Carolina

B E F O R E:

HON. EDWARD B. COTTINGHAM, SR., Judge.

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

ANGELA GARRICK, ASSISTANT SOLICITOR
Attorney for the STATE

SARAH A. HAHN, ASSISTANT PUBLIC DEFENDER
Attorney for the DEFENDANT

CAROL M. THUEME, RPR
Official Court Reporter

I N D E X

DEFENDANT:	PAGE
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EXHIBITS

(There were no exhibits marked.)

1 THE CLERK: Robert Herbert.

2 2012-GS-32-2176, State versus Robert Herbert,
3 indicted for intimidation of court officials, jurors or
4 witnesses. He is pleading to intimidation of a witness.

5 2012-GS-32-2166, State versus Robert Herbert,
6 indicted for arson 3rd degree. He is pleading as charged.

7 2013-GS-32-1259, State versus Robert Herbert,
8 indicted for burglary 3rd degree. He is pleading as
9 charged.

10 2012-GS-32-2167, State versus Robert Herbert,
11 indicted for intentionally detonating a destructive
12 device. He is pleading to manufacturing a destructive
13 device.

14 THE COURT: What is the penalty statute under
15 the intimidation of a witness that he's pleading to?

16 MS. GARRICK: The common law, which is zero to
17 ten.

18 THE CLERK: 2012-GS-32-1454, State versus Robert
19 Herbert, indicted for burglary 2nd degree. He is pleading
20 to burglary 2nd degree violent.

21 2012-GS-32-1452, State versus Robert Herbert,
22 indicted for burglary 2nd degree violent. He is pleading
23 as charged.

24 All indictments are true-billed and he is
25 represented by Ms. Hahn.

1 Raise your right hand, please.

2 ROBERT HERBERT, after being duly sworn,
3 testified as follows:

4 MS. GARRICK: Your Honor, before you even start,
5 I'd like you to be made aware --

6 THE COURT: Let me talk to Ms. Hahn.

7 Ms. Hahn, obviously he's standing before me for
8 numerous serious charges. Have you discussed each of
9 these charges with him in detail?

10 MS. HAHN: Yes, sir.

11 THE COURT: And you are familiar with the facts?

12 MS. HAHN: I am, Your Honor.

13 THE COURT: How does he plead to these charges?

14 MS. HAHN: Guilty, Your Honor.

15 THE COURT: I'll go into detail with him, but
16 you're saying to me that you have discussed each charge
17 with him?

18 MS. HAHN: Yes, sir.

19 THE COURT: And that he knowingly is pleading
20 guilty?

21 MS. HAHN: Yes, sir.

22 THE COURT: And you assert to me that the facts
23 as you understand them so justify such a plea?

24 MS. HAHN: Yes, sir.

25 MS. GARRICK: Your Honor, I just want you to be

1 aware and make this a Court Exhibit that he was evaluated
2 for competency back in December of 2012. The report was
3 issued January 7th.

4 THE COURT: Do we need a Blair hearing?

5 MS. GARRICK: Yes, sir. She is not disputing
6 the findings in this report. It is my understanding that
7 Ms. Hahn is not disputing the findings that he is
8 competent.

9 THE COURT: Ms. Hahn, you have had an
10 opportunity to review the report?

11 MS. HAHN: I have, Your Honor.

12 THE COURT: Is there anything in his background
13 that would make you suspicious of his mental capacity?

14 MS. HAHN: No, Your Honor.

15 THE COURT: And you have no witnesses in
16 opposition to a finding of competency?

17 MS. HAHN: That's right, Your Honor.

18 THE COURT: Let the record reflect that I've
19 reviewed the record of the department and made it a part
20 of the record and find that my findings regarding this
21 issue -- finding him competent to go forward.

22 MS. GARRICK: Thank you, Your Honor.

23 THE COURT: All right. That would be a Blair
24 hearing.

25 All right. Proceed.

1 MS. GARRICK: Yes, sir, Your Honor.

2 Your Honor, I have -- we have three different
3 sets of charges. If I could go through them one at a
4 time.

5 THE COURT: Sure.

6 MS. GARRICK: And I'll do them the way law
7 enforcement was able to track them.

8 The first one is a 2012-1454. Judge, it's one
9 of the burglary 2nds violent. On March 27 of 2012, during
10 the nighttime hours, Bowen's Auto Body Shop here in
11 Lexington County was burglarized. Your Honor, the
12 defendant went into the business at night, went through
13 the stuff in the office, took some things out, and then
14 took a Chevrolet Avalanche from the auto body shop. There
15 is a companion grand larceny charge that is being nol
16 prossed, and that's 2012-1455.

17 THE COURT: Let me deal with that.

18 You understand the facts the State alleges in
19 this case?

20 THE DEFENDANT: Yes, sir, I do.

21 THE COURT: Are you guilty of that charge?

22 THE DEFENDANT: Yes, I am.

23 THE COURT: Did you steal that car?

24 THE DEFENDANT: Yes, I did.

25 THE COURT: All right. What's next, please?

1 MS. GARRICK: Your Honor, just a couple of
2 nights later, there was a burglary to S&R Gun Sales, which
3 is a business here in Lexington County. This is the other
4 burglary 2nd violent that he is pleading guilty to. It is
5 Indictment 2012-1452.

6 Your Honor, on that case, he actually took the
7 Chevrolet Avalanche that had been stolen from Bowen's Auto
8 Body Shop and used it to run into the building where this
9 business and other businesses were located, went inside
10 the business during the nighttime hours and took thousands
11 and thousands and thousands of dollars of property.

12 THE COURT: What kind of property?

13 MS. GARRICK: Lots of guns; many, many firearms,
14 like \$25,000 worth.

15 THE COURT: Do you understand that charge?

16 MS. GARRICK: Well, sir, it wasn't 25,000. It
17 was 4,000 on the guns, sir.

18 THE COURT: It was some amount of money that you
19 stole?

20 THE DEFENDANT: Well, yes, sir.

21 MS. GARRICK: Yes, sir, Your Honor, and I'm
22 going to introduce these people to you in just a bit. But
23 on that case -- so he was arrested on that case.

24 THE COURT: How much did you steal there? Tell
25 me the truth. You already said you stole something. How

1 much money was it?

2 THE DEFENDANT: It was just \$4,000 worth of
3 guns, sir.

4 THE COURT: Pardon me?

5 THE DEFENDANT: Just \$4,000 worth of guns.

6 THE COURT: How about some cash?

7 THE DEFENDANT: No cash, no. I didn't steal
8 anything but the guns. It was \$4,000 worth of guns.
9 Well, eight handguns on the warrant.

10 THE COURT: All right. Eight handguns. How in
11 the world you get that number?

12 MS. GARRICK: Your Honor, I might have been
13 thinking about the Bowen's Auto Body Shop.

14 THE COURT: Okay. Go ahead.

15 MS. GARRICK: So on that one --

16 THE COURT: But he's admitting he stole some
17 guns.

18 MS. GARRICK: Right. And that's the burglary
19 2nd violent. And once again, that grand larceny is being
20 dismissed on that case, too, the 2012-1451.

21 Your Honor, that brings us up to where we get to
22 the arson and the intimidation of a witness.

23 The way that the burglary cases were solved,
24 there were some people that had information. The
25 abandoned Chevrolet Avalanche had been found very close to

1 the defendant's home. A witness came forward and
2 indicated to law enforcement that Mr. Herbert had been
3 involved in these burglaries, that he was the one that had
4 stolen the Avalanche, that he had been selling guns on the
5 street, and some of these were the stolen guns. So these
6 witnesses gave some information to law enforcement.
7 They're part of the Branham family.

8 So Mr. Herbert was made aware I guess through
9 discovery that people had given information to law
10 enforcement against him. So while he was out on bond on
11 those burglary cases, Your Honor, he committed an arson
12 3rd and intimidation of a witness, two indictments he's
13 pleading guilty to.

14 THE COURT: What did he burn?

15 MS. GARRICK: Your Honor, what he did was on
16 July 12 of 2012, he burned a car. He threw a Molotov
17 cocktail -- he and a co-defendant threw this Molotov
18 cocktail on a vehicle that belonged to some of the people
19 that had been a witness against him.

20 THE COURT: Did you do that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You are guilty of that?

23 THE DEFENDANT: Yes, I am.

24 MS. GARRICK: Your Honor, there's a lot more to
25 the facts. Law enforcement in all of these cases did a

1 very good job. They did search warrants on his home,
2 found the keys to the Avalanche, found items that linked
3 him to the burglaries. They found items that linked him
4 to the arson and intimidation of witness. When the
5 defendant was given his rights, he did give a confession
6 to Detective Gooding, who's present with me. He gave an
7 audiotape confession.

8 Your Honor, he has another burglary 3rd when
9 he's been in jail on this arson case. I forgot -- I
10 neglected to mention, too, while he was out, right before
11 he did the arson case, he had missed his first appearance
12 on the burglary cases, so a bench warrant was issued.
13 When he was arrested on the arson and intimidation of a
14 witness, a bench warrant was served, so we are going to
15 have to vacate a bench warrant.

16 But during the course of all that, his DNA was
17 found and linked to a cold case from a 2011 burglary where
18 Bradley Edwards, a building here in Lexington County, had
19 been burglarized. That is the final burglary 3rd he's
20 pleading guilty to.

21 THE COURT: You're pleading guilty to the
22 burglary of the Edwards' building?

23 THE DEFENDANT: Yes, sir.

24 MS. GARRICK: Your Honor, he had cut himself and
25 there was blood collected at that, but at the time law

1 enforcement didn't have a suspect. But since that time
2 it's now been linked to him.

3 THE COURT: Law enforcement done a good job
4 here.

5 MS. GARRICK: Yes, sir, they have.

6 Once you've accepted his three pleas or all of
7 his pleas for sure, I do have his criminal history. I do
8 have victims that wish to address the Court.

9 THE COURT: Tell me about the intimidation of a
10 witness.

11 MS. GARRICK: Your Honor, that was by burning up
12 the family car of one of the witnesses by throwing the
13 Molotov cocktail. It's connected to the arson, but it's
14 to --

15 THE COURT: Ms. Hahn, are these the cases that
16 you discussed with him?

17 MS. HAHN: Yes, sir.

18 THE COURT: And as to each of these, he has
19 indicated he wishes to plead guilty?

20 MS. HAHN: That's correct, Your Honor.

21 THE COURT: And the State now has elicited the
22 facts giving rise to these charges and they tell me that
23 you gave a video confession. Is that true?

24 THE DEFENDANT: It was a recording.

25 MS. GARRICK: Audio.

1 THE DEFENDANT: Audio recording.

2 THE COURT: And what you said in that
3 confession, was that true?

4 THE DEFENDANT: Yes, sir, it was.

5 THE COURT: And they had Mirandized you at the
6 time prior to the confession?

7 THE DEFENDANT: Yes, sir, they did.

8 THE COURT: And you understand these various
9 charges?

10 THE DEFENDANT: Yes, sir, I understand them.

11 THE COURT: And you are saying to me that not
12 only that you plead guilty but you are guilty; is that
13 what you're saying?

14 THE DEFENDANT: Yes, I am, sir.

15 THE COURT: And you understand now -- I suspect
16 you've been around the block. You understand certain
17 constitutional rights, do you not?

18 THE DEFENDANT: Yes, sir, I do.

19 THE COURT: You know you're presumed innocent,
20 the State would have to prove you guilty beyond a
21 reasonable doubt?

22 THE DEFENDANT: Can I get a continuance then?

23 THE COURT: A what?

24 THE DEFENDANT: A continuance?

25 THE COURT: No, you're not going to get a

1 continuance. What kind of continuance are you talking
2 about?

3 THE DEFENDANT: To trial. I want a jury trial.

4 THE COURT: I thought you said you wanted to
5 plead guilty?

6 THE DEFENDANT: I mean you saying --

7 THE COURT: No, I'm not saying that at all. I'm
8 saying that that was your right to trial by jury, but you
9 are -- in pleading guilty you're waiving that right.

10 THE DEFENDANT: You say constitutional rights.
11 They just threw me off.

12 THE COURT: Well, I'm going to go over it again.

13 THE DEFENDANT: Okay.

14 THE COURT: You know that you are entitled to a
15 trial by jury, and in pleading guilty you are waiving that
16 right. You understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You -- at a trial, you would have a
19 right to confront the witnesses against you.

20 THE DEFENDANT: Okay.

21 THE COURT: You would have a right to testify in
22 your own behalf, but at a trial, this confession that you
23 made --

24 THE DEFENDANT: Yes, sir.

25 THE COURT: -- would be presented. All of this

1 evidence including the DNA would come before a jury.

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And in pleading guilty, you're
4 saying to me, I am guilty, I want to waive my rights to
5 trial by jury.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: You're not talking about any
10 continuance or anything like that?

11 THE DEFENDANT: Okay.

12 THE COURT: But the law requires me to inform
13 you -- and I know, Ms. Hahn, you've gone over all this
14 with him?

15 MS. HAHN: I have, Your Honor.

16 THE COURT: And he understands it, doesn't he?

17 MS. HAHN: I think he does.

18 THE COURT: Sure. I think so, too. He's an
19 intelligent young man.

20 THE DEFENDANT: Yes, I am, sir.

21 THE COURT: Unfortunately, he has committed a
22 lot of crimes here.

23 Is there any negotiations in this case at all?

24 MS. GARRICK: Your Honor, just we did reduce
25 down where the Molotov cocktail was used. He was indicted

1 under a subsection that was a mandatory 10 to 25. He's
2 pleading to one that's a mandatory 2 to 15 and we're
3 dismissing --

4 THE COURT: Limited to what?

5 MS. GARRICK: Two years up to 15.

6 THE COURT: Which one is that?

7 MS. GARRICK: Use and manufacturing of an
8 incendiary device.

9 THE COURT: Tell me about that one. I didn't
10 hear the facts.

11 MS. GARRICK: That's just throwing the Molotov
12 Cocktail and burning up the witness's car to intimidate
13 that witness.

14 THE COURT: Who is it wishes to be heard?

15 MS. GARRICK: Your Honor, have you accepted the
16 plea?

17 THE COURT: I have.

18 MS. GARRICK: Okay.

19 THE COURT: Clearly he has waived his
20 constitutional rights and I've gone over it with him, and
21 I've discussed it with his attorney and she tells me that
22 she, too, has discussed these various issues; that he
23 understands it and waives it. Is that correct, Ms. Hahn?

24 MS. HAHN: Yes, sir.

25 THE COURT: All right.

1 MS. GARRICK: Your Honor, this is Mr. Davis.
2 He's the one who owned the gun shop that had been
3 burglarized.

4 THE COURT: Yes, sir. Thank you for being here,
5 Mr. Davis.

6 MR. DAVIS: Thank you for allowing me to speak.

7 Obviously being he's already pleading guilty, I
8 just -- I had to close the business and I lost monies that
9 I cannot recover. Obviously he continues this pattern and
10 will probably do it for the rest of his life. I just
11 request that, if possible, consideration that he serve any
12 time consecutive. I just don't believe his behavior's
13 going to change.

14 THE COURT: I thank you for your time here.

15 MS. GARRICK: Your Honor, this is Detective
16 Gooding. He worked a lot of the cases, the burglaries and
17 the arson and the intimidation of a witness.

18 THE COURT: Detective, you've done a wonderful
19 job in this case.

20 DETECTIVE GOODING: Thank you, Your Honor.

21 Your Honor, if it please the Court, this is a
22 series of events that took place in the county beginning
23 in March of 2012 and they all sort of link together
24 through investigation.

25 Initially another detective had been assigned to

1 the burglary at Bowen's Body and Paint in which the
2 Avalanche was stolen. The Avalanche had a value of
3 approximately \$27,000, and some office-type equipment was
4 stolen as well.

5 Two days after that just three quarters of a
6 mile up the road is where S&R Gun Sales is located and
7 there was a burglary committed there in which a truck was
8 driven into the business. The investigation of that
9 burglary I was assigned to, sir, and began to work that.

10 Physical evidence recovered from that burglary
11 scene, parts and vehicle parts were determined to belong
12 to a full size Chevy Avalanche truck. Believing that
13 somebody would probably not use their own truck to run
14 into a business, I began to research vehicles stolen in
15 the county in the time immediately prior to that and we
16 found the burglary of Bowen's Paint and Body just up the
17 road. We began to believe that these two events might be
18 linked.

19 Through our investigation, it was determined --
20 and the vehicle was recovered in the same neighborhood
21 that Mr. Herbert lived in, and additional information was
22 gathered from a witness that led us to the execution of a
23 search warrant at Mr. Herbert's residence. During the
24 execution of that search warrant, the keys to the vehicle
25 were recovered in Mr. Herbert's closet and items,

1 office-type items stolen from Bowen's Auto Paint and Body
2 were located in the attic of the residence.

3 Ultimately, the information that was gathered
4 during the course of those two investigations led to the
5 charges, the two burglary charges, being the grand larceny
6 charges from the S&R Gun Sales and Bowen's Paint and Body.

7 The witness in this case, or one of the
8 witnesses in this case, lives in the same subdivision as
9 Mr. Herbert and had previously had a relationship with --
10 Mr. Herbert lived with Lucinda Ball and her children, the
11 family lived together in that house, and there was some
12 relationship between the kids, that they would go back and
13 forth. But that relationship began to deteriorate,
14 especially as it became closer in time for Mr. Herbert to
15 go to a hearing.

16 There's other pending criminal charges against
17 other persons that are involved as witnesses in this case,
18 but in this case, in the arson, Mr. Herbert was out on
19 bond at the time for having committed the burglaries. He
20 had managed to post bond on the two previously burglary
21 charges, at which time he was observed, along with a
22 co-defendant, taking and throwing a Molotov cocktail, or a
23 gasoline device with a wick in a bottle, into one of the
24 victim's cars that was parked up next to the residence.
25 Luckily, the victims were awake, they saw this take place,

1 which was fortunate for law enforcement there so they
2 could provide information, but they were also able to
3 summon help immediately before the fire could spread to
4 the home or anybody else's home in the neighborhood, and I
5 believe they began to actually put out or attempt to put
6 out the fire.

7 Based on the information we received at that
8 time, another search warrant was executed on the home of
9 Mr. Herbert in which a gas can was recovered still
10 containing gasoline, jeans were recovered from the laundry
11 room in which we believe there was accelerants on them,
12 and a bloody rag was collected from his bathroom.

13 There was also blood located on the door handle
14 on the back of the home where the gas can was located. It
15 was surmised that someone had cut their hand when running
16 from the scene. Later, in fact, Mr. Herbert was
17 determined to have a cut on his hand, which he admitted to
18 having gotten as he fled the scene. We were able to trace
19 the gas can back to the convenience store in which it was
20 purchased. We have video of Mr. Herbert as well as
21 another person purchasing the gas can that night, and
22 ultimately he did confess to having committed the arson.

23 THE COURT: The other person, has he been
24 brought to court, too?

25 MS. GARRICK: No, Your Honor.

1 DETECTIVE GOODING: That one person has not,
2 Your Honor.

3 THE COURT: That one person, is he the one that
4 was involved in the Molotov Cocktail, too?

5 DETECTIVE GOODING: No, Your Honor. The person
6 charged in that offense is one of Lucinda Ball's sons who
7 lived with Mr. Herbert at the time.

8 Additionally, DNA was recovered from the
9 Chevrolet Avalanche that did match Mr. Herbert, the Chevy
10 Avalanche that was stolen from the paint and body store
11 and used in the burglary of S&R Gun Sales.

12 Since that time, Mr. Herbert has sued both
13 myself and another officer in federal court pro se, and
14 right now there is a series of lawsuits ongoing in regards
15 to malicious prosecution.

16 THE COURT: Sued for what?

17 DETECTIVE GOODING: Malicious prosecution in
18 federal court, Your Honor, by Mr. Herbert on myself as
19 well as other officers in the sheriff's department.

20 Your Honor, also worth noting --

21 THE COURT: Of course, that's not before me.
22 You understand that?

23 DETECTIVE GOODING: Yes, Your Honor.

24 Since -- you know, his criminal history spans
25 over the last 23 years, Your Honor. He began his criminal

1 record back as far as 1989 and it spans through 2012. He
2 has at least 46 criminal charges during that time and a
3 record in two states.

4 Mr. Herbert's been to prison four times. He has
5 multiple property offenses, alcohol and drug charges, and
6 he's also demonstrated prior crimes against persons with
7 pointing and presenting charges, and he's got a history of
8 committing crimes while on bond or probation.

9 As a matter of fact, while these incidents were
10 taking place in Lexington County, Mr. Herbert has been
11 charged in December of 2011 in Richland County with
12 unlawful carrying of a weapon as well as two manufacturing
13 and possessing of narcotics charges.

14 So Mr. Herbert has demonstrated over these 23
15 years that he has a disregard for the safety of persons
16 and property by either stealing from people, selling drugs
17 or being related to alcohol offenses or weapons charges
18 and I'd just ask the Court to consider that when they
19 determine what sentence is appropriate.

20 MS. GARRICK: Your Honor, I do have his criminal
21 convictions, his history.

22 THE COURT: Okay. Detective, let me say again,
23 it's obvious, and I'm very much impressed, with your
24 exhaustive investigation in this case.

25 DETECTIVE GOODING: Thank you, Your Honor.

1 THE COURT: The folks of Lexington County are in
2 your debt and you have their gratitude.

3 DETECTIVE GOODING: Thank you, Your Honor.

4 THE COURT: The last ten years -- obviously he's
5 got a long significant record.

6 MS. GARRICK: Last ten years, if you start in
7 2003, possession of marijuana, DUS; CDV in 2010;
8 fraudulent checks in 2010; 2005, use of vehicle without
9 permission; 2008, he was revoked. I missed the 2007
10 conviction, possession of stolen vehicle. Two counts of
11 pointing and presenting a firearm and forgery. So that's
12 just the last ten years.

13 Your Honor, we did have restitution requests
14 from different businesses and from Mr. Davis who's here.
15 I don't know how you feel about that. I've talked with
16 them about restitution being ordered on someone who is
17 looking at so much time, but I do have restitution
18 requests from three of the victims if you would like to
19 impose restitution.

20 THE COURT: I will deal with that in a moment.

21 MS. GARRICK: Okay.

22 THE COURT: Young man, the record reflects that
23 you've got a long criminal history. Do we agree with
24 that?

25 THE DEFENDANT: Not exactly.

1 MS. HAHN: Your Honor, I might be able to
2 address that.

3 THE COURT: Please do.

4 MS. HAHN: Briefly.

5 I don't have a list of 40-some-odd convictions.
6 What I do have, the most serious convictions he has are a
7 non-violent burglary from back in '89 and then the
8 pointing and presenting charges from '07. I don't have
9 anything about selling drugs. The Solicitor hasn't
10 provided any information to that effect. He does admit
11 that he does have some prior offenses on his record.

12 THE COURT: When's the last time you've been in
13 the penitentiary?

14 THE DEFENDANT: 2009.

15 THE COURT: And there's some indication that you
16 were revoked on several occasions with probation.

17 THE DEFENDANT: No, sir, I've never been
18 revoked.

19 THE COURT: You've never been revoked?

20 THE DEFENDANT: No, sir, Your Honor.

21 THE PROBATION AGENT: Your Honor, he's been
22 revoked two out of three times.

23 THE DEFENDANT: Where at? That was on parole.

24 THE COURT: You've been revoked on parole,
25 though?

1 THE DEFENDANT: Well, I didn't -- I didn't
2 finish them up. I didn't have enough money.

3 THE COURT: Tell me about it.

4 THE PROBATION AGENT: Judge, he was last revoked
5 in 2008. It would take me a few minutes to go through
6 this.

7 THE COURT: That's all right. Revoked when?
8 When else was he revoked?

9 THE PROBATION AGENT: In 1996.

10 THE COURT: Either parole or probation?

11 THE PROBATION AGENT: Probation.

12 THE COURT: Counsel, what do you want to tell
13 me?

14 MS. HAHN: Well, Your Honor, he's never been in
15 the kind of significant trouble that he is now. I can say
16 this: He has done --

17 THE COURT: Wait a minute. He's got a gun
18 charge on his record.

19 MS. HAHN: He does. But I think that -- I think
20 that's a little less serious than what he's got himself in
21 on now. But at any rate, he knows that he has a record
22 and he knows that these charges are significant, and he
23 understands that.

24 THE COURT: Did you hear what the detective said
25 was his record?

1 MS. HAHN: He did. And I disagree with some of
2 that. I agree with what the Solicitor said, but not all
3 that the detective told Your Honor, from the rap sheet
4 they've given us.

5 Your Honor, from my count, it appears that he's
6 done 330 days now total. We would ask the Court to
7 consider applying all of his time served to all of his
8 charges since he bonded out after doing only a couple of
9 days on one set of charges.

10 Your Honor, he's 43 years old. He's from
11 Columbia. He's lived in the Columbia and Lexington County
12 area his whole life. He's worked as a barber most of that
13 time. He's a high-school graduate.

14 He said that when he was working as a barber --
15 he's been doing that since 1993. He says that when he was
16 working as a barber, he was making good money and had a
17 steady job and worked at the same location for about five
18 years. He rented a booth from the business owner and was
19 there for about five years.

20 He does have a daughter that he's in contact
21 with. He says that he goes to church at Zion Baptist
22 Church.

23 THE COURT: Do you understand that these
24 burglaries are violent?

25 MS. HAHN: He does, Your Honor. He knows that

1 that means that he's going to have to serve a larger
2 percentage of his sentence. He also knows these are
3 strikes and if he gets in trouble again, then he's going
4 to be facing life without parole if he has anything
5 similar in the future.

6 Your Honor, he understands the position he's in.
7 Given the fact that he's done almost a year, he wanted me
8 to ask Your Honor to consider probation, but we've talked
9 about it and he understands the position he's in.

10 We'd ask the Court also to consider a short
11 active sentence. He suggested something in the range of
12 five years for what he's done. He knows it's a bad
13 situation. I don't think he's ever done anything as bad
14 as this before, Your Honor, and he is going to have to
15 face some additional consequences for these charges.

16 THE COURT: His actions throughout this thing
17 would indicate to me that he has a total callous
18 indifference to the laws of this county and state and to
19 the interest of other folks' property. It's total
20 callousness in his continued efforts in these things,
21 including the firebombing of a witness.

22 MS. HAHN: The only thing I can say to that,
23 Your Honor, is that he admits what he did. I can say that
24 once he was caught he did cooperate completely and
25 confessed to what he had done.

1 THE COURT: Dealing with burglary 2nd degree in
2 the indictment ending in 454, the sentence and judgment of
3 this Court is that he be confined for a period of ten
4 years. Burglary 2nd degree violent in an indictment
5 ending in 1452, ten years consecutive. My intention is
6 given his significant prior record, that he serve 20
7 years. In the use of an incendiary device, two years
8 concurrent. Arson 3rd degree, three years concurrent.
9 Intimidation of a witness, ten years concurrent. Burglary
10 3rd degree, five years concurrent.

11 Let me address the witnesses.

12 Mr. Witness -- I mean the victims --

13 MS. GARRICK: Yes, sir.

14 THE COURT: I've said this many times, and I
15 wish it were so, I wish there was some fund provided by
16 the State of South Carolina to repay restitution that you
17 received. But this man is going to jail under violent
18 charges for 20 years, where he's going to serve 85 percent
19 of it. Obviously restitution, unfortunately, is not
20 available to you. I will -- there's no sense in me
21 ordering restitution for somebody who's getting ready to
22 go to jail for 20 years.

23 Do you understand that?

24 MR. DAVIS: Yes, sir.

25 THE COURT: I wish there was some way that I

1 could help you, but I just don't have that availability.

2 Do you understand that?

3 MR. DAVIS: Yes, sir.

4 THE COURT: Ms. Hahn, thank you so much for your
5 services.

6 MS. HAHN: Thank you, Your Honor.

7 (The proceedings were concluded.)

8 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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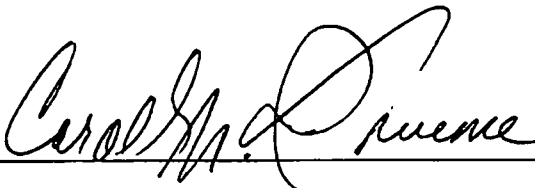
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24

25

1 CERTIFICATE OF REPORTER
2
34 STATE OF SOUTH CAROLINA)
5 COUNTY OF LEXINGTON)
6
78 I, CAROL M. THUEME, RPR, Official Court Reporter for
9 the 11th Judicial Circuit of the State of South Carolina,
10 do hereby certify that the foregoing is a true, accurate
11 and complete Transcript of Record of the proceedings had
12 and evidence introduced in the trial of the captioned
13 case, relative to appeal, in the Court of General Sessions
14 for kex County, South Carolina, on the 6th day of June,
15 2013.16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18
19

20 February 28, 2014

21 
2223 CAROL M. THUEME, RPR
24 Circuit Court Reporter
25

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF

IN THE COURT OF COMMON PLEAS

Robert Fletcher Herbert #231709
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

2013 CP 3203947

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 Perry Correctional Inst.
2. Name and location of Court which imposed sentence Lexington S.C. General S.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012GS3201454
 - (b) 2012GS3201452
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 6-6-13 10yrs 2012GS3201454 consecutive
 - (b) 6-6-13 10yrs 2012GS3201452

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.O.

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) Ineffective Counseling Pled Guilty
- (b) _____
- (c) _____

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

- (a) I WAS told THAT All my charges would be RAN
Concurrent And Violation of my Rights 6th 8th 14th Amendment
Revised 3/2003
Index 17-25-50

- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) ALL CHARGES WAS PLED TO ON THE SAME DAY BY THE STATE JUDGE
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction: NO
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

No

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

- (a) my Lawyer SARAH HANN Did not Present Them when I
- (b) Asked Her to File Under 17-25-50
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? _____

- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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. _____
 - 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 run my two ten year sentences concurrent
under 17C-25-50

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

No

① State Clearly The Relief You Seek in Filing This Application?

Under 17-25-50 Crime Spree Law All my charges As I was under Standing from my Lawyer WAS to Be Concurrent with Our 10yr Sentence not 2 10's Running wild I never would of pled to that So I would like my 2 10yr Sentences run Concurrent

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, _____, 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.

Robert Heber

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

Nancy A. Murchant (L.S.)
Notary Public

My Commission Expires: 1-23-2023

2013CP3203947

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

I, Robert, 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.

Robert Herbert
Applicant

SWORN or affirmed to and subscribed before me this
4th day of November, 2023.

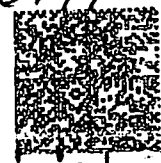
Nancy C. Muehler
Notary Public

My Commission Expires: 1-23-2023

FILED
NOV 13 2023
CLERK OF COURT
JUDICIAL DISTRICT
OF KENTUCKY
NORTHERN DISTRICT

Robert Fletcher Herbert #231704
 Perry Correctional Inst. B3 B214 -
 430 Oak Lawn Rd.
 Afton S.C. 29664

#2013CP32-03947



UNITED STATES POSTAGE
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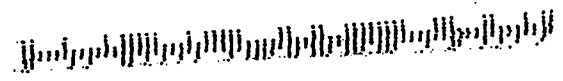
Q/

Lexington Jail
 205 East Main St
 Lexington SC 29072

RECEIVED
 NOV 04 2013
 P.C.I. MAILROOM

LEGAL MAIL

201723557



STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	2013-CP-32-3947
Robert Fletcher Herbert,)	
SCDC # 231709,)	
Applicant,)	
vs.)	AMENDED APPLICATION
	FOR POST CONVICTION RELIEF
State of South Carolina,)	
<u>Respondant.</u>)	

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows to include in addition to prior grounds stated in the original application for post-conviction relief:

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

2012-GS-32-1452

2012-GS-32-1454

2012-GS-32-2166

2012-GS-32-2167

2012-GS-32-2176

2012-GS-32-1259

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

2012-GS-32-1452—ten years, consecutive to all other charges

2012-GS-32-1454—ten years, concurrent

2012-GS-32-2166—three years, concurrent

2012-GS-32-2167—two years, concurrent

2012-GS-32-2176—ten years concurrent

2012-GS-32-1259—five years concurrent

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

- (a) Ineffective assistance of trial counsel – trial counsel Buchanan failed to relay a prior plea deal to client;
- (b) Ineffective assistance of trial counsel—trial counsel Hahn explain full plea to client, as he believed all charges were to be run concurrent as part of the plea deal; and
- (c) Ineffective assistance of trial counsel—trial counsel failed to explain indictment waivers to client.

18. If you answered “yes” to one or more parts of (17), list (a) who represented you:

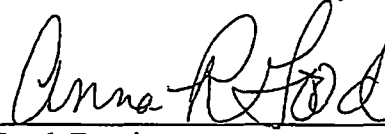
- i. Sarah Hahn—206 E. Main Street, Lexington, SC 29072 (at plea)
- ii. Matthew Buchanan, P.O. Box 50666, Columbia, SC 29250 (prior to plea)

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

Seek to have the benefit of the prior plea deal that was not offered and/or the ten year sentence that was consecutive to be run concurrent based on Applicant’s belief of what the plea deal entailed.

[SIGNATURE ON NEXT PAGE]

LAW OFFICE OF ANNA GOOD, LLC

A handwritten signature in cursive script, appearing to read "Anna Good", is written over a horizontal line.

Anna Good, Esquire
Attorney for Applicant
1720 Main Street, Suite 303
Columbia, SC 29201
803-429-9107
803-799-4059 (fax)

Columbia, South Carolina
This 2nd day of June, 2014

STATE OF SOUTH CAROLINA)
 COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
 2013-CP-32-3947

Robert Fletcher Herbert,)
 SCDC #270630,)
 Applicant,)

-vs-

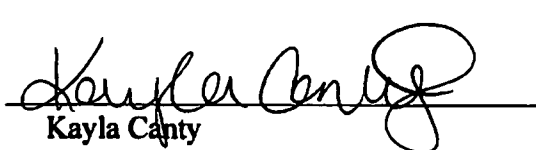
CERTIFICATE OF SERVICE

State of South Carolina,)

Respondant.)

Kayla Canty, certifies that on the 2nd day of June 2014, she served the Amended Application for Post Conviction Relief on Walt Whitmire, Attorney for the Respondant, by placing a copy of the same in the U.S. Mail with due and proper postage attached thereto, addressed as follows:

Walt Whitmire, Assistant Attorney General
 Rembert C. Dennis Building
 P.O. Box 11549
 Columbia, SC 29211

By: 

Kayla Canty

Legal Assistant to Anna Good

LAW OFFICE OF ANNA GOOD, LLC
 1720 Main Street, Suite 303
 Columbia, SC 29201
 (803) 429-9107

Columbia, South Carolina
 This 2nd day of June, 2014.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
LEXINGTON COUNTY	)	
	)	C.A. No. 2013-CP-32-3947
	)	
Robert Fletcher Hebert,	)	
S.C.D.C. No. 231709,	)	
	)	
Applicant,	)	RETURN
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post-conviction relief filed November 13, 2013, 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 Lexington County Clerk of Court. The Applicant was true bill indicted at the July 2012 term of the Lexington County Grand Jury on two counts of burglary, second-degree violent, (2012-GS-32-1452; -1454), intimidation of a witness (2012-GS-32-2176); manufacture of destructive device (2012-GS-32-2167); arson, third-degree (2012-GS-32-2166); and burglary, third-degree first offense (2013-GS-32-1259). Sarah A. Hahn, Esq., represented the Applicant. On June 6, 2013, Applicant pled guilty as indicted without negotiations or recommendations. The State was represented by Asst. Solicitor Angela Garrick, Esq. The Honorable Edward B. Cottingham, Sr., sentenced Applicant to ten (10) years imprisonment on each burglary, second-degree violent charge, ten (10) years imprisonment for intimidation of a witness, two (2) years imprisonment for manufacture of destructive device; three (3) years imprisonment for arson, and five (5) years imprisonment for burglary, third-

degree first offense. Excluding one burglary, second-degree violent charge, all sentences were to be served concurrently. Burglary, second-degree violent (2012-GS-32-1452) was to served consecutively. Applicant did not appeal his sentence of conviction.

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

II.

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

1. Ineffective Assistance of Counsel:
 - a. Counsel misadvised Applicant that he would receive concurrent prison sentences.

Any claims not specifically enumerated in the post-conviction 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, SCRPC.

III.

In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a post-conviction relief applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541,

402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing* Strickland.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel and whether the Applicants plea was involuntary.

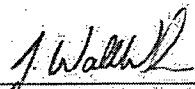
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

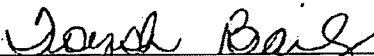
April 28th, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2013-CP-32-3947
	)	
ROBERT FLETCHER HERBERT	)	
	)	
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:

Anna R. Good
1720 Main St, Suite 303
Columbia, SC 29201

DATED this 28th day of April, 2014


 Troyeshi Brailey, Legal Assistant
 For Respondent

1 State of South Carolina) In the Court
2 County of Lexington) Of Common Pleas
3
4 Indictment No.: 2013-CP-32-3947
5 Robert Fletcher Herbert,)
6 Plaintiff,)
7 vs.) Transcript of Record
8 State of South Carolina,)
9 Defendant.)

10 October 15, 2014
11 Lexington, South Carolina

12 BEFORE:

13 The Honorable DeAndrea G. Benjamin, Judge

14 APPEARANCES:

15 Anna R. Good, Esquire
16 Attorney for the Plaintiff

17 Clay Mitchell, Assistant Attorney General
18 Attorney for the Defendant

19 ALSO PRESENT:

20 Robert Fletcher Herbert
21
22
23
24
25

INDEX

WITNESS	PAGE
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ROBERT FLETCHER HERBERT

Direct Examination by Ms. Good	5
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Cross Examination by Mr. Mitchell	17
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Redirect Examination by Ms. Good	20
----------------------------------	----

SARAH HAHN MAULDIN

Direct Examination by Mr. Mitchell	21
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Cross Examination by Ms. Good	28
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Redirect Examination by Mr. Mitchell	33
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EXHIBITS

NO.	DESCRIPTION	ID.	EVIDENCE
-----	-------------	-----	----------

Plaintiff's

#1	Plea Offer	3	8
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#2	Plea Offer	3	13
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#3	Public Defender Letter	3	11
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#4	Letter 10/31/12	3	7
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1 (Whereupon, the following proceedings were had.)

2 (Whereupon, Plaintiff's Exhibits #1 through #4
3 marked for Identification.)

4 MR. MITCHELL: May it please the Court. Your Honor,
5 the next case is Robert Fletcher Herbert versus the
6 State of South Carolina. Case number 2013-CP-32-3947.
7 Applicant was true bill indicted at the July 2012 term
8 of the Lexington County Grand Jury on two counts of
9 second degree burglary violent, intimidation of a
10 witness, manufacturing a destructive device, third
11 degree arson and third degree burglary.

12 Sarah Hahn represented the applicant on these
13 charges as his plea and applicant pled on June 6th, 2013
14 before the Honorable Edward B. Cottingham without
15 negotiation and without recommendation. Judge
16 Cottingham sentenced the applicant to ten years
17 imprisonment on each burglary conviction. One of those
18 was to be run consecutively. Then ten years
19 imprisonment for intimidation of a witness. Two years
20 on the manufacturing of a destructive device. Three
21 years for arson third, and five years for the third
22 degree burglary count.

23 Applicant filed this application for PCR on November
24 13th, 2013. An amended application was submitted to the
25 court in June of 2014 where applicant has alleged that

1 counsel failed to convey a plea offer and where counsel
2 is ineffective in advising applicant that the
3 convictions would be run concurrently instead of
4 consecutively.

5 And I note for the record that the victim of one of
6 the burglaries, Mr. Davis, is present in the courtroom
7 today and the applicant is present with his attorney Ms.
8 Anna Good and I will turn it over to her now.

9 THE COURT: Yes, ma'am.

10 MS. GOOD: Thank you, Your Honor. I just want to
11 clarify, there was a third amendment to the amended
12 application. The trial counsel failed to explain
13 indictment waivers to the client. We are not going
14 forward on that one today. Just the first two.

15 In addition, we did also amend the application to
16 include Matthew Buchanan as the prior attorney for
17 Mr. Herbert. He was his attorney before Sarah Hahn was
18 and that is one of the issues we have regarding the
19 prior plea bill and at this time I will --

20 THE COURT: Is he here to testify?

21 MR. MITCHELL: He's not.

22 THE COURT: Okay.

23 MS. GOOD: At this time I will call Robert Herbert,
24 Your Honor.

25 Thereupon,

1 ROBERT FLETCHER HERBERT
2 after having been first duly sworn, testified as follows,

3 DIRECT EXAMINATION

4 BY MS. GOOD:

5 Q. Please state your full name for the record.

6 A. Robert Fletcher Herbert.

7 Q. Good morning, Mr. Herbert. You just heard the
8 Attorney General list all the charges you pled to on June 6,
9 2013 including ten years consecutive on one of your burglary
10 charges, correct?

11 A. Yes, ma'am.

12 Q. Prior to your plea, when you were first arrested,
13 who was your attorney?

14 A. Matthew Buchanan.

15 Q. And you were arrested in April 2012?

16 A. Yes, ma'am.

17 Q. Did you bond out from that charge?

18 A. Yes, I did.

19 Q. And eventually were you re-arrested on subsequent
20 charges?

21 A. Yes, ma'am. July 2012.

22 Q. In July of 2012 was Mr. Buchanan still your
23 attorney?

24 A. Yes, ma'am.

25 Q. Did you meet with him after you got arrested the

1 second time?

2 A. Yes, ma'am. I met with him one time in August.

3 Q. That was in July of 2012 or August?

4 A. August 7th.

5 Q. Okay. August 7th. When you met with him that one
6 time, where did you meet with him?

7 A. I met with him in the lawyer's --

8 Q. At the jail?

9 A. Yes, ma'am. At the jail.

10 Q. Prior when you were first arrested in April of 2012,
11 did you ever meet with Mr. Buchanan before you were arrested
12 again in July?

13 A. No, ma'am.

14 Q. So the only time you ever met with Mr. Buchanan was
15 August 2012?

16 A. Yes, ma'am.

17 Q. Was that the beginning of August, the middle of
18 August, the end of August, do you remember?

19 A. The beginning of August. August 7th.

20 Q. And then eventually you moved to have Mr. Buchanan
21 relieved as your counsel, correct?

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

23 Q. Why did you move to have him relieved as your
24 counsel?

25 A. He wouldn't - he didn't come up to the jail and talk

1 about my case or anything. Uhm, I thought that those charges
2 were dropped because they didn't find any weapons, uhm, but he
3 never came up there so I wrote a letter to Judge Keesley to
4 have him removed in January.

5 Q. Okay. Did you write a letter also in October of
6 2012?

7 A. Yes, ma'am. October 31st.

8 Q. I'm going to show you what's marked as Plaintiff's
9 Exhibit number 4. Do you recognize this?

10 A. Yes, ma'am, I do.

11 Q. What is this?

12 A. That's a letter to the Clerk of Court telling Matt
13 -- I went through the clerk to tell Matt that if he didn't
14 come up here to see me, I was going to relieve him and I was
15 going to file charges with the Supreme Court.

16 Q. And ultimately he was relieved as your counsel?

17 A. Yes, ma'am.

18 MS. GOOD: I would like to move Plaintiff's Exhibit
19 number 4 into the record.

20 MR. MITCHELL: No objection. What's the date on
21 that?

22 MS. GOOD: October 31st, 2012.

23 (Whereupon, Plaintiff's Exhibit #4 received.)

24 BY MS. GOOD:

25 Q. During that time that Mr. Buchanan was your

1 attorney, did you ultimately find out later that there was a
2 plea offer given?

3 A. Yes, ma'am. Later.

4 Q. Did you find that out from Mr. Buchanan?

5 A. No, ma'am.

6 Q. How did you find out that a plea offer was given?

7 A. I found out that I had a plea offer when I wrote for
8 my Rule 5 once I reached Perry Correctional Institution.

9 Q. So you wrote to Sarah Hahn regarding getting a copy
10 of your discovery?

11 A. Yes, ma'am.

12 Q. Once you were already in prison?

13 A. Yes, ma'am.

14 Q. And you found out you had a plea offer while
15 Mr. Buchanan was your attorney?

16 A. Yes, I did.

17 Q. I'll show you what's marked as Plaintiff's Exhibit
18 number 1. Do you recognize this?

19 A. Yes, ma'am.

20 Q. What is this?

21 A. That's the plea offer I didn't receive.

22 MS. GOOD: At this time I would like to move this
23 into evidence, Your Honor.

24 MR. MITCHELL: No objection.

25 (Whereupon, Plaintiff's Exhibit #1 received.)

1 BY MS. GOOD:

2 Q. And on this plea offer what was the date given on
3 the plea offer?

4 A. August 24th, 2012.

5 Q. When did you meet with Mr. Buchanan the one time you
6 met with him?

7 A. August 7th.

8 Q. Okay. So this came after your one meeting with
9 him?

10 A. Yes, ma'am.

11 Q. Did you ever meet with Mr. Buchanan after August
12 7th?

13 A. No.

14 Q. In fact, that was the reason you asked for him to be
15 relieved?

16 A. Yes, ma'am.

17 Q. What was this plea offer?

18 A. That was all my charges be ran concurrent and also
19 dismissing the grand larceny, burglary and possession of a
20 weapon by a convicted felon during the commission of a violent
21 crime and it was gonna be active time cap of 15 years.

22 Q. Okay. If you had known about that plea offer, would
23 you have taken that plea offer?

24 A. Yes, ma'am, because he told me that I was facing a
25 mandatory 25 years on a destructive device causing injury or

1 death. They charged me wrong.

2 Q. That was during the August 7th meeting with him he
3 told you that?

4 A. Yes, ma'am.

5 Q. Ultimately once Mr. Buchanan was relieved as your
6 counsel you were then appointed Sarah Hahn?

7 A. Yes, ma'am.

8 Q. How many times did you meet with Ms. Hahn?

9 A. I met with Sarah, Ms. Hahn three times.

10 Q. Okay. During the second time you met with her, did
11 you receive discovery from her?

12 A. No, ma'am. She never gave it to me. She talked
13 about it in the client/lawyer's booth.

14 Q. Okay. And she had gotten a copy of Mr. Buchanan's
15 file?

16 A. I don't know if she did or not. She said she had my
17 file from him though.

18 Q. Okay.

19 A. Mm-hmm.

20 Q. And ultimately did you get a copy of that discovery
21 at that time?

22 A. No, ma'am.

23 Q. And ultimately did you get a copy of that discovery?
24 You stated earlier you did.

25 A. I got it March 7th, 2014 at Perry Correctional.

1 Q. March 17th?

2 A. Yes, March 17th.

3 Q. I'll show you what's marked as Plaintiff's Exhibit
4 number 3. Do recognize this?

5 A. Yes, ma'am. That's the verification that I got it
6 in the mail at Perry.

7 MS. GOOD: We'll enter this into evidence, Your
8 Honor.

9 THE COURT: Any objection?

10 MR. MITCHELL: No objection.

11 THE COURT: What number is that?

12 MS. GOOD: Number 3.

13 (Whereupon, Plaintiff's Exhibit #3 received.)

14 BY MS. GOOD:

15 Q. When you received this packet along with this letter
16 March 17th with your discovery, is that when you received the
17 plea offer sheet regarding the August 2012 plea offer with
18 Mr. Buchanan?

19 A. Yes, ma'am.

20 Q. You then had a third meeting with Ms. Hahn in April
21 2013; is that correct?

22 A. Yes, ma'am.

23 Q. Can you explain to the Judge what was occurring
24 during this meeting?

25 A. I was asking her to get a bond reduction and I was

1 asking her about my case and she was saying that I would be
2 doomed if I took it to trial and that I would get a lot of
3 time. And during that meeting, I had a neurological stroke.
4 The side of my mouth had froze and my eye couldn't blink
5 because I was so mad that I couldn't get nothing done with
6 this lady.

7 Q. And during that meeting, did she give you a plea
8 offer sheet?

9 A. She told me about a plea offer.

10 Q. And what was that plea offer?

11 A. That all my charges would be ran concurrent under
12 one sentence.

13 Q. Okay. And did you ever give her an answer regarding
14 that plea offer?

15 A. No, ma'am. I had a stroke right after that. I
16 didn't.

17 Q. Was she present when you had the stroke?

18 A. Yeah. She was right there on the other side of the
19 glass.

20 Q. Did she notify somebody to help you?

21 A. No, ma'am. The officer came because he heard me
22 getting a little loud in there.

23 Q. Okay. I'll show you what's marked as Plaintiff's
24 Exhibit number 2. Do you recognize this?

25 A. Yes, ma'am.

1 Q. What is this?

2 A. This is my burglary third concurrent with all other
3 charges, arson and burglary.

4 Q. Is that the plea offer sheet she was going over
5 with you that day?

6 A. Yes, ma'am.

7 MS. GOOD: I would like to put this into evidence,
8 Your Honor.

9 MR. MITCHELL: No objection.

10 (Whereupon, Plaintiff's Exhibit #2 received.)

11 BY MS. GOOD:

12 Q. So that meeting was cut short due to your stroke
13 that you had at that time?

14 A. Yes, ma'am. Me getting a little loud.

15 Q. When you had that stroke and they took you out, did
16 you ever go to the hospital?

17 A. I went to the Just Care or whatever that care
18 facility they have in the jail house.

19 Q. So you never left the jail, correct?

20 A. No, ma'am.

21 Q. Do you remember on the plea offer when that plea
22 offer was to expire?

23 A. No, ma'am. I don't know nothing about that.

24 Q. Could it have been May?

25 A. Yes. May 15th, 2013 I think I read that.

1 Q. Between that date that you met with her where you
2 had the stroke and the meeting was cut short and May 13th when
3 the offer expired, did she speak with you again regarding the
4 plea offer?

5 A. No, ma'am. The next time I saw her I was going to a
6 bond reduction after I had wrote her a letter saying that I
7 was gonna try to file a lawsuit on her.

8 Q. And that bond reduction was June 6th, 2013,
9 correct?

10 A. Yes, ma'am.

11 Q. Was that after the plea offer had expired?

12 A. Yes, ma'am.

13 Q. When you got to the courthouse on June 6th, can you
14 tell the Court what happened with Ms. Hahn?

15 A. Okay. I went for a bond reduction because I was in
16 jail on a million dollar bond for whatever reason it was a
17 million dollars so I finally got in there and I was looking at
18 Judge Cottingham being nice to other inmates. He was cutting
19 them breaks and all that so I called Ms. Hahn over. I said,
20 Ms. Hahn, do you think I can get that plea that you was
21 talking about? She said, well, let me go and talk to the
22 Solicitor Angela Garrick, and she came back and she was like I
23 don't think she gonna give you that one, but it's gonna be an
24 open plea.

25 Q. Did she mention anything to you about being

1 concurrent or consecutive?

2 A. Yes, she did.

3 Q. What did she say?

4 A. She said that my charges would be run concurrent.

5 Q. Did you base your decision to plea on the fact that
6 you thought they were going to be run concurrent?

7 A. Yes, ma'am, I did.

8 Q. Okay. And other than thinking that they were going
9 to be run concurrent, were you given any other promises about
10 the plea?

11 A. No, ma'am. Just concurrent.

12 Q. Okay. And then you ultimately pled on that date and
13 during the plea, did Ms. Hahn ever ask for the charges to be
14 run concurrent?

15 A. No, she never did.

16 Q. Did the judge ever inform you of the potential
17 sentences or the fact that they could possibly be run
18 consecutive?

19 A. No.

20 Q. Once you heard the sentence and that you were given
21 consecutive time, did you understand what had happened?

22 A. No, ma'am. I thought everything was going to be
23 concurrent just like she said.

24 Q. Did you say anything about it being concurrent
25 during the plea?

1 A. I couldn't. They went ahead and just got me out of
2 the courtroom because it was a high profile trial. I mean,
3 there was a lot of people in there against me.

4 Q. And, in fact, didn't you think you were getting
5 concurrent?

6 A. Yes, I did.

7 Q. Once the plea was over, did you say anything to Ms.
8 Hahn regarding the concurrent or about the sentence that you
9 got?

10 A. No, ma'am, but while I was walking out Angela
11 Garrick said I'm sorry to give you so much time.

12 Q. So you were still under the impression at that point
13 that it should have been concurrent?

14 A. Yes, ma'am.

15 Q. In conclusion, if you had been aware of the prior
16 plea offer of the cap of 15 with Mr. Buchanan, would you have
17 taken that?

18 A. Yes, ma'am, because one of my charges was 25
19 mandatory.

20 Q. And did he ever tell you about that plea offer?

21 A. No, ma'am.

22 Q. And, in fact, the one time you met with him was
23 August 7th; is that correct?

24 A. That's it.

25 Q. If you had been aware of the plea deal that you

1 ultimately pled to with Ms. Hahn that it was not going to be
2 concurrent, would you have pled to that deal?

3 A. Absolutely not.

4 Q. Now, are you asking the Court today to overturn your
5 convictions and guilty plea and remand your case specifically
6 to give you the remedy of the prior plea offer that you were
7 not made aware of by Matt Buchanan?

8 A. Yes, I am.

9 Q. Or for your sentences to run concurrent since that's
10 what you were under the impression --

11 A. That's what I thought I gonna get, yeah.

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

13 CROSS EXAMINATION

14 BY MR. MITCHELL:

15 Q. Good morning, Mr. Herbert.

16 A. All right.

17 Q. Let's see. So you were facing a lot of charges
18 at this point; isn't that right?

19 A. Yes, I was.

20 Q. There were eight or nine charges against you; isn't
21 that right?

22 A. Yes, sir. Nine charges.

23 Q. And you pled as indicted to those charges there?

24 A. Well, no. One of my charges was a lesser included
25 offense if you look at the sentencing sheet.

1 Q. And that was the destructive device?

2 A. The destructive device. Yes, it was. I was over
3 charged.

4 Q. And you were facing --

5 A. 25 years mandatory.

6 Q. A mandatory 25 years on that and they reduced it?

7 A. Yes, sir. They reduced it right there at trial
8 without me going to being indicted. That's why I didn't
9 understand how that worked, you know?

10 Q. There was also a grand larceny charge that was
11 dismissed in accordance with your plea; isn't that right?

12 A. I presume.

13 Q. Now, you testified you only met with Mr. Buchanan
14 one time in his course of representation?

15 A. Well, you know, yes, basically. Well, I'm talking
16 about like, you know, you get appointed a Public Defender and
17 then he came out August 7th. Well, no. April. April is when
18 he was appointed to me and when I got re-arrested, I saw him
19 again August the 7th, 2012.

20 Q. You had some problems with Mr. Buchanan in his
21 representation of you?

22 A. Yes, I did.

23 Q. You had some problems with the investigators in the
24 case, too, didn't you?

25 A. Yes, I did.

1 Q. You filed a lawsuit in Federal Court against the
2 investigators?

3 A. Yes, I did.

4 Q. And then you threatened to file a complaint with the
5 Supreme Court against Mr. Buchanan?

6 A. Yes, I did.

7 Q. And you threatened to file a complaint in the
8 Supreme Court with Ms. Hahn; is that right?

9 A. Yes, I did.

10 Q. So you have had trouble getting along with pretty
11 much everyone involved in this case?

12 A. It's not trouble. There's - there's - there's a
13 thing of the matter of law. You know, I'm entitled to
14 adequate representation, sir.

15 Q. You were aware you could have been facing life
16 without parole; isn't that right?

17 A. Yeah. I mean, I presume.

18 Q. There was a pretty extensive investigation into what
19 happened in your case, all these charges, wasn't there?

20 A. It wasn't that extensive.

21 Q. Not that extensive?

22 A. No.

23 Q. You gave a confession to all the charges
24 essentially; isn't that right?

25 A. Yes. That's why I'm pleading.

1 Q. That was an audio taped confession?

2 A. Yeah.

3 Q. Judge Cottingham, he went over all the charges with
4 you though, didn't he, and asked you if you were guilty of
5 each one?

6 A. Okay. That's procedure when you're pleading.

7 Q. Right. But you told the truth then, didn't you?

8 A. Yes, I did. I'm guilty.

9 MR. MITCHELL: No further questions.

10 REDIRECT EXAMINATION

11 BY MS. GOOD:

12 Q. The Attorney General just asked you that you were
13 potentially looking at life without parole, correct?

14 A. That's what he asked me, yes, ma'am.

15 Q. In fact, is that the reason why you decided saying
16 you wanted to plead guilty?

17 A. Yes, ma'am.

18 Q. Okay. And, in fact, you just testified that you
19 were guilty, right?

20 A. Yes, ma'am.

21 Q. You have never said that you were not guilty?

22 A. No, ma'am.

23 Q. You're just asking to have the benefit of a plea
24 offer that you were not given by Mr. Buchanan?

25 A. Yes, ma'am.

1 MS. GOOD: Okay. No further questions.

2 MR. MITCHELL: Nothing in response.

3 THE COURT: All right, sir, you may step down. Call
4 your next witness.

5 MS. GOOD: No more witnesses for the applicant, Your
6 Honor.

7 THE COURT: Yes, sir, please call your first
8 witness.

9 MR. MITCHELL: The State calls Sarah Hahn.
10 Thereupon,

11 SARAH HAHN MAULDIN

12 after having been first duly sworn, testified as follows,

13 DIRECT EXAMINATION

14 BY MR. MITCHELL:

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

16 A. I have changed my name since Mr. Herbert's plea.
17 My last name is Mauldin.

18 Q. Good morning, Mrs. Mauldin. I apologize for
19 continuing to call you Ms. Hahn.

20 A. That's okay. Good morning.

21 Q. How long have you been practicing?

22 A. About eight years.

23 Q. What percentage of your practice is criminal defense
24 related?

25 A. One hundred percent.

1 Q. How did you become involved in Mr. Herbert's case
2 here?

3 A. Matt Buchanan, another Public Defender from my
4 office, had his case initially and at some point the case was
5 transferred from Mr. Buchanan to me. Usually that happens
6 when there's a conflict, although I don't remember the details
7 on this case, but I received his case on March 14th, 2013.

8 Q. Did you meet with the applicant to discuss the
9 charges he was facing at that point?

10 A. I did. I met with him the first time on April 2nd
11 at the jail and at that point I reviewed with him each charge
12 that was pending against him, the penalty he faced on each
13 charge including any collateral consequences, the ones that
14 were no parole and violent and all of that, and also explained
15 his trial rights to him. That was the first time that I met
16 with him.

17 Q. Okay. Did you have any concerns with his
18 competency?

19 A. No. In fact, Mr. Buchanan had had Mr. Herbert
20 evaluated and by the time I received the case there was a copy
21 of the evaluation report in the file. Looking at the report
22 there was nothing in there that stood out to me as anything
23 that would indicate a problem with competency and throughout
24 my conversations with him there was nothing that I thought
25 rose to the level of any problem with his competency.

1 Q. Was there a discovery motion filed in this case?

2 A. Mr. Buchanan had filed one when he had the case and
3 when I got the file, there was discovery already in the file.
4 I mailed, after I met with Mr. Herbert and he told me that he
5 didn't have the discovery, I mailed him the two packets that I
6 had to him on April 2nd right after I had seen him at the
7 jail.

8 Q. So he ended up getting a copy of that discovery --

9 A. He did.

10 Q. -- right after you took over his representation?

11 A. That's right.

12 Q. How did the plea negotiations go about between you
13 and the Solicitor?

14 A. There was a plea offer in the file when I received
15 it. However, that plea offer did not cover charges that Mr.
16 Herbert got after that point.

17 Q. Okay. Can you explain the sequence of events and
18 how these charges came about?

19 A. I can. Let me refer to my notes. Okay. Mr.
20 Herbert had three different sets of charges. There was one
21 set that were served on him in April of 2012. There was a
22 second set filed in July of 2012. And a third set filed in
23 March of 2013.

24 Q. So the first charges was April 2012 and then he was
25 bonded out; is that right?

1 A. That is probably right. I don't have that
2 information in front of me.

3 Q. Then he picked up more charges there of witness
4 intimidation and manufacturing a destructive device
5 afterwards; isn't that right, and he was re-arrested on
6 those?

7 A. That's right.

8 Q. Okay. To that initial plea offer, what was the date
9 on that before you became involved in the case?

10 A. That offer was made on August 24th, 2012.

11 Q. Okay. So would that have covered all of the charges
12 that he was facing at that point?

13 A. That covered everything from April and July of 2012,
14 but it didn't cover the later charges that he received in
15 March of 2013.

16 Q. What were those later charges in March?

17 A. Those were a burglary second that was a violent
18 charge and then also a grand larceny charge.

19 Q. Was this initial plea offer conveyed to the
20 applicant?

21 A. I have Matt Buchanan's notes in the file. He
22 indicated that he met with Mr. Herbert back on August 7th as
23 Mr. Herbert testified. He also met with him again in November
24 on the 9th, and then he met with him again in January 2013 at
25 the jail as well, and on that third visit his note indicates

1 that he explained the plea offer and that Judge Newman would
2 be the presiding judge and it says that he gave Mr. Herbert a
3 copy of some more discovery that day. I have another note
4 that there was a fourth visit. This is Mr. Buchanan's note
5 that he visited him on February 11th, 2013 that says jail
6 visit, plea to a cap of 15, last chance to accept.

7 Q. Okay. So that was his initial offer that he hopes
8 to go back on today; is that right?

9 A. That's my understanding.

10 Q. From the notes there he rejected that offer that
11 day?

12 A. Yes. Right under that it says speedy trial motion
13 and then some other notes.

14 Q. Let's go to the plea that he actually entered into.
15 How did those negotiations go? Or how did that day of the
16 plea go actually?

17 A. Well, I met with Mr. Herbert the initial time that
18 April. I met with him again in May and gave him the discovery
19 of the charge that had come up most recently, and after that I
20 had talked with the Solicitor on a few different occasions.
21 She made at one point a new plea offer to me and her plea
22 offer was fairly involved, but basically what she wanted to do
23 was have him plea to one set of charges and then have another
24 set consecutive to that. So group one everything is
25 concurrent, and then group two everything is concurrent, but

1 group two is consecutive to group one. It's a fairly
2 complicated thing. We went back and forth on it.

3 I explained that to Mr. Herbert at the jail. I
4 don't know what day I met with him to discuss that with him,
5 but I told him the offer that she'd made and at that point he
6 made a counteroffer that he would plea to burglary third,
7 intimidation of a witness and arson third. At some point I
8 talked to the Solicitor and she declined to accept his
9 counteroffer.

10 He subsequently left messages on my voice mail
11 indicating that he wanted to go to trial and that he wanted a
12 bond hearing and I talked to the Solicitor. She agreed to
13 call his case for a bond hearing in front of Judge Cottingham
14 and that was set for June 6th. When I got to court that day,
15 Mr. Herbert was there and insisted on pleading guilty that day
16 because Judge Cottingham was known to be a favorable
17 sentencing judge and he wanted to have him hear his case. I
18 told him I would talk to the Solicitor. I talked to her
19 again. She made another offer and this one was less
20 complicated. Essentially it was to plead to the charges that
21 he entered the plea to and she would take no position as far
22 as anything being consecutive or concurrent. I informed him
23 that she was not going to ask for anything one way or the
24 other, but I never at any point told him that there was an
25 agreement that everything would be concurrent.

1 Q. You did advise him that the judge could decide to
2 run it consecutively if he thought it was just?

3 A. Yes. That would be up to the judge.

4 Q. So he knew when he was pleading that day that the
5 judge could have sentenced him up to -- There was no cap that
6 day, was there?

7 A. Right. No cap. And by then my feeling on it was
8 that Mr. Herbert understood the difference in consecutive and
9 concurrent because we had the discussion about the prior offer
10 with some charges concurrent and others consecutive.

11 Q. Okay. Did you also advise him that he would
12 possibly be facing life without parole at some point?

13 A. I don't remember off the top of my head. Let me
14 look back and tell you.

15 Q. Okay. Would you just explain the distinction
16 between most serious and serious?

17 A. Yes.

18 Q. Those second degree burglaries are both violent in
19 nature; is that right?

20 A. Right.

21 Q. And were charged as such?

22 A. Yes.

23 Q. Mr. Herbert has had quite a criminal record
24 beforehand, too; isn't that right?

25 A. He has, I think the most serious charge he had

1 before this was a burglary second degree.

2 Q. Okay. I believe the state presented a record from
3 1989 to 2012 that he was convicted of 46 charges in different
4 states?

5 A. I don't remember the details, but he had a long
6 record.

7 Q. Okay. Now, he had confessed to these crimes to the
8 investigator; isn't that right?

9 A. He did. That was part of why he wanted to go to
10 trial. He believed that he would be able to take back his
11 statement. I told him that I didn't think that -- I told him
12 that I thought there was a very strong possibility the
13 statement would come in and it would be used against him at
14 trial and that's one of the things we disagreed about. He
15 thought that he should be able to take back the statement he
16 gave.

17 MR. MITCHELL: No further questions, and I ask you
18 to answer any questions that opposing counsel asks.

19 MS. GOOD: Thank you.

20 CROSS EXAMINATION

21 BY MS. GOOD:

22 Q. Good morning, Mrs. Mauldin.

23 A. Good morning.

24 Q. You said you were appointed in March of 2013,
25 correct?

1 A. That's correct.

2 Q. And you said you went down to meet with him in the
3 jail on April 2nd of 2013?

4 A. That's right.

5 Q. Okay. And you said after -- On April 2nd, 2013, you
6 said there was a prior plea offer where the Solicitor was
7 making it complicated and it was being one set concurrent, one
8 set consecutive, et cetera. I want to show you what's marked
9 as Plaintiff's exhibit number 2. Do you recognize this?

10 A. This was the plea offer that was in the file before
11 Mr. Herbert was served with the third set of charges.

12 Q. So when was he served with the third set of
13 charges?

14 A. Those I believe were in March of 2013. May I see
15 that document again?

16 Q. Yeah. In fact, this is dated April 3rd, 2013,
17 correct?

18 A. That's a different one than the one that I had.

19 Q. Can I see the one you had?

20 A. Yeah (proffering.)

21 Q. In fact, this is the one, and I'll show you what's
22 marked as Plaintiff's Exhibit number 1 which is the one that
23 you have, that's the one previously that Mr. Buchanan had
24 received, correct?

25 A. Right.

1 Q. So the one on April 3rd, 2013 was actually a plea
2 offer after the March 2013 charges were brought, correct?

3 A. Yes.

4 Q. So is it fair to say the August 2012 plea offer, of
5 course, you can only read Mr. Buchanan's notes. You don't
6 know exactly what happened because you weren't there. If he
7 had not given Mr. Herbert that particular plea offer, he
8 subsequently got new charges that were after that plea offer,
9 correct?

10 A. That's right.

11 Q. So if he had taken advantage of that plea offer
12 potentially the March 2013 charges wouldn't have come into
13 play with that plea offer; is that correct?

14 A. That's possible.

15 Q. April 3rd, 2013 you were his attorney at that time,
16 correct?

17 A. Uhm, yes, by then I was.

18 Q. Do you recognize that plea offer? Was that in your
19 file if you were the attorney at that time?

20 A. Let me look back and see. I don't have that one.
21 I'm missing the first page of that.

22 Q. In fact, that plea offer is for concurrent time,
23 correct?

24 A. It is, yes.

25 Q. Are you aware if you ever gave that plea offer to

1 Mr. Herbert?

2 A. I'm not aware that I did.

3 Q. Okay. And did you have a meeting -- You said you
4 met with him in April, correct?

5 A. That's right.

6 Q. During that meeting, is that the meeting where he
7 had the neurological stroke during the meeting? Do you recall
8 that?

9 A. If Mr. Herbert had a neurological stroke, I was not
10 aware of that. There was nothing about his demeanor at any
11 point that would have led me to think that he had a stroke.

12 Q. Is there a meeting where he was taken out of the
13 cell during your meeting with him?

14 A. I don't remember that. I do remember at different
15 points he would become kind of upset and would curse, not
16 directly at me, but about the situation and I would tell him
17 to calm down and my recollection is that he would do that.

18 Q. And you had stated that you went back and fourth
19 with negotiations with the Solicitor?

20 A. Mm-hmm.

21 Q. And eventually you brought Mr. Herbert over for a
22 bond reduction motion on June 6th of 2013; is that correct?

23 A. That's right.

24 Q. Eventually you all decided to plea that day. During
25 the plea, you said the Solicitor was taking no position on all

1 sentencing, correct?

2 A. That's right.

3 Q. Did you and Mr. Herbert discuss you asking for
4 concurrent time for him for his sentence?

5 A. No. I didn't ask the Solicitor for concurrent time.
6 I was trying to get her away from doing the consecutive
7 sentence.

8 Q. Did you have that discussion with Mr. Herbert though
9 that you would ask for concurrent time?

10 A. No. I don't think I did because when I was talking
11 to her, I was trying to get her not to do consecutive
12 sentences or not to specifically ask for that, just leave it
13 up to the judge.

14 Q. Did you ever ask the judge for concurrent time?

15 A. I did not.

16 Q. You, in fact, did object on the record regarding his
17 prior record about the 40 something charges? You didn't agree
18 with that, correct?

19 A. I believe that's true. Yeah. May I respond to one
20 earlier thing and explain?

21 Q. Sure.

22 A. One of the charges that he had pursuant to this
23 offer and this is what --

24 Q. When you say "this offer", which one is that?

25 A. I'm looking at Plaintiff's exhibit number 1. This

1 is the offer for a cap of 15.

2 Q. The Matt Buchanan offer?

3 A. Yes. Part of what we were trying to avoid on this
4 one is that it included using a destructive device.
5 Mr. Herbert didn't admit that he used a destructive device.
6 His position was that he used a incendiary device which was
7 the lesser charge. Since that one carried more than 25 years
8 it would have been a no parole offense and so part of the goal
9 was to try and avoid having him on a no parole offense in the
10 mix although I understand the cap of 15 would have helped
11 there.

12 Q. Do you know where Mr. Buchanan is today?

13 A. He's an attorney for Probation, Pardon and Parole.

14 Q. So he is in the state of South Carolina?

15 A. As far as I know.

16 Q. I know you don't know presently right now where he
17 is, but that is where he currently works?

18 A. That's right.

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

20 THE COURT: All right.

21 REDIRECT EXAMINATION

22 BY MR. MITCHELL:

23 Q. Real quick follow up. On the offer that Mr. Herbert
24 rejected, he stated that he wanted to go to trial?

25 A. That's what Mr. Buchanan's notes say.

1 Q. Okay.

2 A. And then on the subsequent offer that the Solicitor
3 had given me that included some consecutive sentences, he told
4 me that he wanted to go trial and wanted a bond hearing.

5 Q. Then he made a counteroffer, too, at that point?

6 A. Right.

7 Q. And that was rejected by the state?

8 A. Yes.

9 MR. MITCHELL: No further questions.

10 THE COURT: All right. You may step down. Ma'am,
11 I'll be glad to hear from you.

12 MS. GOOD: Thank you, Your Honor. I just want to
13 point out a few things. From the testimony given, of
14 course, under Strickland Mr. Herbert has to prove that
15 his attorney of record acted below the objective standard
16 of reasonableness in this case.

17 First position on that, Your Honor, is that when
18 Mr. Buchanan, he stated that he never got that plea
19 offer. Obviously Mr. Buchanan is not here to testify.
20 We only have to go on the notes that he put in his file
21 which we are not sure whether it happened or not. But
22 also, Your Honor, Ms. Hahn also testified that she wasn't
23 aware that she gave him the offer where it was concurrent
24 time or not. She stated he wanted to go to trial, but
25 she states that she only spoke to him about the Solicitor

1 wanting to do the consecutive time and that she rejected
2 the counteroffer of the concurrent time, but it seems
3 that there was an actual concurrent time offer given at
4 the time when Ms. Hahn was his attorney and she can't
5 testify that she went over that offer with him.

6 In addition, Your Honor, during the plea she
7 negotiated that the Solicitor would not take a position
8 on consecutive or concurrent time, Your Honor. We
9 believe it's well below the objective standard of
10 reasonableness for her not to actually ask for the
11 concurrent time during the plea considering that is what
12 she was trying to hope for and knew that potentially he
13 could get concurrent time based on all of his prior
14 record as well as all the charges that he had in his
15 case. So we are asking that you grant the PCR, Your
16 Honor, for it to be remanded to the Solicitor's Office to
17 either give him his prior plea offer where concurrent
18 time was offered or for the cap of 15 offer regarding
19 Mr. Buchanan's plea offer. Thank you.

20 MR. MITCHELL: Your Honor, it's the state's position
21 that the applicant has failed to meet his burden; that
22 counsel acted reasonably in his and her representation of
23 the applicant. I think it's clear from Mrs. Mauldin's
24 testimony that that first offer was conveyed. The notes
25 in the file clearly show that the offer was conveyed to

1 him; that he declined it. Then there was another offer
2 which was also declined. There was a counteroffer which
3 was also declined.

4 I think the applicant can be a bit difficult to work
5 with as he had trouble with both attorneys, the
6 investigators, pretty much everyone involved in his case.
7 I think what Mrs. Mauldin's main concern with was the
8 Solicitor was going to ask for and recommend consecutive
9 time. She was successful in getting the Solicitor not to
10 ask for that. I think she was also concerned with this
11 mandatory minimum of 25 years of the explosive device.
12 It was a Molotov cocktail that he threw into a car and
13 that was what I think she was mostly concerned with. She
14 was able to reduce that down to a ten to two year range
15 there which was all run concurrent to the other
16 burglaries that happened.

17 So it's just the state's position that the
18 application should be denied.

19 Your Honor, we ask that you keep the record open for
20 ten days in order to submit an affidavit from Mr. Matthew
21 Buchanan.

22 MR. GOOD: Your Honor, I would object to that
23 because it does not give me the opportunity to cross
24 examine him about any of his activities with my client.

25 MR. MITCHELL: I think it would be very limited to

1 just the notes in the - notes in the file there on that
2 limited point.

3 THE COURT: Let me ask you this: When you -- I saw
4 that was the part that was amended? When was that
5 portion added into his application?

6 MS. GOOD: I amended this application, Your Honor,
7 it was filed June 3rd of this year.

8 THE COURT: The amendment regarding Mr. Buchanan?

9 MS. GOOD: Yes, ma'am.

10 THE COURT: She would have to have the opportunity
11 to be able to cross examine him. That's the problem with
12 leaving it open for just an affidavit. Now I can leave
13 it open if he's going to testify, but to leave it open on
14 the affidavit and she's not having an opportunity to
15 cross examine him presents an issue. Yes, sir?

16 MR. MITCHELL: In the alternative can we ask to
17 leave it open to present testimony from Mr. Buchanan?

18 MS. GOOD: Your Honor, I would just ask, I'm not
19 aware and I don't know the answer to this question. Was
20 he subpoenaed to be here today?

21 MR. MITCHELL: He was not.

22 MS. GOOD: Because they had the opportunity to
23 subpoena him and they failed to do so. And I would say
24 with prejudice.

25 THE COURT: He said he's not. But I'm going to -- I

1 will leave the record open to call him as a witness. So
2 I will grant that, I guess, that motion to leave it open
3 to call him as a witness to supplement the record. Now,
4 when you all are going to do it I'm guessing it has to be
5 back before me.

6 MR. MITCHELL: I think we can do it in Richland
7 County, if you retain jurisdiction. Just hold it over --

8 MS. GOOD: That's fine.

9 MR. MITCHELL: -- open scheduling period for
10 everyone.

11 THE COURT: All right. You all just coordinate with
12 my law clerk.

13 MR. MITCHELL: Sure. Thank you.

14 THE COURT: All right. Thank you.

15 (Whereupon, the hearing was concluded.)
16
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1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Court Reporter for the Eleventh Judicial Circuit
7 in and for the State of South Carolina, do hereby certify that
8 I reported the proceedings in the before captioned case in the
9 Court of Common Pleas in and for the State of South Carolina
10 on the 15th day of October, 2014.

11 I FURTHER CERTIFY that the forgoing 38 pages
12 constitute a true, accurate and complete transcript of said
13 hearing.

14 I FURTHER CERTIFY that I am neither related, counsel
15 to, nor of interest to any party hereto.

16 IN WITNESS WHEREOF, I have hereunto set my hand at
17 Lexington County, this 7th day of August, 2015.

18

19

20

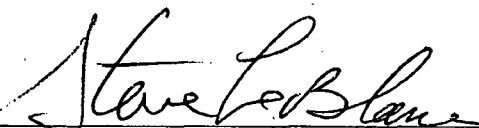
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22

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24

25



Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

THE STATE OF SOUTH CAROLINA
OFFICE OF THE SOLICITOR
ELEVENTH JUDICIAL CIRCUIT
PLEA AGREEMENT OFFER

PLEA OFFER SHEET

DEFENDANT Robert Herbert ATTORNEY Mat

DATE 8-24-12 SOLICITOR J. Angela Garrick

OFFER EXPIRES IF NOT ACCEPTED BY Oct 1

PENDING CHARGES 6L-2cts, Burgl 2cts, PmW During Viol crime
Arson 3rd, using explosive devices, Intimidation of W

PLEAD GUILTY TO:

WARRANT/
INDICTMENT

CHARGE

OFFER

RESTITUTION

Consent 6L + Burgl TBD

Arson 3rd
Consent Intimidation active time -
using of W cap of 15 years
destructive devices

DISMISS:

6L, Burgl, PmW

OTHER TERMS/CONDITIONS

has record for impeachment purposes

ACCEPTED/REJECTED (CIRCLE ONE)



Faul

THE STATE OF SOUTH CAROLINA
OFFICE OF THE SOLICITOR
ELEVENTH JUDICIAL CIRCUIT
PLEA AGREEMENT OFFER

PLEA OFFER SHEET

DEFENDANT Robert ATTORNEY Smith
DATE 4-3-13 SOLICITOR J. Angela Garrick

OFFER EXPIRES IF NOT ACCEPTED BY 5-15-13

PENDING CHARGES B3rd, GL

PLEAD GUILTY TO:

WARRANT/
INDICTMENT

CHARGE

OFFER

RESTITUTION

	<u>B3rd</u>		<u>TBD</u>
	<u>Concurrent w/ other cases</u>		
		<u>Arrest Warrant</u>	

DISMISS:

GL

OTHER TERMS/CONDITIONS

has no convictions for
impeachment purposes

ACCEPTED/REJECTED (CIRCLE ONE)

LE# 11029756



OFFICE OF THE PUBLIC DEFENDER⁸⁹

ELIZABETH FULLWOOD
Lexington Public Defender
407½ W. Main St.
Lexington, SC 29072
Telephone (803) 785-8873
Fax (803) 785-1443

ELEVENTH JUDICIAL CIRCUIT
Lexington, Saluda, Edgefield,
and McCormick Counties

ROBERT M. MADSEN
Circuit Public Defender

W. GREG SEIGLER
Tri-County Public Defender
Post Office Box 1852
McCormick, SC 29835
Telephone (864) 852-9555
Fax (864) 852-9554

March 17, 2014

Mr. Robert Herbert, Inmate Number: 231709
Dorm number: Q3B214T
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, SC 29669

RE: State v. Robert Herbert

Dear Mr. Herbert:

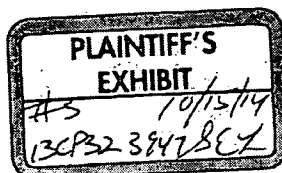
Enclosed, please find a copy of your file. I am mailing it in two separate packets, due to the size of the file. If you have any further questions about your case, please write me.

Sincerely,



Sarah Hahn
Assistant Public Defender

Enclosure

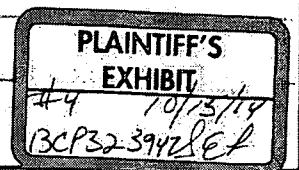


10/31/12

Dear Beth A. Carri SS,

I need a clocked in copy of this
 and send the original to my Public
 Defender Mark Buchanan. Matt my name
 is Robert Fletcher Herbert. I have been in
 Jail over 4 months. I only saw you once
 when you where appointed to me. Can you
 write me and tell me what is going on
 with my case. And why I have not
 been for a bond reduction or to be
 evaluated. I've you said on Aug 7, 2012
 and also send me my Discovery on the
 charges of Intimidation of witness,
 Third Degree Arson, Bomb like I requested
 Aug 7, 2012 and ask you to tell me
 when I'm going to my 2nd or 3rd
 Appearance of Court, or could I get
 someone who can. Or Do I need
 The South Carolina Supreme Court
 office of Disciplinary Counsel
 Because I'm just sitting on a Bench
 warrant of some dropped charges
 or what.

THANKS in Advance
 Robert Fletcher Herbert
~~Robert Fletcher Herbert~~



FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTONIN THE COURT OF COMMON PLEAS
JUN 22 ELEVENTH JUDICIAL CIRCUIT

Robert Fletcher Herbert, #231709

ETHA A. CARRIG 2013-CP-32-3947
CLERK OF COURT
LEXINGTON SC

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed November 12, 2013. Respondent made its Return on April 29, 2014, requesting an evidentiary hearing be convened. Anna R. Good, Esquire, was appointed by the Lexington County Clerk of Court. An evidentiary hearing was held on October 15, 2014, at the Lexington County Courthouse. Applicant was present and represented by Counsel Good. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent. The Court took this matter under advisement and held the record open. The hearing was reconvened on February 11, 2015, at the Richland County Courthouse. Applicant and Counsel Good were both present. The parties waived venue to allow the hearing to proceed in Richland County.

At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's plea counsel, Sarah Hahn Mauldin, Esquire, and Matthew C. Buchanan, Esquire. The Court had before it the Lexington County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the guilty plea transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was true bill indicted at the July 2012 term of the Lexington County Grand Jury on two counts of burglary, second degree (2012-GS-32-1452; -1454), intimidation of a witness (2012-GS-32-2176), manufacture of destructive device (2012-GS-32-2167), arson, third-degree (2012-GS-32-2166, and burglary, third-degree first offense (2013-GS-32-1259). Applicant was initially represented by Counsel Buchanan and then by Counsel Mauldin. On June 6, 2013, Applicant pleaded guilty as indicted without negotiations or recommendations. The State was represented by Asst. Solicitor Angela Garrick, Esquire. The Honorable Edward B. Cottingham, Sr., sentenced Applicant to ten (10) years imprisonment on each burglary, second-degree violent charge, ten (10) years imprisonment for intimidation of a witness, two (2) years imprisonment for manufacture of destructive device; three (3) years imprisonment for arson, and five (5) years imprisonment for burglary, third-degree first offense. Excluding one burglary, second-degree violent charge, all sentences were to be served concurrently. Burglary, second-degree violent (2012-GS-32-1452) was to be served consecutively. Applicant did not appeal his sentence or conviction.

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

1. Ineffective assistance of counsel in failing to request concurrent time be given; and
2. Ineffective assistance of counsel in failing to convey a plea offer.

II. SUMMARY AND EVIDENCE PRESENTED AT THE PCR HEARING

Applicant's Testimony

Applicant testified Counsel Buchanan represented him initially. He testified adamantly that Counsel Buchanan only met with him one time which was in August 2012. Applicant testified he had difficulties with Counsel Buchanan and wrote a letter to the Lexington County Clerk of Court asking that he be relieved. He testified he was never advised of a plea offer dated August 24, 2012, that consisted of a cap of fifteen (15) years imprisonment with all charges to be concurrent. (See Plaintiff's Ex. 1). Applicant testified that if that offer had been conveyed, he would have accepted it.

Applicant testified Counsel Mauldin was then appointed to represent him after Counsel Buchanan left the public defenders' office. Applicant testified he threatened to file ethical complaints against Counsel Buchanan and that he actually filed a civil suit against investigators. Applicant also testified he believed Counsel Mauldin should have requested the plea court sentence him to concurrent time on the multiple charges.

Counsel Sarah Hahn Mauldin's Testimony

Counsel Mauldin testified she represented Applicant on the charges currently before the Court, and took over for Counsel Buchanan in March 2013. She testified she met with Applicant on April 2, 2013, where they discussed the elements and penalties associated with the charges and his various rights. Counsel Mauldin explained Applicant was offered a deal on January 14, 2013, but he was served with additional warrants around March 5, 2013. She testified there was another offer made which included two groups of charges, with one consecutive to the other. Applicant declined that offer.

Counsel Mauldin testified Applicant left her a variety of messages requesting a trial and bond hearing. A bond reduction hearing was scheduled, and Applicant saw Judge Cottingham's interactions with other inmates. Applicant then insisted he wanted to plead guilty. She testified she was surprised he wanted to plead guilty that day. Counsel Mauldin testified she spoke to the solicitor who agreed to allow him to plead guilty to several charges, without specifying that some of the charges be consecutive to others. Counsel Mauldin stressed that there was no agreement that all sentences were to run concurrently. Counsel Mauldin testified the plea was open and did not consist of any recommendations or negotiations with the solicitor.

Counsel Matthew C. Buchanan's Testimony

Counsel Buchanan testified he has been practicing law for about ten (10) years. He testified he is currently General Counsel at the South Carolina Department of Probation, Parole, and Pardons and was formerly a public defender with the Lexington County Public Defenders Office. Counsel Buchanan testified he met with Applicant several times. He agreed that he did meet with Applicant in August 2012, but that he also met with Applicant on November 9, 2012, January 14, 2013, and February 11, 2013.

As to the plea offer dated August 24, 2012, Counsel Buchanan testified he fully reviewed and explained the offer to Applicant on January 14, 2012. He noted that Applicant had an opportunity to accept this offer at their February 11, 2013 meeting.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the guilty plea transcript, Applicant's records from the South Carolina Department

of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to not be credible. In contrast, this Court finds counsels' testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

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). 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, 23 L.Ed.2d 274 (1969).

Failure to Request Concurrent Time

Applicant argues Counsel Mauldin was ineffective in failing to request concurrent sentences. This Court finds Applicant failed to meet his burden in proving Counsel Mauldin was ineffective. Specifically, the Court finds Counsel Mauldin acted reasonably in light of prevailing professional norms during the guilty plea proceeding by asking that he be given credit for time that he served, by requesting a probationary sentence, and by offering mitigation evidence and testimony.

This Court further finds Applicant failed to produce any evidence that he was prejudiced by this alleged deficiency. Applicant failed to prove that even if Counsel Mauldin had asked for concurrent sentences, that the plea court would have complied with her request. The Court emphasizes that despite Counsel Mauldin's failure to request concurrent sentences, the plea court imposed concurrent sentences for four of Applicant's charges. This proves that Counsel Mauldin's failure to request concurrent sentences did not persuade the sentencing judge to either impose or refrain from imposing any concurrent sentences. This Court further finds Applicant failed to meet his burden in proving prejudice as he failed to show that he would have gone to trial instead of pleading guilty but for Counsel Mauldin's alleged advice that he would receive concurrent time. During the guilty plea proceeding, Applicant indicated that he understood there was a possibility the sentencing judge could run the sentences consecutively, and yet, he chose to continue with the plea. This allegation is denied and dismissed with prejudice.

Failure to Convey August 24, 2012 Plea Offer

Applicant further alleges Counsel Buchanan was ineffective in failing to convey the plea offer dated August 24, 2012. (See Plaintiff's Exhibit 1). This Court finds Applicant failed to prove Counsel Buchanan was ineffective in any regard. To be successful on an allegation of an

un-conveyed plea offer, Petitioner must prove: (1) trial counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Petitioner was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted the original plea offer. Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009). Generally, failure to convey a plea offer constitutes deficient performance, although the existence of prejudice needs to be evaluated on a case-by-case basis. Id. at 613, 675 S.E.2d at 422. To show prejudice from a failure to convey a plea offer, Applicant must:

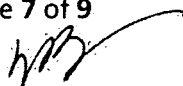
Demonstrate a reasonable probability [he] would have accepted the earlier plea offer had they been afforded effective assistance of counsel. [He] must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1409 (2012).

Here, Counsel Buchanan's testimony is persuasive on all issues. Counsel Buchanan met with Applicant multiple times, not just once as Applicant claimed. This Court finds Applicant's testimony to not be credible. This Court finds Counsel Buchanan properly conveyed the August 24, 2012, plea offer to Applicant multiple times. Applicant had the opportunity to accept the plea and chose to decline the offer. This Court sees no need to reach a prejudice analysis because it is clear that Counsel Buchanan not only communicated the offer to Applicant, but fully advised him of the offer at multiple meetings.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any



evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 11 day of June, 2015.



DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina

WITNESSES

Lexington County Sheriffs Department

Michael Gooding

Law Enforcement Case #: 120012731

JAG

ARREST WARRANT NUMBER

2012A3210200082

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 8/10/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202176

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2012

THE STATE

vs.

Robert Fletcher Herbert

CDR #: 2451

Indictment for

INTIMIDATION OF COURT OFFICIALS,
JURORS, OR WITNESSES

§ 16-09-0340

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
INTIMIDATION OF COURT OFFICIALS,
JURORS, OR WITNESSES

§ 16-09-0340

At a Court of General Sessions, convened on SEPTEMBER 2012, the Grand Jurors of Lexington County present upon their oath:

That **Robert Fletcher Herbert** did in Lexington County, South Carolina, on or about July 12, 2012, by threat or force did intimidate or impede Nikki Branham a witness in the discharge of her duty or did impede or attempt to obstruct or impede the administration of justice in the Courts of the State of South Carolina; all in violation of Section 16-9-340 of the South Carolina Code of Laws, 1976, (as amended)

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



ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Shawn Spivey

Law Enforcement Case #: 11029756

JAG

ARREST WARRANT NUMBER

2013A3210200377

ACTION OF GRAND JURY

Ron Bessington
Foreperson of Grand Jury
Date: 5-6-13

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013GS3201259

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

MAY TERM 2013

THE STATE

vs.

Robert Fletcher Herbert

CDR #: 0427

Indictment for

BURGLARY THIRD DEGREE

§ 16-11-0313

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

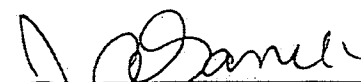
INDICTMENT FOR
BURGLARY THIRD DEGREE

§ 16-11-0313

At a Court of General Sessions, convened on MAY 2013, the Grand Jurors of Lexington County present upon their oath:

That Robert Fletcher Herbert did in Lexington County, South Carolina, on or about September 18, 2011, ~~did~~ enter the building of Bradley Edwards located at [REDACTED], West Columbia, SC, without consent and with the intent to commit a crime therein, in violation of Section 16-11-313 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.



ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Michael Gooding

Law Enforcement Case #:

JAG:

ARREST WARRANT NUMBER

M304226

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 7/9/2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS3201452

The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

JULY TERM 2012

THE STATE
vs.

Robert Fletcher Herbert

CDR #: 0086

Indictment for

BURGLARY SECOND DEGREE

§ 16-11-0312(B)

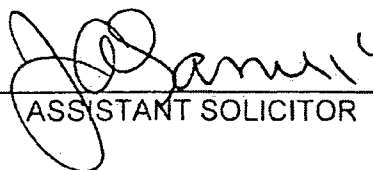
DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	BURGLARY SECOND DEGREE
COUNTY OF LEXINGTON	)	
	)	§ 16-11-0312(B)

At a Court of General Sessions, convened on JULY 2012, the Grand Jurors of Lexington County present upon their oath:

That Robert Fletcher Herbert did Lexington County, South Carolina on or about March 29, 2012 knowingly and willfully enter a building at [REDACTED] Lexington, SC, without consent and with the intent to commit a crime therein when the entering or remaining occurred in the nighttime, in violation of § 16-11-312 (B) 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.


ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

B. Smith

Law Enforcement Case #:

JAG

ARREST WARRANT NUMBER

M304230

ACTION OF GRAND JURY

[Signature]
Foreperson of Grand Jury
Date: 7/9/2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS3201454

The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

JULY TERM 2012

THE STATE
vs.

Robert Fletcher Herbert

CDR #: 0086

Indictment for

BURGLARY SECOND DEGREE

§ 16-11-0312 (B)

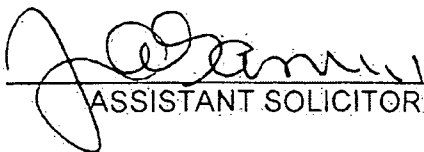
DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	BURGLARY SECOND DEGREE
COUNTY OF LEXINGTON	)	
	)	§ 16-11-0312(B)

At a Court of General Sessions, convened on JULY 2012, the Grand Jurors of Lexington County present upon their oath:

That Robert Fletcher Herbert did Lexington County, South Carolina on or about March 27, 2012 knowingly and willfully enter Bowen's Auto Body & Paint at [REDACTED] [REDACTED] Lexington, SC, without consent and with the intent to commit a crime therein and the entering or remaining occurred in the nighttime, in violation of § 16-11-312 (B) 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.


ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Michael Gooding

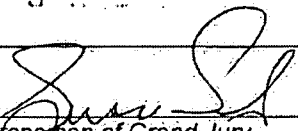
Law Enforcement Case #: 120012731

JAG

ARREST WARRANT NUMBER

2012A3210200078

ACTION OF GRAND JURY


Foreperson of Grand Jury

Date: 9/10/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202166

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2012

THE STATE

vs.

Robert Fletcher Herbert

CDR #: 3435

Indictment for

ARSON - THIRD DEGREE

§ 16-11-0110(C)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	ARSON - THIRD DEGREE
COUNTY OF LEXINGTON	)	
	)	§ 16-11-0110(C)

At a Court of General Sessions, convened on SEPTEMBER 2012, the Grand Jurors of Lexington County present upon their oath:

That Robert Fletcher Herbert did in Lexington County, South Carolina, on or about July 12, 2012, willfully and maliciously cause an explosion, set fire to, burn, or cause to be burned or aided, counseled, or procured a burning that resulted in damage to a dwelling house, building, structure, or any property, whether the property of himself or another, which resulted, either directly or indirectly, in bodily injury to a person or damage to the property, to wit: the defendant and co-defendants used a destructive incendiary device (molotov cocktail) to burn a vehicle, in violation of §16-11-110(c) of the South Carolina Code of Laws of 1976, as amended.

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


ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Michael Gooding

Law Enforcement Case #: 120012731

JAG

ARREST WARRANT NUMBER

2012A3210200079

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 9/18/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202167

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2012

THE STATE

vs.

Robert Fletcher Herbert

CDR #: 2775

Indictment for

INTENTIONALLY DETONATE
DESTRUCTIVE DEVICE

§ 16-23-0720(A)(3)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
) INDICTMENT FOR
COUNTY OF LEXINGTON) INTENTIONALLY DETONATE DESTRUCTIVE
) DEVICE
)

§ 16-23-0720(B)

At a Court of General Sessions, convened on SEPTEMBER 2012, the Grand Jurors of Lexington County present upon their oath:

That Robert Fletcher Herbert did in Lexington County on or about July 12, 2012, knowingly cause an explosion by means of a destructive device or aids, counsel, or procures an explosion by means of a destructive device, which resulted in damage to a building or other real or personal property, to wit: a "Molotov Cocktail" was used to burn a vehicle belonging to another. This being in violation of Section 16-23-720(B) of the South Carolina Code of Laws (1976), as amended.

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



ASSISTANT SOLICITOR