



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

February 28, 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Donovan Henderson v. State of South Carolina

2/28/2012

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Lorlene French  
Legal Services Coordinator

RECEIVED

FEB 28 2012

S.C. Supreme Court



# SCCID

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Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

September 12, 2011

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SEP 12 2011

S.C. Supreme Court

Ms. Vivian Cross  
Circuit Court Reporter  
PO Box 492  
Goose Creek, SC 29445

Dear Ms. Cross:

Please provide us with the following transcript:

Donovan Henderson v. State of South Carolina      Case #:      09-CP-15-00591

County: Colleton      Date of Trial: April 21, 2011

Presiding Judge: D. Craig Brown

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lorlene French  
Legal Services Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

HETRICK, HARVIN & BONDS  
ATTORNEYS AT LAW  
P.O. BOX 139  
125 WALTER STREET  
WALTERBORO, SOUTH CAROLINA 29488

JOHN R. HETRICK  
L. SCOTT HARVIN  
ROBERT J. BONDS

(843) 549-6432  
FAX (843) 549-1973

August 30, 2011

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211



RE: Donovan Henderson vs. State of South Carolina  
Case Number: 2009-CP-15-691

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

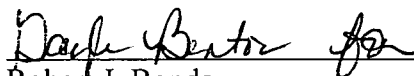
- (1) Proof of service of the Notice of Appeal on the Respondent.
- (2) A copy of the Order of Dismissal which is to be challenged on appeal.
- (3) A filing fee of \$100.00 is not included due to the fact that Mr. Henderson is indigent.
- (4) This appeal is being filed with the Supreme Court in accordance with Rule 227 of the SCACR. This involves an appeal from a final decision entered under the Post-Conviction Relief Act.

**RECEIVED**

SEP 01 2011

**S.C. SUPREME COURT**

Sincerely,



Robert J. Bonds  
Hetrick, Harvin & Bonds  
125 Walter Street  
Walterboro, South Carolina 29488  
843-549-6432  
Attorney for Appellant

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

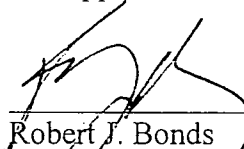
Case No.: 2009-CP-15-691

Donovan Henderson .....Appellant  
-vs-  
The State of South Carolina .....Respondent.

NOTICE OF APPEAL

Donovan Henderson appeals the Order of the Honorable D. Craig Brown dated May 9, 2011, which dismissed Appellant's Post Conviction Relief application. Appellant received written notification of this order on July 25, 2011.

August 10, 2011

  
Robert J. Bonds  
Hetrick, Harvin & Bonds  
125 Walter Street  
Walterboro, South Carolina 29488  
(843) 549-6432  
Attorney for Appellant

Other Counsel of Record:

Matthew J. Friedman  
South Carolina Attorney General's Office  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211  
Attorney for Respondent

**RECEIVED**

SEP 01 2011

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

---

Case No.: 2009-CP-15-691

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Donovan Henderson.....Appellant

-vs-

The State .....Respondent

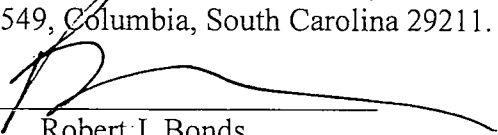
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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on August \_\_, 2011, addressed to its attorney of record, Matthew J. Friedman, South Carolina Attorney General's Office, Rembert C. Dennis Building, Post Office Box 11549, Columbia, South Carolina 29211.

August \_\_, 2011

  
Robert J. Bonds  
Hetrick, Harvin & Bonds  
125 Walter Street  
Walterboro, SC 29488  
Attorney for Appellant

STATE OF SOUTH CAROLINA )

COUNTY OF COLLETON )

Donovan Henderson, #199129, )

Applicant, )

v. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS

2009-CP-15-691

ORDER OF DISMISSAL

PATRICIA C. GRANT  
COLLETON COUNTY  
COMMON PLEAS  
JANUARY 19 AM 11:03

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 4, 2009. The Respondent made its Return on February 1, 2010. An evidentiary hearing into the matter was convened on April 21, 2011 at the Colleton County Courthouse. The Applicant was present at the hearing and was represented by Robert J. Bonds, Esquire. Mathew J. Friedman, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant's plea counsel, Everett W. Bennett, Jr., Esquire, testified at the hearing. Captain Charles Frazier also testified at the hearing. This Court had before it the records of the Colleton County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, the PCR application, Respondent's Return thereto, a letter dated January 5, 2009 from counsel to Applicant, an affidavit from counsel, a request to staff dated February 1, 2009 from Applicant to the Colleton County Detention Center, and a letter dated January 14, 2009 from counsel to Applicant.

### PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Colleton County. The Applicant was indicted at the June 2008 term of the Colleton County Grand Jury for burglary – 1<sup>st</sup> degree (2008-GS-15-295). Everett W. Bennett, Jr., Esquire, represented the Applicant. On January 27, 2009, the Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable Perry M. Buckner sentenced the Applicant to confinement for eighteen (18) years. The Applicant did not appeal the guilty plea or the sentence.

### ALLEGATIONS

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

1. Ineffective assistance of counsel in that counsel failed to object to indictment obtained through willful acts of perjury and prosecutorial misconduct.
2. Conflict of interest in that counsel had represented the victim on previous charges.
3. Involuntary guilty plea in that Applicant was not advised that his sentence would include a mandatory term of CSP (community supervision program).
4. Due process violation.

At the hearing, Applicant only proceeded on the allegations of conflict of interest, ineffective assistance of counsel for failure to challenge whether Applicant was eligible for life without parole (LWOP), and failure to file a direct appeal.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the

relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Applicant testified that counsel told him a week before court that he had previously represented the victim. He asserted there was a hearing to relieve counsel about a week before court, but Judge Buckner denied the motion to relieve counsel. Applicant testified that he wanted to appeal the conflict of interest issue. He testified that he completed a request to staff indicating that he wanted his attorney to file an appeal. Applicant asserted that he was not eligible for LWOP because he received a Youthful Offender Act (YOA) sentence on his 1993 armed robbery.

Captain Charles Frazier testified that he worked at the Colleton County Detention Center and he recognized his signature on the request to staff dated February 1, 2009 from Applicant. He testified that to the best of his knowledge he delivered the request to counsel's office on February 2, 2009. Captain Frazier testified that he did not personally hand the request to Mr. Bennett. He testified that he now faxes the request forms to attorneys, but that was not his practice in February 2009.

Plea counsel testified that he met with Applicant about six times prior to the plea hearing. He testified that Applicant gave a videotaped confession. Counsel testified that Applicant was shot twice at the scene and was in the hospital for eleven days. He asserted that he moved to suppress the confession because Applicant was on pain medication at the time of the confession. Counsel testified that Applicant did not have a strong case for trial, but he was prepared to go to trial until Applicant decided to plead guilty. He testified that a negotiated sentence of eighteen (18) years was the best deal the solicitor would offer in this case. He contended that he explained the significance of a negotiated plea to Applicant, and he informed him that burglary -

1<sup>st</sup> degree was a no-parole offense and he would have to serve 85% of the sentence. He testified that it was Applicant's decision to plead guilty. Counsel testified that he believed Applicant was eligible for LWOP based on his prior armed robbery conviction. He testified that he discussed the LWOP issue in detail with Applicant.

Counsel testified that he does not recall Applicant asking him to file an appeal and he does not recall seeing the request to staff from Applicant. He asserted that he would have filed an appeal if Applicant had asked, even though it was a negotiated plea. Counsel testified that Applicant potentially waived the conflict of interest issue by pleading guilty.

Counsel testified that he represented the victim in a grand larceny case in 2001, which was about eight years before this case. He asserted that he did not know the victim before the 2001 case and he never spoke with him after the case concluded. He testified that he informed Applicant as soon as he realized the potential conflict and told Applicant that he had no ongoing attorney-client relationship with victim. Counsel told Applicant that he did not think the prior representation would keep him from effectively representing Applicant. He asserted that he filed an affidavit of conflict and a motion to be relieved as counsel, but Judge Buckner did not believe there was an actual conflict and denied the motion. Counsel testified that his prior representation of the victim did not adversely affect his representation of the Applicant. He testified that he did not think the Applicant had any problem with his representation, and he asserted that the conflict was not even discussed during the plea hearing.

#### Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective

assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry, 386 S.E.2d 624.

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 625 (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

This Court finds that counsel's testimony was credible. This Court finds that counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof.

The record reflects that Applicant understood the nature of the charges and the possible punishments. At the plea hearing, he indicated that he was fully satisfied with counsel and that no one threatened him or promised him anything to get him to plead guilty. He told the court that he understood the terms of the negotiated sentence. He also admitted guilt at the plea hearing. This Court finds that Applicant's plea was entered voluntarily and intelligently with a full understanding of the consequences. This Court finds that Applicant understood the terms of the negotiated sentence and that it was Applicant's decision to plead guilty.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. This Court finds that counsel obtained a favorable negotiated sentence for Applicant considering that Applicant was facing exposure of confinement for life for burglary - 1<sup>st</sup> degree plus an attempted armed robbery charge. In addition, the State had noticed Applicant for LWOP based on a prior conviction for armed robbery. This Court finds that counsel properly advised Applicant regarding his eligibility for LWOP. Applicant was eligible for LWOP based on his prior conviction for armed robbery, a most serious offense. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

This Court finds that counsel was not ineffective for failing to file a direct appeal. Further, this Court finds that Applicant is not entitled to a belated direct appeal. The United

States Supreme Court has rejected a bright-line rule that counsel must always file an appeal in a criminal case. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1079 (2000). The Court went on to hold that a professionally reasonable attorney should, in most cases, consult with the defendant regarding an appeal. Id.

In determining whether an attorney should consult with the criminal defendant concerning an appeal, the totality of the circumstances must be considered. Id. In examining the totality of the circumstances, courts should consider: (1) whether a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) whether this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

Trial counsel is not required to file a notice of appeal without specifically being asked to do so. Roe, 528 U.S. 470. In the present case, there is no indication that Applicant specifically asked counsel to file a notice of appeal. Since Applicant pled guilty to a negotiated plea agreement, there was also no reason for counsel to believe that Applicant wanted to file an appeal.

Moreover, this Court finds that Applicant waived his right to challenge the conflict of interest ruling when he pled guilty. A guilty plea must be unconditional. State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001). Conditional pleas are not recognized in South Carolina. State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982). "The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes *waiver* of all prior claims of constitutional rights or

deprivations thereof." Id. Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations. State v. Snowden, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006); Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); see also State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (holding that a guilty plea "leaves open for review only the sufficiency of the indictment and waives all other defenses"); State v. Griffin, 914 S.W.2d 564 (Tenn. Crim. App. 1995) (finding that defendant waived appellate review of juvenile court transfer by pleading guilty without reserving question).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that counsel's performance was deficient. This Court also finds the Applicant has failed to prove the second prong of Strickland, specifically that he was prejudiced by plea counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

#### Conflict of Interest

Applicant contends that counsel's prior representation of the victim resulted in a conflict of interest. This Court finds that no conflict of interest actually materialized. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict

of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). The applicant bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998).

Here, Applicant has failed to establish that counsel's prior representation of the victim adversely affected his representation. Counsel testified that the prior representation was eight years earlier and he had no contact with the victim after the 2001 case was concluded. The charge on which he represented the victim was completely unrelated to the Applicant's charges. Counsel even testified that he would not recognize the victim. Moreover, out of an abundance of caution, counsel filed a motion to be relieved and Judge Buckner found no actual conflict and denied the motion. This Court finds that no conflict of interest actually materialized.

#### 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, including involuntary guilty plea and due process violation, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

#### CONCLUSION

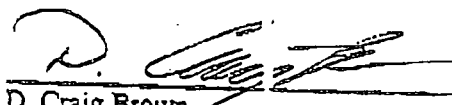
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely served and filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 9<sup>th</sup> day of May, 2011.

  
 D. Craig Brown  
 Presiding Judge  
 14<sup>th</sup> Judicial Circuit

Flora South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF COLLETON )

AFFIDAVIT OF INDIGENCY

Case Name DONOVAN HENDERSON V. STATE OF SOUTH CAROLINA

Criminal Case No. 2009-CP-15-691

Current Address: LIEBER CORRECTIONAL INSTITUTE

Are you incarcerated?  Yes (If "Yes") Where? LIEBER CORR INST.  
 No

What were you convicted of? BURGLARY 1ST DEGREE

What was your sentence? 18 YEARS

In what county was this hearing held? COLLETON

Presiding Judge's name? D. CRAIG BROWN

Date of hearing? MAY 9, 2011

Are you appealing from  a trial,  a guilty plea or from  a post-conviction relief hearing?

Were you represented by  a court-appointed attorney,  a public defender, or  retained counsel?

Name of attorney/public defender? ROBERT J. BONDS

If retained, how much did you pay for attorney fees? \$ 0.00

If you still owe money to your attorney, how much? \$ 0.00

.....

1. Are you presently employed? Yes  No

a. If "yes," state the amount of your salary or wages per month, and give the name and address of your employer. \_\_\_\_\_

b. If "no," state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month. PRESENTLY INCARCERATE

2. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support. NONE  
PRESENTLY INCARCERATED

3. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes \_\_\_\_\_ No

b. Rent payments, interest or dividends?

Yes \_\_\_\_\_ No

c. Pensions, annuities or life insurance payments?

Yes \_\_\_\_\_ No

d. Gifts or inheritance?

Yes \_\_\_\_\_ No

e. Any other sources?

Yes \_\_\_\_\_ No

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

4. Do you own cash, or do you have any money in a checking or savings account?

Yes \_\_\_\_\_ No

If the answer is "yes," state the total amount of the cash owned. \$ \_\_\_\_\_

5. Do you own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing)? Yes \_\_\_\_\_ No

If the answer is "yes," describe the property and state the appropriate value of the items owned. \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

6. What kind of motor vehicle do you own? NONE-PRESENTLY INCARCERATED

Is it paid for? Yes \_\_\_\_\_ No \_\_\_\_\_

If not, what are the monthly payments? \$ \_\_\_\_\_

7. How much do you owe (on liens, mortgages, other encumbrances or debts)? \_\_\_\_\_

NONE PRESENTLY INCARCERATED

\_\_\_\_\_  
\_\_\_\_\_

I do solemnly swear that the account by me delivered into this Court does contain a true and full account of all my real and personal estate, debts; credits and effects whatsoever without exception, which I, or any person in trust for me, have or at the time of my possession had, or am, or was, in respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand that the State shall file a claim against me in an amount equal to the cost for representation, but that such claim shall not constitute a lien against my property, unless, the claim is reduced to judgment by the Order of the Court after giving me at least thirty days' notice.

Under penalty of perjury, I certify that the information give by me on this affidavit is true and correct, and I understand that I will be subject to civil and/or criminal penalties if I knowingly furnish false information.

I am financially unable to employ counsel.

This 17 day of August, 2011.

Donovan Henderson  
Defendant

I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 17 day of August, 2011.

Donovan Henderson  
Defendant

SUBSCRIBED AND SWORN to before  
me this 22<sup>nd</sup> day of August, 2011.

Lechean Bryant  
NOTARY PUBLIC FOR SOUTH CAROLINA


My commission Expires: May 26, 2020

HETRICK, HARVIN & BONDS  
ATTORNEYS AT LAW  
POST OFFICE BOX 139  
WALTERBORO, SOUTH CAROLINA 29488

*Donovan  
Henderson*

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211



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