

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable George C. James, Circuit Court Judge

RYAN DARRELL IRBY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002165

APPENDIX

JOHN H. STROM
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
P.O.Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

RECEIVED

MAY 17 2017

S.C. SUPREME COURT

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STATE OF SOUTH CAROLINA)	COURT OF GENERAL SESSIONS
)	
COUNTY OF GREENVILLE)	Case No(s) : 2013GS2310970A,
)	2013GS2311027
State of South Carolina,)	
)	
Plaintiff,)	
)	
-VS-)	TRANSCRIPT OF RECORD
)	
Ryan D. Irby,)	
)	
Defendant.)	
)	

August 13, 2015
 Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

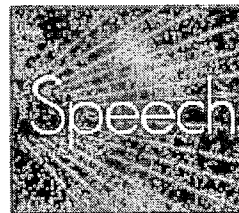
A P P E A R A N C E S:

CHRISTY SUSTAKOVITCH, Esquire
 Attorney for the Plaintiff

AMANDA WICKER, Esquire
 Attorney for the Defendant

Teresa B. Johnson, CVR-M
 Certified Court Reporter
 P.O. Box 2812
 Greenville, S.C. 29602

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I N D E X

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EXHIBITS PAGENO.DESCRIPTIONID EV**PLAINTIFF EXHIBITS**

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

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P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 13th day of August, 2015 at approximately 2:40 p.m.)

THE CLERK: Your Honor, in the case of 2013-GS-23-11027, the state versus Ryan D. Irby, he is indicted for Murder and Possession of a Weapon During the Commission of a Violent Crime. He is pleading to Murder. Your Honor, this is true billed.

In the case of 2013-GS-23-10970A, Mr. Irby is indicted for Armed Robbery and Possession of a Weapon During the Commission of a Violent Crime. He is pleading to Armed Robbery. That is also true billed.

Mr. Irby, the best you can, please raise your right hand.

(WHEREUPON, the defendant is first duly sworn.)

THE CLERK: Thank you.

THE COURT: All right. Mr. Irby, you are here today to plea guilty to murder. It is classified, of course, as a violent offense and a most serious offense. It carries 30 years to life. Possession of a Weapon during the Commission of a Violent Crime. It carries five years and armed robbery also classified as a

1 violent and most serious offense. It carries
2 10 years up to 30 years. Is that your
3 understanding?

4 **MR. IRBY:** Yes, ma'am. Yes, ma'am.

5 **THE COURT:** Okay. Have you discussed
6 these charges with your lawyer?

7 **MR. IRBY:** Yes, ma'am.

8 **THE COURT:** Are you happy with what your
9 lawyer has done for you?

10 **MR. IRBY:** Yes, ma'am.

11 **THE COURT:** Are you under the influence
12 of drugs or alcohol here today?

13 **MR. IRBY:** No, ma'am.

14 **THE COURT:** Has anyone forced you to
15 plead guilty?

16 **MR. IRBY:** No, ma'am.

17 **THE COURT:** Has anybody promised you
18 anything to get you to plead guilty?

19 **MR. IRBY:** No, ma'am.

20 **THE COURT:** When you plead guilty, you
21 give up certain constitutional rights. One is
22 your right to remain silent about these
23 charges. Do you know that?

24 **MR. IRBY:** Yes, ma'am.

25 **THE COURT:** You also give up your right

1 to a jury trial on the charges. At that trial,
2 your attorney could call witnesses for you,
3 cross-examine witnesses against you and the
4 state would have to prove your guilt beyond a
5 reasonable doubt. But when you plead guilty,
6 you give up your right to a jury trial. Do you
7 know that?

8 **MR. IRBY:** Yes, ma'am.

9 **THE COURT:** How old are you?

10 **MR. IRBY:** 30.

11 **THE COURT:** How far did you go in school?

12 **MR. IRBY:** 12th grade.

13 **THE COURT:** What kind of work have you
14 done since that time?

15 **MR. IRBY:** Construction.

16 **THE COURT:** Construction work? All
17 right. Have you ever been treated for mental
18 illness?

19 **MR. IRBY:** Yes, ma'am.

20 **THE COURT:** Tell me about that.

21 **MR. IRBY:** I was diagnosed with paranoid
22 schizophrenia.

23 **THE COURT:** Okay. Are you on medication
24 for that currently?

25 **MR. IRBY:** They stopped it.

1 **THE COURT:** They stopped it?

2 **MR. IRBY:** Yes, ma'am.

3 **THE COURT:** Let me ask you this. Do you
4 feel clearheaded here today?

5 **MR. IRBY:** Yes, ma'am.

6 **THE COURT:** Do you feel like you
7 understand what's going on?

8 **MR. IRBY:** Yes, ma'am.

9 **THE COURT:** I know sometimes I have been
10 told that folks who suffer from this condition
11 hear voices or hear things that are not really
12 going on at that time. Do you have any of
13 those feelings here today or are you hearing
14 voices that you think are not there?

15 **MR. IRBY:** No, ma'am.

16 **THE COURT:** Have you ever been treated
17 for substance abuse problem?

18 **MR. IRBY:** No, ma'am.

19 **THE COURT:** All right. Let me ask you
20 this, Ms. Wicker, have you had an opportunity
21 to talk to your client before about this?

22 **MS. WICKER:** I have, Your Honor.

23 **THE COURT:** Do you agree with his
24 decision to enter a guilty plea here today?

25 **MS. WICKER:** Yes, Your Honor.

1 **THE COURT:** Do you have any concerns
2 about his understanding what's going on here
3 today or his competency to enter this plea here
4 today?

5 **MR. IRBY:** No, ma'am.

6 **THE COURT:** All right. Uh, and how do
7 you plead to these charges, guilty or not
8 guilty?

9 **MR. IRBY:** Guilty.

10 **THE COURT:** You have 10 days from today's
11 date to appeal this if you so choose, but you
12 must do so in writing to this court.

13 **MS. SUSTAKOVITCH:** Thank you, Your Honor.
14 May it please the court. On August 30th, 2013,
15 police responded to reports of a shooting at
16 920 Poinsett Highway at the Illusion Smoke Shop
17 within Greenville County. Your Honor, upon
18 arrival, they found the victim, 29-year-old
19 Theodore Ross McClellan, lying on the store
20 floor on his back. He had a gunshot wound to
21 the upper chest, the neck area. EMS was called
22 and he was declared deceased at the scene.

23 Police began interviewing witnesses at the
24 scene, Your Honor, to try to determine who had
25 shot the victim in this case. There were two

1 people on scene who stated they were inside
2 Illusion Smoke Shop when the shooting happened.
3 First police spoke with Amanda Steinseifer.
4 She told law enforcement that she was in the
5 store with the clerk, the victim in this case,
6 when a black male came in the back door, had a
7 black handgun, uh, was wearing a camo jacket
8 and said, "Give me the fucking money."

9 She stated the victim, Ross McClellan, was
10 holding a small bucket of change. Steinseifer
11 said the victim was unable to hand the money
12 over before the suspect shot him in the chest
13 and then ran out the back door, which is the
14 door that he came in.

15 She did state if she was shown a picture of
16 the shooter, she was certain that she would be
17 able to pick him out of a photo lineup. When
18 the investigation turned to this defendant,
19 Steinseifer was not able to pick out this
20 defendant, Your Honor, but, instead, picked out
21 a different person as the shooter in this case.

22 Police also interviewed another witness who
23 was on the scene, Christopher Rico Mayes. He
24 gave a similar account to what had occurred.
25 He stated that he was at the front of the

1 store. He said that, uh, he heard a gunshot.
2 He turned. He saw the suspect running wearing
3 a camo jacket, a baseball hat. He said that the
4 person who shot the victim looked like a person
5 from the neighborhood known as, quote, Trouble,
6 by the nickname Trouble. Mr. Mayes was later
7 shown a photo lineup. He did, in fact,
8 identify this defendant as the shooter that
9 killed the victim in this case.

10 Your Honor, the investigation continued on.
11 Law enforcement, several days later, discovered
12 that there was another witness, Amber Smith,
13 who was also in the store during the shooting.
14 She came forward after seeing stories on TV
15 about the shooting and felt that it was the
16 right thing to do. She admitted that she ran
17 from the scene when the shooting happened
18 because she was worried about a warrant that
19 she thought was out for her arrest.

20 Ms. Smith said that she knew the defendant
21 because he frequented a store where she worked.
22 And she didn't know his real name but she knew
23 him by the nickname of Trouble. She stated
24 that she saw this defendant shoot and kill the
25 victim and she did pick him up out of a photo

1 lineup. She admitted to having done
2 methamphetamine several hours before the
3 shooting but stated that it did not affect her
4 ability to recognize the defendant.

5 After the police got the information from
6 Amber Smith, they continue their investigation.
7 Several weeks later, another witness named
8 Arlene Hawkins came forward stating that a man
9 with a camo jacket matching the description of
10 this defendant had asked her for a ride near
11 the incident location. She stated she did not
12 know that the person is she picked up had just
13 killed the victim. She did pick him out of a
14 photo lineup as looking like the person that
15 she had get into her car. She has also stated
16 to the state that he looks similar to another
17 person in Greenville County as well. Your
18 Honor, those would be the facts that the state
19 would present at trial in this case.

20 **THE COURT:** Does Mr. Irby have any prior
21 record?

22 **MS. SUSTAKOVITCH:** Yes, ma'am, he does.
23 2001, Possession of Marijuana; 2002, Failure to
24 Stop; 2003, Receiving Stolen Goods, Malicious
25 Injury to Personal Property; 2003, Pointing and

1 Presenting, Unlawful Carrying; 2003, Possession
2 of Crack, Possession of Drug Paraphernalia,
3 Open Container; Driving under Suspension in
4 2011; and, Your Honor, he has a Resisting
5 Arrest from 2004. He also has one charge, uh,
6 from 2010 where he was found guilty in federal
7 court to being a felon in possession and was on
8 probation for that at the time of this shooting
9 and does have a federal case pending against
10 them.

11 **THE COURT:** All right. Mr. Irby, you
12 heard the facts as related by the solicitor.
13 How do you plead, guilty or not guilty?

14 **MR. IRBY:** Guilty.

15 **THE COURT:** And you heard your prior
16 record as stated by the solicitor. Is that, in
17 fact, your record?

18 **MR. IRBY:** Yes, ma'am.

19 **THE COURT:** Ms. Wicker, have you
20 discussed with your client -- I heard the
21 solicitor allude to certain discrepancies in
22 the case and it sounded like maybe some
23 difficulties from the standpoint of the state's
24 prosecution. Have you discussed possible
25 defenses with your client? You feel like he

1 does understand them and knows that he's
2 waiving those, any defenses here today?

3 **MR. SMITHS:** Yes, ma'am.

4 **THE COURT:** All right then. Well, I'll
5 accept his plea as being freely and voluntarily
6 me with the advice of extremely competent
7 counsel with the whom the defendant says he is
8 well satisfied and the plea does have a
9 substantial factual basis.

10 Yes, ma'am?

11 **MS. SUSTAKOVITCH:** Your Honor, as to
12 sentencing, the recommendation in this case is
13 30 years which as I have explained to the
14 victim's family is day for day. I did want to
15 state on the record that is no reflection in
16 any way in what the state believes that this
17 case means as far as the death of Ross
18 McClellan. It simply is looking at facts of
19 this case and some of the evidentiary issues at
20 trial. That is the basis for that
21 recommendation.

22 The victim's family, Dianne McClellan would
23 like to address the court at the appropriate
24 time. Also, the victim's brother Jarrett
25 McClellan and Daniel McClellan would like to

1 address the court, Your Honor.

2 **THE COURT:** All right.

3 **MS. SUSTAKOVITCH:** Who would like to
4 speak first?

5 **MR. JARRETT McCLELLAN:** I've dreaded the
6 day that I would have to come here and face the
7 person who took my brother from me and my mom
8 and my other brother as well as everybody else
9 today who's here for my brother. He would have
10 given you the shirt off of his back. I had to
11 find him in that store like that laying there.
12 I don't even know what to say, man. May God be
13 with you.

14 **THE COURT:** Sir, I'm so sorry for your
15 loss and I appreciate you being here. I'm
16 sorry. It was senseless. That's all that can
17 be said. Thank you.

18 **MS. DIANNE McCLELLAN:** I don't even know
19 where to begin. He took my son. My son is six
20 feet under the ground. He is standing right
21 here breathing air. And I want you to know what
22 kind of son Ross was. I found this and it was
23 like a gift from him about four months ago. It
24 says the greatest woman. You are a beautiful
25 person inside and out. You are the mom of

1 three sons who love you very, very much. We
2 all would go to the end of the earth and back
3 for you because you are the greatest mom God
4 could give. I love you, Ross McClellan.

5 He destroyed my life. I'm not the same
6 person I was. I'm not the same mother. I'm
7 not the same grandmother. He took my son's
8 life. He took his future. He took my future
9 daughter-in-law and my grandchildren from me. I
10 don't even really leave my house and I'll never
11 get over this pain. It's the first pain
12 imaginable. So much worse than childbirth.

13 (Indiscernible.)

14 He made the choice to kill my son. He's
15 making choices here today to only get 30 years
16 and we only decided to do it because we can't
17 live with this anymore. I don't think 30 years
18 is enough. I believe when God says an eye for
19 an eye. I beg and I know that you have the
20 possibility to give him more time because I
21 know at 60 -- I'm almost 60 and I know there's
22 a life after that. And I don't think he needs
23 to walk out of a prison. He can't bring my
24 child back.

25 **THE COURT:** Ma'am, I cannot possibly

1 imagine what you have gone through, your
2 family's gone through. I'm a mother. I can't
3 even begin to imagine. My heart goes out to
4 you. I just hope that, if nothing else, I know
5 there's nothing we can do here today that's
6 going to bring you closure. But maybe at least
7 you won't have this day to dread.

8 **MS. DIANNE McCLELLAN:** I just want if you
9 could possibly make him stay in there 40 or 50
10 years to where he has nothing to come out to,
11 no future, no nothing. My son has no future.
12 He's gone. He's gone and he was the best son
13 there was. He would have given you anything.

14 **THE COURT:** He sounds like an absolutely
15 wonderful person. This is just absolutely
16 senseless. That's it.

17 And yes, sir?

18 **MS. SUSTAKOVITCH:** This is Daniel
19 McClellan.

20 **MR. DANIEL McCLELLAN:** Yeah, I don't know
21 where to begin. I just want you to know how
22 much my brother Ross meant to me and everybody
23 else and how much he is missed every day. He
24 was kindhearted, full of life and loved life.
25 We did not just lose a brother, my kids lost

1 their uncle, my mom lost her firstborn son. My
2 brother didn't ask for this.

3 The last week of his life, he was the
4 happiest I'd ever seen him. He was so excited
5 about this small shop that he took ownership of
6 (Indiscernible.) Ross had in his mind that
7 this shop was going to make it big and my
8 family could stop struggling. Ross wasn't
9 given that opportunity. On August 30, 2013 at
10 7:30, Ryan Irby took it upon himself to work in
11 my brother's business, rob him, shoot and kill
12 him for no reason but pure evil and greed.

13 Judge, I beg you not to allow this man to
14 return to society but to give him life in
15 prison. If not, any extra time at all. I do
16 not get my brother back period. I buried him,
17 so please sentence Ryan Irby to life without
18 the possibility of parole. I do not want this
19 -- I don't want him back in society with my
20 family.

21 **THE COURT:** Again, I'm so sorry for your
22 loss and thank you for being here.

23 Yes, ma'am?

24 **MS. WICKER:** Thank you, Your Honor. May
25 it please the court. Your Honor, obviously,

1 this is a very tragic situation. I don't think
2 there is anything that can be said to alleviate
3 the family's grief. We understand that.

4 As we discussed earlier, Your Honor, there
5 were some issues we discussed about the
6 eyewitness identification. Ultimately after
7 discussing this at length, Mr. Irby felt like
8 this would be the best resolution in this case.
9 We're going to respectfully request that you
10 follow the recommendation made by the state.
11 We believe it's appropriate in this case.

12 He's been in custody since September 16th
13 of 2013. He's got a very loving and supportive
14 family, some of whom are here today. They've
15 been involved throughout the duration of this
16 case. I've spoken to them. I've spoken to his
17 mother several times about this case. Again,
18 Your Honor, we would just respectfully request
19 that you accept the recommendation of 30 years
20 in this case.

21 **THE COURT:** All right. Is there anything
22 your client would like to say?

23 **MS. WICKER:** I don't believe so, Your
24 Honor.

25 **THE COURT:** In light of the circumstances

1 of the case and in light of the negotiations
2 between the state and the defense, uh, and the
3 inducement to enter a guilty plea and bring
4 this to a resolution, uh, the sentence of the
5 court is 30 years on armed robbery, 30 years on
6 murder and five years the possession of a
7 weapon during the commission of a violent
8 crime.

9 My heart goes out to you all and my prayers
10 go out to you.

11 **MS. WICKER:** Thank you, Your Honor.

12 **THE COURT:** Good luck to you.

13 **(WHEREUPON, the proceedings conclude at**
14 **approximately 2:53 p.m.)**

15
16
17
18

FORM 5

STATE OF SOUTH CAROLINA)
)
 County of Greenville)
)
Ryan Erby #298917)
 Full name and prison number (if any) of Applicant)
)
 v.)
)
 State of South Carolina)
)
)
)

IN THE COURT OF COMMON PLEAS

2015-CP-23-06218

APPLICATION FOR
POST-CONVICTION RELIEF

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENS/JMER
 2015 OCT 14 PM 11 16

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 Kirkland Correction Inst.
4344 Broad River Road, Columbia S.C. 29210
2. Name and location of Court which imposed sentence Greenville, S.C. 29601
3. Name(s) of co-defendant(s) (if any) NA NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Murder / Murder A/w #2013A2330207724; Indict. #2013GS2311027
 - (b) Robbery / Armed Robbery A/w #2013A2330207725; Indict. #2013GS2310970

(c) Weapons / Pass. Weapon during Violent Crime AW# 2013A2330207726

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

- (a) Aug. 12, 2015 - 30 years for Armed Robbery,
- (b) Murder and 5 years for pass weapon. during a
- (c) Violent Crime

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. NA
- ii. _____
- iii. _____

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

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

(c) the date of each such result:

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

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

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

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

- (a) Because A (PCE) Post Conviction Relief was Quicker
- (b) _____

(c) _____

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

- (a) My Lawyer / counsel, was ineffective Counselor in performing his duties
- (b) my Counsel didnt fully Represented me 100% Best of His Abilities
- (c) my Counsel Never Submitted my Motions By filing them in clerk of Court

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

- (a) I was Sentenced on 8-12-15 on indictment / case
- (b) # 2013GS231107 on Sentencing sheet Weapons pass
- (c) during a Violent crime and MURDER under the same indictment #
#2013GS231107

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

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? _____

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. _____

NA

(d) the date of each such disposition:

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

NA

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

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

NA

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. _____

NA

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

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

NA

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) I just located myself after sentencing on 8-12-15 the ineffective
- (b) of my Counselor By Allowing me to be sentence twice (2x) under
- (c) the same indictment # 2013GS2311027 for 1) MURDER 2) weapons poss.

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

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

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

- (a) the name and address of each attorney who represented you:
 - i. Amanda L. Wicker #75400 Public Defender
Public defender office
Greenville S.C.
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Amanda L. Wicker #75400 Public Defender
public defender office
Greenville, S.C.
 - ii. _____
 - iii. TO: Arraignment, trial and Sentencing - plea.

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

To have My Sentence of 30 years vindicated - NOLLE PROSSEDO
due to: I was Sentence on 8-12-15 under the same
indictment # 2013GS 2311027 for MURDER and Weapons possession.

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

NO

STATE OF SOUTH CAROLINA)
County of Columbia, S.C.)

VERIFICATION

I, Ryan IRBY # 298917, 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.

Ryan IRBY # 298917

SWORN to and subscribed before me this 30th
day of September, 2015.

[Signature] (L.S.)
Notary Public

My Commission Expires

DEVERLE ALBERT
Notary Public, State of South Carolina
My Commission Expires May 3, 2023

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

I, Ryan IRBY, 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.

Ryan IRBY # 298917
Applicant

SWORN or affirmed to and subscribed before me this
30th day of September, 2015.

[Signature]
Notary Public

My Commission Expires: **DEVERLE ALBERT**
Notary Public, State of South Carolina
My Commission Expires May 3, 2023

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Ryan Darrell Irby,)
 S.C.D.C. No. 298917,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2015-CP-23-6218

RETURN

In response to the post-conviction relief application filed October 14, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the April 2015 term of General Sessions for armed robbery (2013-GS-23-10910, count 1), murder (2013-GS-23-11027, count 1), and two counts of possession of a weapon during commission of a violent crime (2013-GS-23-10910, count 2; 2013-GS-23-11027, count 2). Amanda L. Wicker, Esquire represented the Applicant.

On August 21, 2015 the Applicant pled guilty to armed robbery, murder, and one count of possession of a weapon during commission of a violent crime (2013-GS-23-11027, count 2). The Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of 30 years for armed robbery, 30 years for murder, and 5 years for possession of a weapon during commission of a violent crime. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville

County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the plea transcript.

II.

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

1. Ineffective assistance of counsel.
 - a. Counsel didn't fully represent to the best of his abilities.
 - b. Counsel never submitted motions.
 - c. Allowed the Applicant to be sentenced to possession of a weapon during commission of a violent crime and murder under the same indictment number.

III.

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

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

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

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

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


Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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

By: 
Attorneys for Respondent

January 29, 2016

STATE OF SOUTH CAROLINA)
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 COUNTY OF GREENVILLE)
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 RYAN DARRELL IRBY, 298917)
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 Applicant,)
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 vs)
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 STATE OF SOUTH CAROLINA,)
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 Respondent.)
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IN THE COURT OF COMMON PLEAS

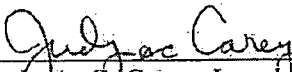
2015-CP-23-6218

AFFIDAVIT OF SERVICE BY MAIL

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

Ryan Darrell Irby, 298917
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010

DATED this 29th day of January, 2016.



 Judy A. C. Carey, Legal Assistant
 For Respondent

State of South Carolina
County of Greenville

Court of Common Pleas

Ryan Irby)
)
 Applicant,)
 v.)
)
 State of South Carolina)
)
 Respondent.)

Transcript of Record
2015-CP-23-06218

June 15, 2016
Greenville, South Carolina

B E F O R E:

The Honorable George C. James, Judge.

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

R. Mills Ariail, Jr., Esquire
Attorney for the Applicant

Johnny James, Esquire
Attorney for the Respondent

Lisa Scott
Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits.

P R O C E E D I N G S

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1
2
3 MR. JAMES: And, Your Honor, I believe we're
4 ready to proceed.

5 I apologize. I told Ms. Wicker that because
6 Mr. Irby is a little late or scheduled last, that
7 she could be here a little late and then a couple
8 cases fell off.

9 THE COURT: That's fine. Is there anything
10 you'd like to put on the record before we begin, or
11 are you ready to go? I've read the plea transcript
12 and the application and the returns.

13 MR. ARIAIL: No, Your Honor. You have an
14 understanding of the matters in the case, and we can
15 just proceed. And I'd call Mr. Irby to the stand.

16 THE COURT: All right. Any victims present?
17 Victim's family?

18 MR. JAMES: Oh, yes, Your Honor. The victims
19 are present here behind me, Ms. Diane McClellan and
20 Mr. Daniel McClellan.

21 THE COURT: All right. They'll have the right
22 to speak at the end. Will they be called as
23 witnesses as far as PCR is concerned?

24 MS. JAMES: No, Your Honor.

25 THE COURT: They'll have the right to speak,

1 but their comments won't be considered as evidence
2 as whether -- whether or not there was ineffective
3 assistance of counsel. Thank y'all for being here.

4 THE WITNESSES: (Collectively:) Thank you.

5 THE COURT: All right. Mr. Ariail?

6 MR. ARIAIL: Yes, Your Honor. I call Mr. Irby
7 to the stand.

8 THE APPLICANT: (Approaching.)

9 RYAN IRBY,

10 having been produced and first duly sworn as a
11 witness on behalf of the Applicant testified as
12 follows:

13 THE CLERK: Thank you. You may be seated.

14 THE APPLICANT: (Complying.)

15 THE CLERK: Please state your full name for the
16 record.

17 THE APPLICANT: Ryan D. Irby.

18 DIRECT EXAMINATION

19 BY MR. ARIAIL:

20 Q. Mr. Irby, how are you doing today?

21 A. I'm doing good.

22 Q. Good. We're here on behalf -- on your PCR
23 application that you filed. Do you remember filing
24 that?

25 A. Yes, sir.

1 Q. Okay. You were represented by Ms. Wicker in
2 this case, correct?

3 A. Yes, sir.

4 Q. Okay. And she represented you, and I think it
5 was three different charges; is that correct?

6 A. Yes, sir.

7 Q. Okay. It was murder, armed robbery, and then I
8 think possession of a weapon during a violent crime;
9 is that correct?

10 A. Yes, sir.

11 Q. Okay. Now, tell me, was she appointed as your
12 counsel?

13 A. Yes, sir.

14 Q. Okay. So when you got arrested for these
15 charges, how long after your arrest did you meet
16 with her or have your initial conversation with her?

17 A. Prior to a couple of weeks.

18 Q. A couple of weeks?

19 A. Yes, sir.

20 Q. Okay. You didn't have any other attorneys on
21 this before her, correct?

22 A. No, sir.

23 Q. Okay. And nobody else represented you on these
24 charges except for her, correct?

25 A. Yes, sir.

1 Q. Okay. Now, when she met with you, how many --
2 over, I guess, the length of her representation, how
3 many times did you meet with her?

4 A. Possibly, about four or five times.

5 Q. Okay. Now during that time, were you in the
6 law enforcement center during that time?

7 A. Yes, sir. I was in Greenville County Detention
8 Center.

9 Q. Okay. Did you get -- were you out on bail at
10 any time?

11 A. No, I was not.

12 Q. Okay. So during that time when you were
13 incarcerated, how long do you think it was before
14 you pled guilty?

15 A. I was in the county from September 13th. I
16 think around the 14th I started to plea because she
17 come at me when I was in lock up and asked me do I
18 want to take a -- a plea. I was skeptical, but then
19 she said, "Well, we're going to try something else."
20 And I waited till the next day, and then she talked
21 to me again.

22 Q. Okay. Let's go -- I'm going to go back a
23 little bit and piece these dates in. September of
24 what year?

25 A. 2013.

1 Q. Okay. So 2013, you pled guilty on ---

2 A. No. That was September -- that was August of
3 2014 I pled guilty.

4 Q. Okay. August 2014, you pled guilty is what
5 you're saying?

6 A. Let me check these dates and make sure.

7 Q. I think your dates might be a little -- I'm
8 going to check on that too. I have August of 2015.

9 A. August 12, 2015.

10 Q. Correct.

11 THE COURT: Would you clarify with the witness
12 please when -- what he's talking about when she came
13 to visit him first ---

14 MR. ARIAIL: Okay. When you ---

15 THE COURT: --- got a plea or a possible plea.

16 BY MR. ARIAIL:

17 Q. And let's go through that a little bit. I'll
18 get the dates afterwards. When she came to you,
19 when was that, that she came to talk to you about a
20 possible plea?

21 A. That was August. That's two -- I think it's
22 days before.

23 Q. August 10th?

24 A. Yeah.

25 Q. Okay. She was talking about a plea?

1 A. Yeah, she had brought the plea papers because I
2 was still stuck on the trial.

3 Q. Okay. When you say "plea papers," you're
4 talking about the sentencing sheets?

5 A. Yes, sir.

6 Q. Okay. So she explained to you that there --
7 was there any recommendation as to the plea?

8 A. She was like, if I just plead to it, they'll
9 give me 30 years.

10 Q. Okay. So they -- she -- she told you they're
11 not asking for life without parole. They were
12 asking for 30 years?

13 A. That what the plea -- that's what she was
14 trying to get the plea for, but the main part of the
15 plea was, if I didn't plea and go to trial, I could
16 get more time.

17 Q. Okay.

18 A. But if I plead, I will get 30 years and that's
19 was going to be the end of it.

20 Q. Okay. Did she explain to you what a
21 recommendation was?

22 A. No, sir.

23 Q. Did she tell you anything about the judge could
24 follow it or the judge doesn't have to follow it?

25 A. Oh, yes, sir. Yes, sir. Yes, sir.

1 Q. Okay. Did she also explain to you that the 30
2 years was day for day for murder?

3 A. She said it was 85.

4 Q. She told you it was 85 percent for murder?

5 A. Eighty-five percent. So what I know about the
6 85 percent of the law is anything that's violent,
7 that's 85 percent mandatory day for day.

8 Q. Explain that mandatory day for day. What do
9 you mean by that?

10 A. Okay. What I mean by -- see I done -- I done
11 time before.

12 Q. Right.

13 A. And I done a Fed sentence.

14 Q. Okay.

15 A. And it was day for day. You know, most guys
16 that I've been talking to about the case law, it's
17 day for day of 85 percent. So when I said day for
18 day, it was mandatory, it's like doing -- basically,
19 I'm doing Fed time all over again.

20 Q. Okay.

21 A. I've got a 30-year sentence, but I'm serving
22 day for day on 30 years.

23 Q. All right. And you're saying before you pled,
24 you didn't know that it was going to be day for day?

25 A. Yes, sir.

1 Q. But you -- you are saying -- did she explain to
2 you that if you went to trial, you could get life
3 without parole?

4 A. Yes, sir.

5 Q. Okay. Now ---

6 THE COURT: Did he say she did not or did tell
7 him day for day on the numerical sentence?

8 BY MR. ARIAIL:

9 Q. She didn't tell you day for day on the
10 30 years, did she?

11 A. When she was telling me about it, she was
12 saying it was 85.

13 Q. Okay. Now, let's go back a little bit and I
14 skipped over this. When she's representing you, you
15 had discussions with her. I think you met with her
16 four to five times is what you said?

17 A. Uh-huh.

18 Q. Did y'all discuss the case in depth?

19 A. Discussed pieces -- pieces of it. We didn't
20 sit down and go over the whole motion.

21 Q. Okay. But did she go through with you the
22 elements of the offenses that you were charged with,
23 I mean what they had to prove?

24 A. No.

25 Q. Did she say in murder, they've got to do this,

1 this, and this to be able to prove that you did it?

2 A. She was telling me about the case. When she
3 said that I had the charges, she was like, "Well,
4 you know if you lose, you can get this amount of
5 time."

6 Q. Okay. Let me go about it a different way. Did
7 she explain to you the evidence in the case that
8 they were going to put up against you?

9 A. From what she was telling me, there wasn't no
10 evidence. She was -- they were questioning -- like,
11 they were still trying to get the plea to go on.

12 Q. And I've read your guilty plea, and we've
13 talked about this a little bit. There were
14 witnesses to this case, correct?

15 A. Yes, sir.

16 Q. Okay. In fact, there was one witness that
17 couldn't put you there. There was another witness
18 that could put you there; is that correct?

19 A. Yes, sir.

20 Q. Did y'all discuss, you know, how beneficial
21 that would be at trial or, you know, ramifications
22 if you went to trial with those witnesses?

23 A. She was basically saying like it was 50/50.

24 MR. ARIAIL: Okay.

25 THE COURT: She said what, sir?

1 THE APPLICANT: She was saying like it was
2 50/50. There's a chance for you to win; there's a
3 chance for you to lose.

4 BY MR. ARIAIL:

5 Q. Okay. So you're explaining -- y'all talked
6 about that during the course of this during these
7 five meetings; is that correct?

8 A. (Nonverbal response.)

9 Q. Did you have -- she wants you to speak up. If
10 you can, make sure it's a --

11 A. Yeah.

12 Q. Okay. Yes and no's are what she needs.

13 During the course of your representation, did
14 you have -- do you feel like you had a good
15 understanding of the facts and evidence that were
16 going to be used against you?

17 A. No, sir.

18 Q. Okay. Do you believe that she investigated the
19 case or did what she needed to do to, I guess, check
20 with the witnesses or look at the background
21 information to help you?

22 A. No, sir.

23 Q. Okay. And did you ask her to do certain things
24 that she didn't do?

25 A. I -- I filed motions and she was telling me,

1 like, it's not necessary to file until the end,
2 so...

3 Q. Tell me what motions you filed?

4 A. I know I filed a motion for dismissal.

5 Q. Okay.

6 A. And I never -- ain't never heard nothing else
7 about it.

8 Q. All right. When you say you filed it, did you
9 send it to the clerk's office?

10 A. I did it in the county, turned it in myself.

11 Q. To the Clerk of Court?

12 A. Yes, sir.

13 Q. Okay. Did she -- did you send her a copy?

14 A. No. I sent it directly to her.

15 Q. Okay. To ask her to file?

16 A. Yes, sir.

17 Q. Okay. So you didn't send it to the clerk's
18 office?

19 A. No, sir. I did not.

20 Q. Okay. Did she -- and it was a dis -- a motion
21 to dismiss, I guess?

22 A. Yes, sir.

23 Q. And then were there any other motions you asked
24 her to file?

25 A. I can't think of right off my head, sir.

1 Q. Okay. But you sent the motion to dismiss, and
2 did y'all have a discussion about it?

3 A. Only discussion we had was, she was like, "It's
4 not supported till the end."

5 Q. Okay. So she didn't file that?

6 A. No, sir.

7 Q. And you -- in regards to the investigation,
8 were there things that you asked her to do that she
9 didn't do or should've investigated that you asked
10 her to do?

11 A. On the investigation part, like, she was
12 telling me there's witnesses. And I never -- she
13 kept saying she was going to bring her laptop so I
14 could see the, what you call it, the investigation
15 of it?

16 Q. Right.

17 A. I never saw the investigation of certain
18 witnesses. Only thing I know about it is when I got
19 the motion.

20 Q. Okay. So you got a copy of your motion for
21 discovery?

22 A. I got a copy of my motion. I had to do my
23 own -- own work just to really get a whole
24 understanding of the case and didn't get a full
25 understanding of my case.

1 Q. Okay. Maybe I need to ask this too. When did
2 you get a copy of all the motion for discovery? Was
3 it after you pled guilty or before?

4 A. Before.

5 Q. Okay. So you had it before you pled guilty?

6 A. Uh-huh.

7 Q. Had you reviewed it before you pled guilty?

8 A. I reviewed pieces of it.

9 Q. Okay. And before you pled guilty, she came
10 down and y'all had a discussion about a sentencing
11 sheet about pleading guilty, correct?

12 A. Uh-huh.

13 Q. Did y'all ---

14 A. Yes, sir.

15 Q. Did y'all fully discuss what it meant to plea
16 and your Constitutional rights during that time?

17 A. Not at the moment. I didn't understand the
18 liability of the pleas.

19 Q. What did you mean by that?

20 A. What I mean by that, like, okay, what I was
21 asking her to do, she was doing different. She was
22 doing as she seen fit for -- for me. You know, I
23 asked her about a plea. And the first time, it
24 wasn't no plea deal.

25 But then I kept saying trial and trial and

1 trial, she was like, "Well, I might can get a plea."
2 I was sitting in county for so long, now y'all come
3 at me with a plea.

4 Q. Okay. Did she explain to you that it's not up
5 to her to get a plea offer? That comes from the
6 Solicitor's Office?

7 A. Yes, sir.

8 Q. Okay. Did she say anything about the
9 Solicitor's Office hadn't given you a plea offer, or
10 they're not willing to do anything?

11 A. At the moment she was like, "The Solicitor is
12 not willing to do nothing."

13 Q. Okay. So -- but at some point in time, you got
14 a recommendation for 30 years?

15 A. Uh-huh.

16 Q. And that was for the murder charge, correct?

17 A. Yes, sir.

18 Q. Okay. So when you got back, did y'all discuss
19 it and have a, you know, full understanding of what
20 you were doing in regards to that?

21 A. I signed the plea sheets on one day. A couple
22 days later, I was in court.

23 Q. Okay. Now, you went and you pled guilty,
24 correct?

25 A. Yes, sir.

1 Q. Now, tell me -- you've told me that you
2 wouldn't have pled guilty had you known additional
3 things, so can you elaborate on that?

4 A. Okay. When you mean elaborate, I would have
5 never pled guilty to the charge had I knew more
6 about the pleas. You know what I'm mean? I'm
7 trying to think of the name of the plea.

8 Q. The Alford?

9 A. Alford plea.

10 Q. Alford. Okay.

11 A. I didn't know nothing about that.

12 THE COURT: This wasn't an Alford plea, right?

13 MR. ARIAIL: No -- No, Your Honor.

14 THE COURT: Okay.

15 THE APPLICANT: If I had known more about the
16 Alford plea before I pled guilty, I would never
17 plead this. I would've went straight to trial.

18 BY MR. ARIAIL:

19 Q. So did y'all -- did y'all discuss the
20 Alford-type plea?

21 A. Discuss it?

22 Q. Yeah.

23 A. She was like, "Well, if you plead, the judge is
24 going to recommend -- she's going to say 65, but
25 she's only going to give you 30 years."

1 Q. Okay. Do you understand that Alford is just a
2 type of plea where you're not admitting to the
3 facts?

4 A. Now that I have the understanding of the law, I
5 do.

6 Q. Okay. My question, and understand that I mean,
7 even if you did an Alford plea, are you against the
8 30 years or saying she did something wrong in
9 regards to the recommendation or the plea that she
10 got you other than Alford?

11 A. Yes, sir.

12 Q. Okay. What's that?

13 A. I don't feel like no investigation was done ---

14 Q. Okay.

15 A. --- just to come to me and say, "Well, I could
16 try to get you 30 years."

17 Q. Now ---

18 A. If an investigation was done on my case, I
19 wouldn't be sitting here. They would have the right
20 man in custody instead of the wrong man in custody.

21 Q. Okay. So -- and I just want to make sure we
22 put it on the record. This is your day in court.
23 What investigation ---

24 THE COURT: Could you -- could you clarify
25 whose investigation he's talking about?

1 BY MR. ARIAIL:

2 Q. Right. Okay. And you're talking about the
3 investigation that Ms. Wicker was supposed to do; is
4 that correct?

5 A. I'm talking about the investigation my lawyer
6 that's representing me is supposed to do on my
7 behalf.

8 Q. Okay. You're not saying the investigation that
9 the officers should've done?

10 A. All in one. It's the investigation -- my
11 lawyer, the law enforcement. I don't feel like it
12 was no investigation. I mean, they snatched me up,
13 set me in county, and I just sat. And then a court
14 date appeared out of nowhere. I've been sitting in
15 the county almost three -- three years.

16 Q. Okay. Let's go through this. What are you
17 saying investigation-wise Ms. Wicker did not do that
18 she should've done?

19 A. As far as like witnesses I should've known
20 about, like I should've -- when she's telling me
21 she's going to bring something to show it to me, as
22 a lawyer, I'm expecting to see the evidence that's
23 upon me -- that's -- that's against me instead of,
24 "Well, my laptop is always down," you know.

25 Q. And I understand you're saying that's her not

1 explaining to you what the discovery is or showing
2 that to you. Is there anything you asked her to go
3 out and to do for you that she didn't?

4 A. I told her about the convenient store that I
5 was at that she could go get a video surveillance
6 from, and wasn't nothing ever done.

7 Q. Where was that?

8 A. That was in Greer, South Carolina.

9 Q. What was the convenient store?

10 A. Fast Field on 29.

11 Q. And you -- what was the depth -- what did you
12 tell her that was going to show?

13 A. That would show at the time that I was not in
14 Greenville, South Carolina, when any of this was
15 going down. I was in Greer, South Carolina.

16 Q. Okay. And what was her response to that?

17 A. Well, it never -- never got looked into. You
18 know, the video surveillance never got pulled.

19 Q. Did you give her all that information as to
20 where to go look at that?

21 A. Yes, sir.

22 Q. How long after you were -- I guess she was
23 appointed to you and you met with her, did you give
24 her that information?

25 A. After I was arrested, I sat in county for

1 about -- probably about three -- two or three
2 months. As soon as I met her, I told her.

3 Q. Okay.

4 A. I let her know that I know how to try to get me
5 out the situation, but nothing ever was brought to
6 my attention about her pulling the video
7 surveillance or nothing.

8 Q. Okay. Now, I've gone through the things we've
9 discussed, and I want to make sure this is your day
10 to be able to tell the Court what you believe the
11 issues are in regards to your representation by
12 Ms. Wicker. Is there anything else you want to
13 relay or put on the record?

14 A. No, sir.

15 MR. ARIAIL: Okay. Your Honor, I have no
16 further questions.

17 THE COURT: Cross-examination?

18 MS. JAMES: Thank you, Your Honor. May it
19 please the Court? My name is Johnny Ellis James,
20 Jr.

21 THE COURT: Okay.

22 CROSS-EXAMINATION

23 BY MS. JAMES:

24 Q. Mr. Irby, just to cover this again. How many
25 times did you meet with your attorney, Ms. Wicker?

1 A. Four to five times.

2 Q. Do you recall reviewing the discovery with your
3 attorney on the charges of your case?

4 A. I recall going over my case.

5 Q. So you went over your case with your attorney?

6 A. Yes, sir.

7 Q. Do you recall discussing any possible defenses
8 with your attorney?

9 A. Not until the last.

10 Q. So you did, just at the last moment?

11 A. Yes, sir.

12 Q. All right. You mention that you had given your
13 attorney leads to investigate?

14 A. Yes, sir.

15 Q. All right. Do you recall waiving your
16 Constitutional rights, such as your right to a jury
17 trial, your right to present witnesses on your
18 behalf, your right to remain silent, and so forth?

19 A. Yes, sir.

20 Q. Do you recall telling the plea judge that you
21 were satisfied with the work that your attorney did?

22 A. Yes, sir.

23 Q. Do you recall telling the judge that you were
24 happy with your attorney?

25 A. No, sir.

1 Q. Are you sure about that?

2 A. Yes, sir.

3 MR. JAMES: And if I may beg the Court's
4 indulgence for just one moment.

5 I have in my hand a transcript of the guilty
6 plea proceeding from Mr. Irby. If I may approach
7 the witness?

8 THE COURT: Yes, sir.

9 MS. JAMES: Thank you, sir.

10 BY MR. JAMES:

11 Q. If you could, Mr. Irby, please review lines
12 eight, nine, and ten on page five of the transcript
13 of your guilty plea.

14 A. Eight, nine, and ten?

15 Q. The portion that I have highlighted for you.

16 A. "Are you happy with what your lawyer has done
17 for you?"

18 "Yes, I am."

19 Q. So you told the Court that you were happy with
20 what your lawyer did for you?

21 A. Yes, sir.

22 Q. Do you recall offering any complaints to the
23 plea judge regarding your counsel's performance?

24 A. No, sir.

25 Q. Do you recall telling the plea judge that no

1 one was promising you or threatening you with
2 anything in order for you to plead guilty?

3 A. Yes, sir.

4 Q. Do you recall telling the plea judge that you
5 wished to plead guilty?

6 A. Yes, sir.

7 Q. Did you, again, after hearing the State offer
8 the facts of your case, tell the plea judge that you
9 still wished to plead guilty?

10 A. Yes, sir.

11 Q. Mr. Irby, I took note in your application that
12 you requested not only that your conviction be
13 vacated, but that you wished for the indictments
14 against you to be nolle prossed and those are your
15 words.

16 Do you want a new trial on the charges of
17 murder, armed robbery, and pos -- and commission of
18 a crime -- possession of a weapon during the
19 commission of a crime?

20 A. Yes, sir.

21 MR. ARIALL: I have no further ---

22 THE APPLICANT: Your Honor, could I say
23 something?

24 THE COURT: Yes, sir.

25 THE APPLICANT: That gentleman in the back --

1 in the back keeps sign languaging [sic] me.

2 THE COURT: Who?

3 THE APPLICANT: This gentleman sitting right
4 here (indicating). He slid over from his mother and
5 started sign languaging me.

6 THE COURT: Sing languaging you?

7 THE APPLICANT: Yeah, he slid over and ---

8 THE COURT: Hold -- hold -- hold -- hold on.
9 Let's stop. Talking about the gentleman behind
10 y'all?

11 THE APPLICANT: Yes, sir.

12 THE COURT: Are you behaving, sir?

13 MR. MCCLELLAN: I didn't move.

14 THE COURT: Okay. Just -- just restrict
15 their -- everybody restrict their conduct
16 accordingly.

17 All right. Go ahead, Mr. James -- or Mr. Irby,
18 is there anything else that you were wanting to say?

19 THE APPLICANT: No, sir. Thank you.

20 MR. ARIAIL: I have no further questions, Your
21 Honor.

22 THE COURT: Redirect?

23 MR. JAMES: No, Your Honor.

24 THE COURT: Any objection to me asking a
25 question?

1 MR. JAMES: No, Your Honor.

2 MR. ARIAIL: No, Your Honor.

3 THE COURT: Mr. Irby, did you say initially
4 that your lawyer came to see you for the first time
5 four or five days before you pled guilty?

6 THE APPLICANT: Yes, sir.

7 THE COURT: If that is the case, did you also
8 say that within two to three months of you being
9 locked up, she came to see you and you gave her
10 certain information about a video from a convenient
11 store?

12 THE APPLICANT: Yes, sir.

13 THE COURT: So she -- she came to see you
14 within two to three months of you being arrested?

15 THE APPLICANT: Yes, sir.

16 THE COURT: When were you arrested?

17 THE APPLICANT: I was arrested in September of
18 2013.

19 THE COURT: So she came to see you within two
20 to three months of that. That was two months -- two
21 years before you pled guilty, correct?

22 THE APPLICANT: Yes, sir.

23 THE COURT: So she did come to see you well
24 before four to five days before you pled?

25 THE APPLICANT: Yes, sir.

1 THE COURT: All right. Any follow-up on that,
2 Mr. Ariail?

3 MR. ARIAIL: No, Your Honor.

4 THE COURT: Any -- any follow-up from the
5 State?

6 MS. JAMES: No, Your Honor.

7 THE COURT: Okay. You can step down. Thank
8 you, sir.

9 THE APPLICANT: (Complying.)

10 THE COURT: Next witness, Mr. Ariail.

11 MR. ARIAIL: Yes. I call Ms. Wicker to the
12 stand.

13 THE COURT: All right.

14 (Witness approached.)

15 AMANDA WICKER

16 having been produced and first duly sworn as a
17 witness on behalf of the Applicant, testified as
18 follows:

19 THE CLERK: You may be seated, and please state
20 your full name for the record.

21 THE WITNESS: My full name is Amanda Wicker.

22 DIRECT EXAMINATION

23 BY MR. ARIAIL:

24 Q. Amanda, how are you doing today?

25 A. I'm good. How are you?

1 Q. Good. Doing fine. I want to go back to a
2 little bit about your representation in the
3 beginning of Mr. Irby. Do you recall how long after
4 he was arrested that you were appointed as his
5 counsel?

6 A. Sure. He -- I believe he was arrested on
7 September 16th of 2013. The case was originally
8 assigned to my boss, John Mauldin, because they
9 weren't sure if the State would be seeking the death
10 penalty. And his notes reflect that he met with him
11 on September 17th of 2013.

12 Q. Okay.

13 A. I subsequently met with him, it looks like
14 January 27th of 2014.

15 Q. Do you know when the case was assigned to you
16 as part of your office?

17 A. Let me look real quick. I'm sorry. I believe
18 it was September 17th.

19 MR. ARIAIL: Okay.

20 THE COURT: You were appointed 9/17/14?

21 THE WITNESS: 2013, Your Honor.

22 THE COURT: Okay. And you met with him for the
23 first time on what date?

24 THE WITNESS: I personally met with him for the
25 first time on January 27, 2014. My boss's notes

1 reflect that he met with him on September 17, 2013.

2 THE COURT: Okay.

3 BY MR. ARIAIL:

4 Q. During the interim between 9/17/2013 and
5 1/27/14, was there anybody in your office,
6 investigators or anybody else, that met with
7 Mr. Irby?

8 A. Yes. On September 19, 2013, one of our
9 investigators, Ken Jones, met with him. Then again
10 on September 27, 2013, another investigator, J.C.
11 Starkes, met with him.

12 Q. Okay. When you -- I guess during this period
13 of time you received discovery in this case; is that
14 correct?

15 A. That's correct.

16 Q. Okay. Do you remember when you got your
17 discovery?

18 A. There's one sheet that says we received it on
19 Jan -- or excuse me -- February 3, 2014.

20 Q. Okay.

21 A. There's another one in here, it looks like we
22 would've received earlier, December the 9th, 2013.

23 Q. Okay.

24 A. There's another dated August 12, 2014. And
25 then another dated July 15, 2015. I apologize. I

1 know that's not in order.

2 Q. That's fine. So you got supplemental
3 discovery ---

4 A. Right.

5 Q. --- throughout.

6 A. Right.

7 Q. Okay. Now, as part of your records, do you
8 recall or know how many times you went to meet him
9 at the law enforcement center or the detention
10 center?

11 A. I do. Let me count them. I have eight times
12 that I personally visited with him at the law
13 enforcement center.

14 Q. Okay. And those periods would've stretched
15 between 1/27/2014 and I guess August 12, 2015, when
16 he pled guilty?

17 A. That's correct.

18 Q. Okay. Now during that period of time, do you
19 recall what y'all discussed? Was it about the
20 evidence in the case?

21 A. We -- I mean, broadly we discussed the
22 weaknesses in the State's case, there were some
23 witness issues, and then obviously also some of the
24 strengths in the State's case. So just kind of a
25 global review, I suppose, of the case and I'm sure

1 there were some details about it.

2 Q. And going back in your review of the case, this
3 was a murder charge and what were the strengths or
4 weaknesses that you saw that you explained to him
5 about this case?

6 A. I believe the biggest weakness was the witness
7 that was closest to the shooter, I don't believe
8 identified Mr. Irby out of a photo lineup. But then
9 there were some subsequent witnesses who -- there
10 were other witnesses there who did identify him, and
11 there was a subsequent witness who I believe had
12 seen him running down the street and knew him from
13 before and matched the description of what the
14 shooter had been wearing.

15 Q. Okay. Did you go over all of that with him?

16 A. Yes.

17 Q. Okay. Did you, during this process, explain to
18 him the elements that they had to prove in regards
19 to each of these offenses?

20 A. I believe so. I mean, honestly, our -- our
21 main thing was -- either was or wasn't -- he either
22 was or was not the shooter. It was identification
23 issue.

24 Q. Okay.

25 A. We would've discussed obviously the charges and

1 maximum possible punishment and all that, as well.

2 Q. Okay. So going ---

3 THE COURT: I'm sorry. You said what? You
4 would have discussed?

5 THE WITNESS: We -- our defense would have
6 been, "Is he the shooter?" And we would've
7 discussed what the offenses were and what that
8 entailed, but our discussions were focussed mainly
9 on the strengths and weaknesses of the case and
10 whether he could be identified and whether a jury
11 would convict him.

12 BY MR. ARIAIL:

13 Q. And he had -- I mean, he was fully aware of,
14 you know, either he's the shooter or he's not and
15 he's going to be identified as to how this is going
16 to go?

17 A. Oh, I believe so.

18 Q. Okay.

19 A. He indicated that's ---

20 Q. Okay. And I guess where I'm going with that,
21 because you talked to him. You're saying you met
22 with him seven or eight times. When you got to
23 August -- it appears to be August 10, 2015, you went
24 to him with a -- what appears to be a recommendation
25 for 30 years; is that correct?

1 A. So, originally, the Solicitor had sent over a
2 plea offer back that we received in March of 2015
3 which we discussed. And basically it -- she had
4 said that she indicated that she was going to ask
5 for a substantial amount of time, so that wasn't at
6 that time a plea offer that we wanted to pursue.

7 I went and met with him again at the end of
8 July, July 31, 2015, because the Solicitor had
9 indicated to me she intended to prepare it for
10 trial.

11 And at that discussion, he had asked if I could
12 get him 30, he would plead guilty, so I spoke to the
13 Solicitor.

14 THE COURT: All right. Slow down. I'm not
15 following you with the dates.

16 THE WITNESS: I'm sorry, Your Honor.

17 THE COURT: You said July 31st ---

18 THE WITNESS: July ---

19 THE COURT: --- is when she was going to get it
20 ready for trial?

21 THE WITNESS: She had said the day before -- on
22 July 30th, she indicated to me that she was
23 preparing this case for trial. So July 31, 2015, I
24 went and met with Mr. Irby to discuss that his case
25 would be docketed for trial in the near future.

1 I don't recall that she gave me a specific
2 date, but it would be coming up probably either
3 August or September. At that meeting, he had asked
4 me if I could get him 30, he would plead guilty.

5 On August 5, 2015, I sat down with the
6 Solicitor -- excuse me -- and she -- discussed that
7 our conversation with her. She ultimately came back
8 to me the next day on August 6, 2015, and said if I
9 could get Mr. Irby signed up, she would go to the
10 victim's family and basically sell 30 would be a
11 good resolution.

12 So on August 7, 2015, I went back to the
13 detention center. Discussed that with Mr. Irby.
14 Discussed ---

15 THE COURT: On what day?

16 THE WITNESS: August 7, 2015. We went back and
17 honestly, we discussed at length whether to plead
18 guilty or whether he wanted a trial.

19 And we discussed how much time he would have to
20 serve, that he was on Federal probation. He's
21 facing Federal time at the end of this sentence, and
22 there were serious repercussions.

23 He ultimately signed the sentencing sheets. I
24 left the Solicitor a voicemail that same day on
25 August 7, 2015, and let her know that he had signed

1 the sentencing sheets.

2 I spoke to Mr. Irby again on August 11, 2015.
3 Told him the Solicitor came through. She will
4 recommend the 30 years. And he indicated, yes, he
5 still wanted to go forward with the guilty plea at
6 that time.

7 August 12, 2015, the Solicitor and I again
8 discussed the recommendation was 30. We spoke to
9 the plea judge prior to the plea to determine if she
10 would accept that, if she would follow the
11 recommendation, and she indicated that she would.

12 So we proceeded with the plea at that time
13 after -- because I relaid to Mr. Irby that that was
14 our discussion with the judge, make sure he still
15 wanted to go forward. He indicated he did, so we
16 proceeded with the plea at that time.

17 Q. Okay. And going in the plea, you believed he
18 was fully aware of all the potential ramifications,
19 that she could either follow the recommendation or
20 she could give him life without parole?

21 A. Sure.

22 Q. Okay. You went through all that with him?

23 A. I did.

24 Q. Okay. And you believe he was pleading freely
25 and voluntarily at this time?

1 A. I do. We -- we -- we extensively went over
2 whether he wanted a trial or a plea because honestly
3 up until I met with him at the end of July, we had
4 just been prepping for trial.

5 Q. Okay.

6 A. And that was the first I knew that he might
7 want to plead guilty at that time.

8 Q. Okay. And I know he's raised some issues in
9 regards to the investigation of this case. You're
10 saying it was an ID of the witnesses who were there
11 pretty much type of case?

12 A. That was basically the State's case, yes.

13 Q. Okay. There's no -- from what I understand, no
14 forensic evidence, correct?

15 A. No.

16 Q. Okay. And it was whether or not he was -- I
17 think there was one witness who couldn't identify
18 him, another witness who was there and then left but
19 showed up later to give a statement?

20 A. Right.

21 Q. And then a lady that either picked him up on
22 the road, which was consistent with the lady that
23 had ID'd him at the Illusion Smoke Shop; is that
24 correct?

25 A. I believe so, yes.

1 Q. Okay. So with that being kind of the facts of
2 the case, did he ask you to investigate anything
3 else or go out and do additional stuff?

4 A. I don't have any notes that he told me that. I
5 feel like I followed up on -- we discussed, you
6 know, letters he sent with the motion he was
7 requesting. I -- I don't have any notes that he
8 mentioned anything about that.

9 Q. Okay.

10 A. I feel like I would've written that down and
11 investigated it. And if he had an alibi, great.

12 Q. Right.

13 A. I certainly would look into that.

14 Q. That was my next question. Did he raise
15 anything about an alibi like this video that he has
16 raised at a convenient store in Greer?

17 A. Not that I have any notes or that I recall, no.

18 Q. Okay. And it appears that he either raised
19 that with you, if my notes are correct, that he did
20 that at your initial meeting back in maybe January
21 of 2014. Do you have any notes that show that?

22 A. No. Our discussions at that time were -- his
23 preliminary hearing was coming up, so we were
24 discussing what the preliminary hearing was and all
25 of that.

1 Q. Okay. So you have no -- no notes in your file
2 about a potential alibi?

3 A. Right.

4 Q. And if you had gotten that, would you have sent
5 an investigator or looked into that?

6 A. Absolutely.

7 Q. And you would have some records of that?

8 A. I would.

9 Q. Okay. Were there any other things that you
10 look at this case and say, "Well, we could've
11 investigated," or now have come up to you as to
12 things you could've addressed?

13 A. I don't believe so.

14 Q. Okay. This Alford -- and I know he didn't do
15 an Alford plea in regards to that. Do you remember
16 discussing with him Alford and how that ---

17 A. No. I -- we did not discuss an Alford plea and
18 I typically don't discuss Alford pleas. I tell -- I
19 tell people what the judge is going to ask, and if
20 they say, "I can't -- you know, I don't want to say
21 I'm pleading guilty because I am guilty," then we
22 discuss the Alford plea. So, no, I didn't discuss
23 that with him at all.

24 Q. Okay. And I guess my question, I've done
25 Alford pleas. You've done them before. What was

1 your view in regards to how Judge Verdin or the
2 Solicitor's Office was going to handle an Alford
3 plea in this case?

4 A. I don't recall that I even discussed an Alford
5 plea with the Solicitor or with Judge Verdin.

6 Q. Okay.

7 A. I don't think -- I didn't -- in my discussions
8 with Mr. Irby, I didn't get the impression that he
9 wouldn't be able to satisfy the questions for a
10 regular plea colloquy.

11 Q. Okay.

12 A. So I didn't even go there with that.

13 Q. Okay. And I think I hit on this. I want to
14 make sure. Do you think he had full understanding
15 of the discovery that was against him, or he says he
16 had a copy of all his discovery.

17 A. He did.

18 Q. Do y'all believe y'all went over that enough
19 for him to understand what the evidence was against
20 him?

21 A. I believe so. I mean, I will tell that I
22 didn't sit there and read it verbatim with him. We
23 discussed -- we went over kind of what I was getting
24 in and then really hit the highlights because a lot
25 of it was just -- it was not particularly -- didn't

1 really have a whole lot to do with the case, just,
2 you know, chain of custody stuff and that sort of
3 thing. So, I mean, I didn't go over that in length
4 with him.

5 MR. ARIALL: Okay. I have no further
6 questions, Your Honor.

7 THE COURT: Cross?

8 MR. JAMES: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. JAMES:

11 Q. Ms. Wicker, how are you doing today?

12 A. I'm doing well. How are you?

13 Q. Oh, I can't complain. Ms. Wicker, how long
14 have you been practicing law?

15 A. I have been practicing since November of 2007.

16 Q. And you kind of hinted around this and just to
17 make it abundantly clear. Were you appointed or
18 retained on this case?

19 A. I was appointed.

20 Q. All right. You discussed at length the
21 preparations that you made in anticipation of trial
22 and that you had gone over that evidence with
23 Mr. Irby. Prior to Mr. Irby's plea, you felt
24 adequately prepared to proceed this case to trial?

25 A. Yes.

1 Q. All right. You also mentioned that it was upon
2 Mr. Irby's request that you entered into
3 negotiations with the State for a plea deal?

4 A. That's correct.

5 Q. All right. And it was Mr. Irby's decision to
6 plead guilty?

7 A. Yes.

8 Q. If Mr. Irby had changed his mind at any point
9 up to including at the plea -- guilty plea
10 proceeding, would you have been ready and willing to
11 take that case to trial?

12 A. Yes.

13 Q. During the guilty plea proceedings, did anybody
14 such as, for example, the victim's family who are
15 here today, request that Mr. Irby receive a sentence
16 in excess of the recommendation made by the State?

17 A. I don't recall. I can look at the transcript.
18 They may have at the plea asked for more time.

19 THE COURT: Page 15.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: Line 19.

22 THE WITNESS: Yes. It looks like they did ask
23 for more time.

24 BY MR. JAMES:

25 Q. And if you could for me please just also review

1 very briefly page 16, lines 8 and 9.

2 A. Yes.

3 Q. All right. So they requested a substantially
4 greater amount of time in prison than the 30 years
5 that he received?

6 A. That's correct. In discussing the case with
7 the Solicitor, I know at one point they wanted to
8 ask for life or wanted the Solicitor to ask for
9 life.

10 Q. And very briefly direct your attention to page
11 17 at the very bottom, as well as page 18 of the
12 guilty plea transcript. You did go ahead after that
13 request by the victim's family and make an effort to
14 mitigate the impact of -- of their remarks and
15 convince the judge to stay with that 30 year
16 recommendation by the State, correct?

17 A. That's correct.

18 Q. The applicant has alleged here today that you
19 told him that he would only serve 85 percent of his
20 30-year murder sentence. Did you ever tell him
21 that?

22 A. I don't believe so. No. We went over the
23 seriousness and that he had to serve potentially
24 Federal time whenever he finished that up.

25 THE COURT: Could you -- could you repeat that

1 question? I'm sorry. I just missed it.

2 MR. JAMES: That's just fine, Your Honor.

3 BY MR. JAMES:

4 Q. Did you tell the applicant, Mr. Irby, that he
5 would have to serve only 85 percent of his 30-year
6 murder sentence?

7 A. No. I don't believe so.

8 Q. All right. Is it your general practice to
9 explain the sentencing credits to your clients?

10 A. Yes. We go over them beforehand. And then
11 when we're -- when I'm going through the sentencing
12 sheet where they're signing, we kind of go over
13 serious, most serious, all of that as well at that
14 time.

15 MR. JAMES: I have no further questions, Your
16 Honor.

17 THE COURT: Redirect?

18 MR. ARIAIL: No, Your Honor.

19 THE COURT: All right. Thank you, ma'am. You
20 can step down.

21 THE WITNESS: Thank you, Your Honor.

22 (Witness excused.)

23 MR. ARIAIL: That is our case, Your Honor.

24 THE COURT: Okay.

25 MR. ARIAIL: No further witnesses.

1 THE COURT: Any witnesses for the State?

2 MR. JAMES: No, Your Honor.

3 THE COURT: All right. Then, Mr. Ariail,
4 anything you'd like to put on the record in the form
5 of argument or otherwise?

6 MR. ARIAIL: No, Your Honor. I think I'd just
7 the record speak for itself.

8 THE COURT: Anything from the State?

9 MR. JAMES: No, Your Honor. We'll just let the
10 record speak for itself.

11 THE COURT: All right. So, of course, either
12 of the folks who are present, I believe
13 Ms. McClellan, and you're his -- you're the victim's
14 mother?

15 MS. MCCLELLAN: Yes.

16 THE COURT: And, Mr. McClellan, you're his
17 brother?

18 MR. MCCLELLAN: Yes, sir.

19 THE COURT: If there's anything you'd like to
20 say, of course I'll allow you to do that. It'll
21 have to be directed to me and not to the defendant
22 or applicant. Okay. Anything y'all would like to
23 tell me?

24 MS. MCCLELLAN: (Affirmative response.)

25 THE COURT: Yes, ma'am. Your first name?

1 MS. MCCLELLAN: Diane.

2 THE COURT: Yes, ma'am.

3 MS. MCCLELLAN: I really wasn't prepared to say
4 anything. I'm not prepared for this at all to be in
5 this courtroom again. All -- all I know is my son
6 was shot and he was robbed and he was killed, and it
7 doesn't get easier. It doesn't get easier.

8 He -- he might as well have shot me that day
9 too because my life has stopped. I stay in my
10 house. I stay in my room all because of what he
11 did.

12 And, yes, I want him to serve more than
13 30 years. That's not enough time for him to serve.
14 He needs a life sentence and not to go out unless
15 it's something -- (crying).

16 MR. MCCLELLAN: A jury trial is not going to
17 hurt us. I would like to make a juror. That's all
18 I can say.

19 THE COURT: All right. Anything else,
20 Mr. Ariail?

21 MR. ARIAIL: No, Your Honor.

22 THE COURT: State?

23 MR. JAMES: No, Your Honor.

24 THE COURT: All right. Mr. Irby, I'm going to
25 review the material in this case, and I'm going to

1 sign an order that will do one of two things:

2 First alternative I have is to deny your
3 application for post-conviction relief. If I do
4 that, you will have appellate rights that you can
5 discuss with Mr. Ariail.

6 THE APPLICANT: Yes, sir.

7 THE COURT: The other alternative I will have
8 will be to grant your application. And that's -- in
9 that event, the case would be remanded back for a
10 trial. Of course, the State would have the right to
11 appeal that. Do you understand all that?

12 THE APPLICANT: Yes, sir.

13 THE COURT: Do you have any questions?

14 THE APPLICANT: No, sir.

15 THE COURT: All right. Thank you.

16 (The proceedings concluded at 10:30 a.m.)

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1 C E R T I F I C A T E O F R E P O R T E R

2

3 STATE OF SOUTH CAROLINA

4 COUNTY OF GREENVILLE

5

6 I, the undersigned, Lisa Scott, Circuit Court
7 Reporter for the Thirteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete
10 transcript of record of all the proceedings had and
11 the evidence introduced in the hearing of the
12 captioned cause, relative to appeal in the Common
13 Pleas Court for Greenville County, South Carolina,
14 on the 15th day of June, 2016.

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

17

18

December 13, 2016

19

20

/s/Lisa Scott *Lisa Scott*

21

Lisa Scott
Circuit Court Reporter

22

23

24

25

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
 Ryan Darrell Irby,)
 S.C.D.C. No. 298917)
 v.)
 State of South Carolina)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT
 2015-CP-23-06218

ORDER OF DISMISSAL
 ENTERED COMPUTER

FILED-CLEER OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2015 SEP 26 PM 2 44

This matter comes before the Court by way of an application for post-conviction relief by Ryan Darrell Irby (“Applicant”) filed October 14, 2015 (“the Application”). Respondent made its return on or about January 29, 2016. An evidentiary hearing into the matter was convened on June 15, 2016 at the Greenville County Courthouse. Applicant was present at the hearing and represented by Mills Ariail, Esquire. Johnny E. James Jr., Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s counsel, Amanda L. Wicker, Esquire, (“Plea Counsel”) also testified. Before the Court was a copy of the plea transcript, the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant’s records from the South Carolina Department of Corrections, and the pleadings. For the reasons set forth herein, the application is denied.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. On September 6, 2013, the Greenville County Sheriff’s Office sought and obtained arrest warrants against Applicant for the crimes of murder (2012 A23 30207724), armed robbery (2013 A23 30207725), and possession of a weapon

during a violent crime (2013 A23 30207726). Applicant was thereafter indicted by the Greenville County Grand Jury during the April 2015 term for murder (2013-GS-23-11027, C.I), armed robbery (2013-GS-23-07725, C.I), and two counts of possession of a weapon during a violent crime, (2013-GS-23-11027, C.II; -07725, C.II). Amanda L. Wicker, Esquire represented Applicant on the charges. On August 21, 2015, Applicant entered a plea of guilty to murder, armed robbery, and one count of possession of a weapon during a violent crime. Consistent with the recommendation by the State, the Honorable Letitia H. Verdin sentenced Applicant to concurrent terms of thirty (30) years for murder, thirty (30) years for armed robbery, and five (5) years for possession of a weapon during the commission of a violent crime. Applicant did not appeal.

Present Allegations

In his application for post-conviction relief, Applicant alleges he is being held unlawfully for the following reasons (verbatim):

1. "My Lawyer / counsel was ineffective Counselor in performing his duties"
 - a. "I was Sentenced on 8-12-15 on indictment / case # 2013GS231107 on Sentencing Sheet weapons poss during a violent crime and MURDER under the same indictment # # 2013GS231107"
2. "My Counsel didn't fully Represented me 100% Best of His abilities"
3. "My Counsel Never Submitted my motions By filing them in clerk of court"

II. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against an individual, and an applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusively, unless an applicant presents valid reasons why he should be allowed to depart from

the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) (overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985)).

An applicant “who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial.” Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993) (Applicant must show advice received from plea counsel was not within the range of competence demanded of attorneys in criminal cases). The applicant must prove that the “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. An applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation, which includes, at a minimum, the interviewing of potential witnesses and an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). To establish counsel was inadequately prepared for trial due to a failure to investigate, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared.



Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (“failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result”); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation could have had any possible effect on the result at trial).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have 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, I have reviewed the Clerk of Court’s records regarding the subject convictions, the trial 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), I make the following findings of fact based upon all of the probative evidence presented.

Applicant testified that he met with Plea Counsel a couple of weeks before trial and 4-5 times in all. However, I find credible Plea Counsel’s testimony that after Chief Public Defender John Mauldin met with Applicant on September 17, 2013, the day after he was arrested, she met with Applicant eight times at the detention center and that she discussed all of the issues in the case, including strengths and weaknesses. I conclude that Applicant also met with Public Defender’s Office investigators Cam Jones and J.C. Starkes on September 19, 2013 and September 27, respectively. Plea Counsel’s first meeting with Applicant was on January 27, 2014. She gave



detailed testimony of her dealings with the assistant solicitor, and I conclude that on Friday, July 31, 2015, she met with Applicant, at which time Applicant told her that if she could get an offer of 30 years, he would plead guilty. Plea Counsel met with the assistant solicitor on Wednesday, August 5, 2015 and relayed this offer to the assistant solicitor. The assistant solicitor told Plea Counsel that she (the assistant solicitor) would have to convince the victim's family this was a desirable outcome. Plea Counsel met with Applicant on August 7, 2015 and discussed with him at length the aspects of a trial versus a plea, the time he faced, and the fact that he was also on federal probation. Applicant signed the plea sheets. Plea Counsel then notified the solicitor that Applicant had signed the sheets and was ready to plead.

I find credible Plea Counsel's testimony that the big issue in the case was eyewitness identification and that until July 2015, she had been preparing for a trial. The witness closest to the shooter did not identify Applicant, but others did identify him as being in the store and running away after the murder. Until Applicant brought up the possibility of a plea deal, Plea Counsel had been preparing for trial.

Applicant testified he told Plea Counsel that video surveillance in the store could show that he was not the perpetrator and that he gave her this information after being in lockup for 2-3 months. Plea Counsel testified she did not recall Applicant telling her this, but stated that if he had, she would have investigated that possibility. I find credible Plea Counsel's testimony that she would have followed up on such a lead if Applicant had told her about the cameras. I further conclude that even if Applicant had told Plea Counsel about possible video, no information about video was presented at the hearing and this court cannot speculate as to what the video, if it existed, might have shown.



Applicant testified Plea Counsel did not explain the elements of the crime of murder to him. I find this testimony is not credible. I find credible Plea Counsel's testimony that she relayed to Applicant the strengths and weaknesses of the case, including the State's main weakness of eyewitness identification. Applicant testified he did not have a good understanding of the evidence against him, but I find credible Plea Counsel's testimony that she discussed in detail with Applicant all of the evidence in the case. She provided Applicant with discovery after it was produced by the State on February 3, 2014.

Applicant claims he would not have pled guilty (and admitted guilt) had he known more about the prospects of an Alford¹ plea. I find this testimony not credible for several reasons. First, the law is clear that even if Applicant had entered an Alford plea, he would have been sentenced just as if he had entered a "regular" plea. See State v. Herndon, 403 S.C. 84, 91, 742 S.E.2d 375, 379 (2013) ("The Alford plea is, in essence, a guilty plea and carries with it the same penalties and punishments."). The clear fact remains that had Applicant pled under Alford, the State would have made the same sentencing recommendation and Applicant would have been facing the same sentencing range. Second, there is no evidence that an Alford plea would have been applicable, since there was no real bargain in place, which is prerequisite for an Alford plea. Applicant was pleading to murder and armed robbery, under Alford or not, in exchange for the State recommending a sentence to the minimum term of 30 years in prison for murder, the maximum term of 30 years for armed robbery, and the maximum term of 5 years for possession of a weapon during commission of a violent crime, with the sentences to run concurrently.

Applicant also claims that he was under the impression that he would only have to serve 85% of the murder sentence and that had he known he would have to serve his sentence day-for-

¹ North Carolina v. Alford, 400 U.S. 25 (1970)



day, he would not have pled guilty. Plea Counsel testified that she does not recall telling Applicant he would only have to serve 85% of the murder sentence. The plea judge did not recite on the record that Applicant would have to serve the murder sentence day-for-day, nor did the plea judge state the murder sentence would be served day-for-day. This court had the opportunity to evaluate Applicant's testimony face-to-face at the PCR hearing. The court does not find credible Applicant's testimony that he thought he would only have to serve 85% of the murder sentence.

CONCLUSION

Based on all the foregoing, I find and conclude that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant entered his plea freely, voluntarily, knowingly, and intelligently. I conclude there has been no showing of any failure on Plea Counsel's part to act in accordance with established professional norms; even if there has been such a showing, I find Applicant has not established that but for such failure, he would not have pled guilty and instead gone to trial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant is notified that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. His attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.


IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief is denied and dismissed with prejudice; and



2. Applicant is remanded to the custody of the South Carolina Department of Corrections.

SEPTEMBER 9, 2016



GEORGE C. JAMES, JR.
Presiding Judge, 13th Judicial Circuit



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2306218

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 SEP 28 PM 2:17

Ryan Irby vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC; Rule 41(a),
 - SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC; Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE - George C James Jr

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11
Greenville, SC 29601

Patrick Schmeckpeper PO Box 11549 Columbia,
SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

010970A

DOCKET NO. 2013-GS-23-
CLK

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April

TERM 2013 ²⁰¹⁵

THE STATE

vs.

RYAN D. IRBY

WITNESSES

Lloyd C Newman

Greenville County Sheriffs Office

DOA: 9/16/2013 B/M DOB:

SSN:

ARREST WARRANT NUMBER

2013A2330207725, DIRECT PRESENTMENT

ACTION OF GRAND JURY

TRUE BILL

Wayne Chapman

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

Wicker

Indictment for

0139, 0549

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

VIOLATION § 16-11-0330 and §16-23-0490

ENTERED
ACCT. *fel*

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

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

At a Court of General Sessions, convened on **APR 21 2015** the Grand Jurors of Greenville
 County present upon their oath:

COUNT ONE

ARMED ROBBERY

That RYAN D. IRBY did in Greenville County, on or about the 30th day of August, 2013, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods and/or monies from the person or presence of Theodore Ross McClellan. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That RYAN D. IRBY did in Greenville County, on or about the 30th day of August, 2013, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Armed Robbery. This is in violation of §16-23-0490 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.


 SOLICITOR

011027

DOCKET NO. 2013-GS-23-
CLK

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April

TERM 2013 ²⁰¹⁵

THE STATE

vs.

RYAN D. IRBY

WITNESSES

Lloyd C Newman

Greenville County Sheriffs Office

9/16/2013

ARREST WARRANT NUMBER
2013A2330207724, 2013A2330207726 ✓

ACTION OF GRAND JURY

TRUE BILL

Wayne S. Spalderson

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

0116, 0549 ✓

MURDER AND POSSESSION OF A WEAPON
DURING THE COMMISSION OF A VIOLENT
CRIME

VIOLATION § 16-03-0010 and § 16-23-0490

ENTERED
ACCT. *for*

FILED

DEC 18 2013

Clerk of Court
Greenville County

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

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

At a Court of General Sessions, convened on **APR 21 2015** the Grand Jurors of Greenville
 County present upon their oath:

COUNT ONE

MURDER

That RYAN D. IRBY did in Greenville County, on or about the 30th day of August, 2013, unlawfully and with malice aforethought kill THEODORE MCCLELLAN by means of shooting him with a handgun, and that THEODORE MCCLELLAN died as a proximate result thereof. This is in violation of §16-03-0010 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That RYAN D. IRBY did in Greenville County, on or about the 30th day of August, 2013, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-0490 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.


 SOLICITOR